SACE TWO

LEGAL STUDIES

WORKBOOK
FIRST EDITION

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JOHN MCCALL

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0.1 Course Overview

Unpacking the Subject

- Competing tensions
- Big questions
- Inquiry questions

Structure of the Workbook

Assessment

- Folio
- Inquiry
- Examination [Response to Sources & Essay]

Introduction

Legal Studies is a subject that has been designed to explore the structures of the Australian Legal System, the principles and values that underpin it, and to allow students to apply their learning in this area to issues in the real world.

The structure of the course has changed for 2021. There is a lesser focus on simply learning content about the legal system, and a stronger focus on allowing students to develop their own questions and investigations into the Australian legal system, to follow their own interests and passions. Students are encouraged to think conceptually, and connect values, principles and ideas between each of the Focus Areas.

The course is firstly designed around "Big Questions". These are broad, large questions that could have many different answers, and require a lot of knowledge and understanding to address in depth. Your teacher might choose one or two big questions to focus on per Focus Area, or per chapter of this workbook. These make a great starting point at the beginning of a Focus Area.

To be able to answer the "Big Questions", there are smaller, "Inquiry" questions that students will be addressing. These smaller, narrower questions form the basis of your learning for each Focus Area. Once you have covered all the "Inquiry" questions for each Focus Area, you should have the knowledge and understanding you need to be able to answer the "Big Questions" that you started with.

Amongst the questions, and across the whole course are the, "competing tensions". These are ideals that run through our Legal System. These are ideas you should consider as you are learning about the different structures and principles that make up the Australian Legal system, to help you to understand the complexity of our system. They are not questions to be answered, or topics to study, rather, a way to help you access, evaluate and analyse the strengths and weaknesses of our system of government. They are explained in more depth, below.

Structure of the Workbook

The workbook has been divided up into the three separate Focus Areas as written into the subject outline.

- Focus Area 1 – Sources of Law
- Focus Area 2 – Dispute Resolution
- Optional Area 1 – The Australian Constitution

Each section, or Focus Area, is then broken down into smaller chapters (1.1–The Australian Legal System etc), in order to address different elements of each Focus Area.

At the beginning of each chapter, the authors have included suggested "Big Questions" and "Competing Tensions" from the SACE Outline that they believe fit well into each sub-chapter. Teachers and students may include and address these as they like. The "Inquiry" questions at the beginning of each chapter are also taken from the Subject Outline, and they are the focus of the content and activities.

Teachers and students are not limited to the "Big Questions" and "Inquiry Questions" as indicated at the beginning of each chapter. In collaboration, teachers and students may wish to create their own "Big Questions" for each Focus Area from their own interests that connect with the "Inquiry Questions". Teachers and students may also wish to devise additional "Inquiry Questions" to what has been provided in the SACE Outline and/or this workbook.

The purpose of this workbook is to demonstrate how each Focus Area may be approached, and provide a starting place for research, question development, inquiry and discussion.

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Unpacking the Subject

What are competing tensions?

Competing tensions recognise the opposing ideals that are at work in the legal system in its attempts to provide justice, and uphold principles such as the Rule of Law, responsible government and our parliamentary democracy. There are many different aims that our legal system is trying to achieve, and sometimes, these ideals seem to be contradictory to each other.

The purpose of including these competing tensions into the Legal Studies course is to give you the opportunity to weigh and consider each of these tensions in different contexts. By considering the competing tensions, you will automatically be considering concepts, issues, principles and structures from different angles; assisting you in your ability to analyse and evaluate.

For example–one of the competing tensions included in the Stage 2 course is, "**certainty and flexibility**".

While not necessarily antonyms, these two concepts, or tensions, highlight opposing ideals. However, these are both tensions that we see in the legal system every day in different ways.

The Focus Area(s) that you and your teacher choose to consider this competing tension within is completely up to you and your class. We have suggested, for instance, that it be included in your study and inquiry into **Chapter 1.5 – Court Hierarchy and Case Law.**

In the context of this topic, the competing tension of "certainty and flexibility" could:

- Form the basis of a discussion at the beginning of the chapter, such as "How does the court hierarchy simultaneously provide certainty, but allow for flexibility?" This question could also be re-visited at the end of the chapter to gauge learning and understanding.
- Form the basis of a "Big Question" developed by the class at the beginning of the unit.
- Form the basis of a formative or summative assessment during the chapter.
- Students could use this set of competing tensions to devise a list of their own questions that arise through the study of the topic.
- Be visited weekly, fortnightly, or at the beginning and end of each chapter or Focus Area.

The inclusion of the competing tensions can be flexible and creative, and suit the needs of the class and their learning environment.

Big Questions

As mentioned in the introduction to this workbook, "Big Questions" are large, broad questions that are designed to:

- Promote discussion
- Allow for flexibility in the approach for each Focus Area
- Encourage critical and creative thinking
- Guide students in developing their own Inquiry questions, and areas of independent research.

Teachers and students are not limited to the "Big Questions" provided by the SACE Board, and outlined in this workbook. Teachers and students are encouraged to devise their own "Big Questions" that guide the study of each Focus Area that encompasses student interest in the context of each Focus Area.

Likewise, schools are not required to address all of the "Big Questions" outlined in the SACE document, in fact, it would be difficult to address them all in sufficient detail. We suggest choosing 1-3 "Big Questions" per Focus Area in response to student interest, to help focus the study of the Focus Area overall.

Inquiry Questions

The "Inquiry Questions" are the smaller, narrower, more direct questions in each Focus Area. These questions have formed the basis of each chapter in this workbook. Students should be able to address each of the "Inquiry" questions confidently at the end of each Focus Area.

It is these "Inquiry Questions" for the compulsory Focus Areas that will form the basis of the end of year examination.

Teachers and students may wish to add additional "Inquiry Questions" to their course of study if they like, to break down some questions into smaller parts, or to address other areas that may not have been addressed by the SACE Subject Outline, or this workbook.

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Assessment

Folio – 40%

The Folio is the first assessment type. You will need to complete four tasks across the year that will be marked by your teacher. At least one of these tasks will be completed under your teacher's direct supervision, and at least one of these tasks must correlate to the Option Focus Area that your class has chosen. Additionally, students will be assessed on their ability to address one set of the competing tensions in at least one assessment task.

Schools have the flexibility to choose their own task types to suit the strengths of the students, and their interests. The maximum word count for all the tasks combined is 4,000 words. Schools may allocate the word count as they wish.

Helpful online resources

Schools may wish to visit the SACE website for examples of different assessment items.

https://www.sace.sa.edu.au/web/legal-studies/stage-2-in-2021/assessment-type-1-folio

Inquiry – 30%

The Inquiry task is an independent task that gives students the flexibility to develop their own question about the Australian legal system to investigate an area of interest.

There are a few requirements that students must meet to be successful:

- The question must address an element of the Australian Legal System
- The question must address one set of the competing tensions in some way (this does not need to be explicitly written into your question, although it can be)
- The maximum word limit is 2,000 words

Chapter 0.2 has some detailed tips and tricks for developing strong Inquiry questions, undertaking good quality research and referencing help to get you started.

Helpful online resources

Schools can also access more information by visiting the SACE website for further information about the Inquiry task:

https://www.sace.sa.edu.au/web/legal-studies/stage-2-in-2021/assessment-type-2-inquiry

Examination – 30%

The new Legal Studies course has a new examination.

From 2021 onwards, the Legal Studies examination will be two hours in length, online, and feature two parts:

- Part 1: Response to Sources
- Part 2: Extended Response

Part 1 – Response to Sources will be based upon one, or both, of the compulsory Focus Areas (Sources of Law and Dispute Resolution), as all SACE students will be addressing these Focus Areas. Students will be provided with a range of sources that could include:

- Excerpts from legislation
- Photos
- News articles
- News clips (television)
- Videos
- Court judgements
- Sentencing remarks
- Hansard etc.

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Students will then be provided with a series of questions that they must answer in response to the sources they have been provided. They will increase in complexity from the first question to the last question.

Part 2 – Extended Response will feature four different questions that students can choose from. They must choose only one of the questions to address as an extended response. There will be one question from each Focus Area: Sources of Law, Dispute Resolution, the Australian Constitution and When Rights Collide.

As this is an extended response, students should be aiming to write a completed essay, that addresses both sides of an argument, and is an **extended piece of writing.** As a general rule of thumb, students should be aiming for three (at least) good length paragraphs, with an introduction and conclusion. Students should use examples to demonstrate their points–fictional examples are fine if students cannot think of real world examples that suit the question.

As per the subject outline, students are not required to be able to quote the Australian Constitution, or pieces of legislation in order to be successful in this task. However, if students are able to do so accurately, it would be to their benefit.

Helpful online resources

At the time of writing, the Legal Studies examination has not yet run in this format. Students and teachers can visit the SACE website for an example examination paper, based upon the Subject Outline, after December, 2020.

https://www.sace.sa.edu.au/web/legal-studies/stage-2/assessment-type-3

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0.2 Essential Skills

Skills covered in this chapter:

- How to research effectively
- How to reference, incorporate quotes into your work, and paraphrase
- Using different referencing systems
- How to analyse and evaluate sources
- How to interpret essay questions and write an effective essay
- How to conduct a legal inquiry

How to Research Effectively

To undertake effective research, it is important to:

- Identify quality sources
- Cross-check information
- Ensure correct paraphrasing or quoting of text
- Correct referencing of sources

Identifying Quality Sources

Identifying a quality source when researching relies upon finding reliable and accurate information.

When conducting research online:

- Consider using "Google Scholar", rather than only Google. Google Scholar will automatically filter results to return academic sources in any search result, such as government sites, published texts, and peer-reviewed sites. Additionally, schools may subscribe to databases through the Library or Resource Centre which operate in a similar way and offer quality sources without having to sift through a large number of search results.
- Look at the URL of the site visited. Does it end with, ".gov", ".org", or ".asn"? These sites are typically run by government or private organisations, and while they should still be cross-checked, due to the nature of their business or organisation, are likely to be a reliable starting point.
- Is the site authored by an individual or group of individuals?
- If yes, have a look at their credentials, if provided. Are they a journalist? An academic? Their qualifications and/or job title will give a strong clue as to the reliability and accuracy of this source.
- If not, the site, and information, may not be reliable.
- When using media articles, consider the following:
- What type of article is this? (News report, opinion piece etc)
- Who is the publisher (a major news organisation, small independent publication, satirical website etc), and will this impact on the reporting of information?
- Is the same information available in an article from a different source?

Using published texts (ie–a textbook, or work of non-fiction such as an encyclopedia) is also a good, reliable starting place. Before publication, these sources are proof-read and checked by editors for factual accuracy. Peer-reviewed journal articles are also reliable sources due to the nature of the reviewing process before publication.

Below is a list of reliable sources for the study of SACE Legal Studies:

- South Australian parliament website: **https://www.parliament.sa.gov.au/**
- Northern Territory parliament website: **https://parliament.nt.gov.au/**
- Australian Federal parliament website: **https://www.aph.gov.au/**
- Austlii (Australasian Legal Information Institute): **http://www.austlii.edu.au/**
- South Australian Courts Administration Authority: **http://www.courts.sa.gov.au/Pages/default.aspx**
- Northern Territory Courts: **https://justice.nt.gov.au/attorney-general-and-justice/courts**
- High Court of Australia: **https://www.hcourt.gov.au/**
- Australian Law Reform Commission: **https://www.alrc.gov.au/**
- Jade (online search for Australian legal judgments)–**https://jade.io/**

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Cross-checking Information

When conducting research, it is very important to cross-check information for accuracy. The volume of information available online necessitates cross-checking your sources and is an important step to ensure information found is factually accurate and reliable. Having identified a potential source for an assignment, look at a separate, unrelated source to check whether consistent information is presented. Multiple sources reporting the same information, will indicate the source is accurate, and therefore, a good source.

Independent Activity

Practise research skills to find **reliable** and **accurate** resources.

Task: Find eight sources of information about the role of a jury in the adversarial system of trial.

Search #1 – Search Engine

1. Write key words to use in a Google search below:

Select **up to six results** and input the information below. With the reliability column, consider data in the previous three columns as a starting point to assess reliability.

Site (title or url)	Author	Source Type	Reliability?
Legal Services Commission–"Role of the Judge and Jury" **https://lawhandbook.sa.gov.au/ch13s04s08s01.php**	Legal Services Commission	Information page	This information is published on behalf of the South Australian Government, and the organisation's primary role is to provide citizens with accurate legal information. Therefore, it is likely to be highly reliable.

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Independent Activity

Search #2 – Online Encyclopedia/Online Journals/Google Scholar

Write down the key words to be used in a search of an online encyclopedia or online journal below:

Select **up to three results** and input the information below. With the reliability column, consider the data in the previous three columns as a starting point to assess reliability.

Site (title or url)	Author	Source Type	Reliability?
International Journal of the Sociology of Law (Google Scholar search)	Dr Mark Israel	Journal Article	This peer-reviewed journal article was published in 1998, by Dr Israel of Flinders University, SA. While a little old, this article is peer-reviewed, and written by a university professor. A reliable source.

Reflect on the search results and answer the questions below.

1. What types of results did the selected search words reveal?

2. Overall, were identified sites reliable sources of information, or a mix or reliable and less reliable?

3. What differences emerged between the results from a search engine, when compared to results from an online encyclopedia or journal?

4. What changes can be made to improve the quality of future search results?

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Quotes, Paraphrasing and Referencing

When undertaking research, it is imperative to reference the authors or organisations who have provided the information which will be used. Copying images, text, figures and sources, without acknowledging the original author, is plagiarism. Plagiarism refers to theft of intellectual property and is a serious academic offence. Under SACE policy, teachers cannot mark plagiarised work, and a student will only be rewarded for the percentage of work completed in their own words.

At university, incidences of plagiarism can result in failure of a subject, being excluded from a degree, and in some instances, such as the practise of law, permanent exclusion from admission to the profession.

Referencing research

** All examples of referencing in this section are written using the Harvard referencing system **

General knowledge does not require a reference. A good way to measure whether something requires referencing is to consider what was already known before undertaking the research. If a piece of information is already known by the researcher (such as the fact the sky is blue, or the lowest court in the South Australian court hierarchy is the Magistrates Court), it does not need to be referenced.

When using a source as the basis for an argument or task, students can choose to either paraphrase the work of the original author, or insert a direct quotation. Both of these options require an in-text reference (or footnote, depending on the referencing system of choice), and a citation in a bibliography at the end of the document.

A direct quotation is inserted into the text with the use of double quotation marks, followed immediately with an in-text reference. For example, "If plagiarism is detected in the word submitted for marking, teachers should allocate a grade based upon the work that is the students own" (SACE, 2020 p24). This method of inserting a source into work means the information can be included word-for-word as there is acknowledgement the wording and ideas are credited to the author exactly as they appeared in the source.

The alternate method of using a source in work is through paraphrasing.

Paraphrasing is where someone else's idea forms the basis of what is written, but the actual information communicated is different from the original text. The most effective way to do this, is make notes from the original source, and use the notes to generate text used in the assignment. This will ensure there is no unintentional plagiarism, or direct copying of phrases or sentences. An in-text reference is still required as acknowledgment of the use of another's ideas.

Reference for quote:

South Australian Certification of Education (SACE), 2020. *Breach of Rules Information Sheet 03.* Accessed 14 September, 2020, at **https://www.sace.sa.edu.au/coordinating/admin/information-sheets/03**

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Example of Paraphrasing

The text used below is from:

Bailey, G. 2008, *Legal Studies Key Ideas: SACE Stage 2*, 2nd edition, Essentials Education, Adelaide, Australia (pg 188).

Original text – Parliamentary Deadlock

In the Commonwealth Parliament a deadlock, as defined in section 57, occurs when the House of Representatives passes a bill twice and it is rejected twice in the Senate after a lapse of three months between each rejection. This process must occur in the same tenure of the parliament.

Example of Poor Paraphrasing

In Commonwealth Parliament a deadlock, as outlined in section 57, occurs when the House of Representatives passes a bill two times and it is defeated twice in the Senate after a gap of three months between each defeat. This process must occur in the same tenure of the parliament.

What are the problems here?

1. Sentence structure is the same as the original
2. Most sentences remain largely unchanged. Only a few words have been altered to give the appearance of paraphrasing or re-writing (highlighted).
3. There is no reference for the source of this information
4. Several sections are identical to the original and no quotation marks are included.

Example of Correct paraphrasing

A parliamentary deadlock occurs when the House of Representatives attempts to pass a bill twice, but it is blocked in both attempts by the Senate. At least three months must pass between each rejection of the bill, and each rejection must occur within one term of parliament for this to meet the Constitutional definition of a deadlock under section 57 (Bailey, 2008).

What makes this accurate paraphrasing?

1. While the information is the same, it is not presented exactly as it appeared the original text hence is not a direct quote.
2. The writer has changed the language used to explain the information/concept, while retaining accurate legal terminology
3. The writer has acknowledged the source of the information.

** Note: A page number is only required for direct quotes.

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Independent Activity

Using this excerpt from the textbook cited above, paraphrase the information and include an appropriate reference.

Original Text – Role of the Jury (pg 270)

Jurors are considered to be peers of the person accused of the crime whose guilt they will decide. The jury's role is to hear all of the conflicting admissible evidence presented at the trial by the two parties, and weigh it, in order to reconstruct its own version of the facts. The jury can then reach a verdict of guilty or not guilty consistent with those facts and the legal principles advised by the trial judge. A jury can only convict a person if it believes guilt has been proved beyond a reasonable doubt.

Paraphrased version:

Bibliographies and Reference Lists

Most tasks undertaken at Stage 2 require a reference list or bibliography. This is an alphabetical list of all the sources used in the compilation of the work. A useful strategy is to compile a running reference list adding new sources to the list as they are accessed. This removes the onerous task of having to remember or locate sources used or consulted throughout the process and can result in significant time savings.

Referencing Systems

The SACE Board does not stipulate a particular referencing system to adopt. The main consideration is whatever system is used is applied consistently and accurately in the final piece of work. Some universities will dictate the style of referencing which must be used.

In the absence of a school dictating a particular referencing style, any of the following commonly used in South Australian universities may suffice:

- Harvard
- APA
- MLA
- Chicago
- Australian Guide to Legal Citation

Each of the South Australian universities have published freely available referencing guides to assist you in the formatting of references (both in-text, and bibliography).

Referencing generators (including those included in word processors) are not recommended for use due to a general lack of accuracy.

Helpful online resources

The SACE Board has its own suggestions and guidelines for research and referencing effectively. Follow the link for more information:

https://www.sace.sa.edu.au/studying/support/research-advice

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How to Analyse and Evaluate Sources

Many of the principles and ideas listed above under the heading "Identifying Quality Sources" are relevant here, when considering how to analyse and evaluate a source.

Why evaluate and analyse sources?

There are several reasons, but primarily, sources of information are evaluated and analysed to determine their usefulness and accuracy, and inclusion or non-inclusion in a piece of work. When using a source of information as the basis of an assignment or essay, it is important the source is factual. Using an unreliable source as the basis of an assignment can cause significant problems and result in work which is factually inaccurate.

The Internet is full of information, but the lack of regulation means anyone can publish with little or no regard to accuracy, honesty or fact. Analysing and evaluating sources ensures selection of trustworthy sources at the expense of unreliable sources.

When analysing and evaluating sources, consider the questions listed below:

1. Authorship

Who wrote the source? What is their background? What particular skills, academic background, life experience, qualification etc do they have which might inform their work? Is there the potential for bias in this source because of the relationship between the author and content? Has there been a disclosed conflict of interest?

2. Audience

Who is the intended audience for the source? Has it been designed to reinforce beliefs, or challenge them? Where was the information published, and who can access it? Does the language used target a specific audience? What language was the source originally published in, and has the message been affected through translation?

3. Purpose

Has the source been developed to inform, or entertain? Is the source designed to be informative, or persuasive? Is this source designed to reinforce existing beliefs, or challenge them? Is this source a form of advertisement or propaganda?

Remember, when analysing sources:

- Just because a source is biased, does not necessarily make it bad, or unreliable. These are important considerations when assessing its usefulness. Statements released by political parties, for example, are obviously going to be biased to align with a political party's ideology. These are still useful sources and, if reflective of bias, such bias can be acknowledged in the submission of a piece of work.

How to Interpret Essay Questions to write an effective Essay

When interpreting essay questions, it is important to break the question down into parts in order to determine what structure the question demands, and what content is required in order to answer the question appropriately.

For example, consider the essay question below:

*To what extent is a **jury** an **essential element** of the **adversarial system of trial**?*

Firstly, consider the structure required for the question above. The words "To what extent" indicate this is an argumentative essay. "To what extent" is another way of asking, "how far", "how much", or, "to what degree", is this statement true?

Secondly, consider the content required to answer the question. The question can be broken down as demonstrated below.

To what extent is a jury an essential element of the adversarial system of trial?

Three elements need to be addressed to correctly and thoroughly answer the question. Firstly, consider the role of a jury. Secondly, address whether or not a jury is "essential". Thirdly, both of these things must be considered in the context of the adversarial system of trial. Each of these elements must be addressed in order to successfully answer the question. Simply outlining the role of a jury in an adversarial trial, for example, would not successfully answer the question and would result in a marginal grade.

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Writing an Effective Essay

Deconstruction of the question has identified the need to write an argumentative essay, considering whether or not a jury is an essential element of the adversarial system.

Step 1: Research

As outlined in other places in this chapter, the research stage of an assignment is important. High-quality sources and accurate information will contribute significantly to a high-quality assignment.

All information gathered in the research stage should be analysed with regard to its reliability and accuracy. Where possible, students should be looking to find multiple, independent sources with the same information. As a guide, one reference per 100 words is something to aim for; so, for example for an 800-word assignment, eight independent sources should be accessed.

When undertaking research, **note-taking** is an important step that should not be overlooked. Many students can get into trouble with plagiarism when researching, through simply copying and pasting slabs of relevant text into their document. While the intention is usually to re-word the original text, this is often overlooked, and can have serious consequences. Making notes from the original source, greatly reduces the risk of plagiarism.

Some key reminders for effective note-taking:

- Write down your source! There is nothing worse than trying to locate the source of information at the end of an assignment.
- Try to write in dot-points or short sentences.
- If selecting direct quotes from the source, make sure they are included in quotation marks even when note-taking. This serves as a visual reminder they are not your own words, and that quotation marks need to be included. This also helps to remind you where your in-text references or footnotes need to go. Alternately, highlighting this text in another colour can also serve as a visual reminder to complete the required referencing.
- If lists of notes are not effective, try using a graphic organiser to note-take, like a mind map, fishbone diagram, bubble chart, etc. Most graphic organisers can be downloaded online for free.
- It is also helpful to categorise your notes by:
    - Author
    - Paragraph
    - For/Against side of your question

Step 2: Essay Plan

Writing an essay plan may feel like an unnecessary step, but it is a good practise to get into. Creating an essay plan allows organisation of thoughts and ideas, before commencing writing. This makes for easy identification of paragraphs lacking evidence or examples before the writing begins. It also helps to identify whether an argument is unbalanced, and if all the elements of the question have been addressed.

Having all this information before starting the final write-up saves time, rather than sitting and staring at a blank screen, trying to think of things to write.

A number of planning tools can ensure paragraphs are well constructed and have all necessary elements. Some suggested models include:

The TEEL paragraph method:

- Topic sentence
- Explanation
- Example/evidence
- Linking sentence (back to question, or to next paragraph)

The SEE paragraph method:

- Statement
- Example
- Evidence

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The PEEL paragraph method:

- Point
- Evidence
- Explanation
- Link

While each of these is a slightly different acronym, they all follow roughly the same pattern. Clear paragraphs begin with a topic sentence to introduce the idea, are followed by an example and some evidence, and then conclude by linking the argument back to the question.

Independent Activity

Below is a model paragraph written to address the proposed essay question; *To what extent is a jury an essential element of the adversarial system of trial*. Using highlighters, highlight each feature of the paragraph as you read it.

- The topic sentence/statement
- Evidence
- Example/explanation
- Link

To what extent is a jury an essential element of the adversarial system of trial?

To a large extent, a jury is not an essential element of the adversarial system of trial, as they do not fulfill the requirement of being "peers of the accused". Many circumstances provide a juror grounds to apply for exemption or deferral from jury service, or reasons they may be ineligible for service, meaning certain groups in society are subsequently over or under-represented in a jury. This does not guarantee a broad cross-section of the community are available for jury duty. For example, people with small businesses, or prominent medical or business specialists will likely be exempted from service as replacing them in their employment can be difficult. Similarly, by removing people with criminal backgrounds, people with a broad range of lived experiences and different perspectives are not included. This results in a jury comprising a narrow rather than broad cross-section of society they are intended to represent. A less representative jury can be detrimental for an accused, as the jury does not represent the community at large, but rather, a narrow range of community members who are not peers of the accused. This is despite the ideal a jury is supposed to be a trial before one's peers. Therefore, to a large extent, a jury is not an essential element of the adversarial system, as it fails to represent a broad cross section of the community, or "peers of the accused".

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Independent Activity

Essay Plan Template

Question (write here):

Introduction:

Remember to include:

- An overview of the question, or issues around the question (this could include background/context of the issue)

- Definitions of all key terms. They are:

- Topic sentences:

Paragraph 1:

T:

E:

E:

L:

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Independent Activity

Paragraph 2:

T:

E:

E:

L:

Paragraph 3:

T:

E:

E:

L:

Conclusion

Remember to:

- Briefly summarise main arguments, and highlight most important/strongest evidence
- Make specific recommendations (where appropriate)

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Step 3: Essay Writing

Once research is completed and a plan is generated, it is time to begin writing.

PRO TIP: **Always put the essay question at the top of the draft/assignment**. Students who only put the general topic or "vibe" of the question at the top of their work will almost always end up off-track, and waste time writing about irrelevant things. Always have the question visible when writing as this helps to remain focused.

The writing process does not have to necessarily begin with the introduction. It may be easier to start with one of the body paragraphs first, and then come back and write the introduction at the end having determined the crux of the argument.

It is customary to begin an essay with the side of the statement most favoured (after the introduction, of course). This is followed by acknowledgement of the other side of the argument before a conclusion. This is demonstrated above in the example essay plan.

Some tips for effective essay writing:

- Use formal language. Avoid informal language, colloquialisms or text-speak (ie–lol, ur (instead of "your") etc).
- Avoid using first-person pronouns (I, me, my).
- Use technical, subject-specific language. For example, if discussing a jury, refer to them as the jury, or jurors, rather than "people listening to the trial".
- Do not use words which are unfamiliar.
    - While it might be tempting to use a thesaurus and change a few words, it is unwise to simply insert unfamiliar words into work. This will help to avoid inserting words in the wrong context and detracting from the meaning.
    - It can also make work seem awkward, as the tone and meter of the language may lack consistency.
- Proof-read work by reading it aloud! This is so important, and a step many students simply skip over. This process will remove silly mistakes and typos, and ensure all sentences make sense (and removing notes accidentally left in the text), will mean a teacher will not be distracted by these mistakes, and can concentrate on providing quality feedback on the elements of the task which are important, like the quality of the research and analysis.
    - If not a fan of proof-reading, swap work with a friend! Have them highlight sections they don't quite understand or think could be improved. A parent, family member or another teacher may be able to perform this role as well.
    - Additionally, Microsoft Word can now read work back, so having a pair of headphones to listen to work can be extremely helpful. This is a GREAT way to proof-read work, as the computer will read the work exactly how it is, meaning mistakes, typos and grammatical errors are really easy to identify, and subsequently fix.

How to Conduct a Legal Inquiry

The Legal Inquiry at Stage 2 is its own Assessment Type, and is weighted at 30%.

From the SACE Legal Studies Subject Outline:

… students develop a range of capabilities by **posing a question** that encourages consideration of a range of competing perspectives or arguments. The Inquiry is a critical response to the question.

Through self-directed inquiry, students develop their deep learning for transference, civic literacy skills and understanding of the Australian legal system. Students respond to a legal issue by researching in depth; providing relevant and appropriate acknowledgment of sources; synthesising, and analysing information and opinions, and where appropriate, offering recommendations.

The focus of the inquiry must be a contemporary legal issue of public interest in the 12 months before the assessment began and **related to one pair of the competing concepts and focus areas of this subject.**

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The key to a successful Inquiry comes down to two things:

1. The writing and construction of the question
2. The quality and depth of research.

1. The writing and construction of the question

A good question is the cornerstone of a high-quality Inquiry. A poorly phrased question, or a question not requiring analysis or evaluation in order for it to be answered, will limit the quality of the finished product, and the eventual result.

Some suggestions for question design regarding structure:

- Use the question stem, "To what extent" to begin phrasing a question. This automatically demands two sides of an issue are addressed.
- Write a statement, and then add the phrase, "Argue." or, "Using examples, evaluate this statement" at the end, again, to force consideration of both sides of an issue.
- Consider the complexity of the question. If it can be answered with a simple "Yes" or, "No", or without doing any research consider making changes to allow for more research and complexity in your response.

Some suggestions for question design regarding content:

- As per the subject outline:
- Make sure the issue has been in the public sphere in the last 12 months. It needs to be a recent issue, and one connected to the Australian legal system.
- Ensure the question can connect to at least one set of competing tensions, as outlined in the subject outline. It is not necessary to directly reference these tensions in the question, but it should be evident when reading the Inquiry which one(s) have addressed, language used.
- Select an area of interest! It is much easier to follow an issue of passion or interest.
- Make sure the chosen issue is **legal, and not social.** Many students fall into the trap of approaching issues which are more social in nature, rather than legally based. This means they do not analyse issues from a legal perspective in enough depth to achieve a high grade.
- An example of this type of issue is the subject of voluntary euthanasia. While this is a current legal issue in Australia, due to recent legalisation in Victoria and Western Australia, be careful to consider legal arguments for changes in the law, or the legal process by which to change the law, and not just the reasons for and against it.

For example, writing an argument about how voluntary euthanasia should be legalised to reduce suffering is a social argument, not a legal argument.

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Independent Activity

Question brainstorming

This is an opportunity to do some preliminary research on current legal issues which could be considered as Inquiry topics. Complete the tasks below, remember what you've just read about your question construction, remaining mindful of suggested approaches to question construction.

Some suggested places to look for recent legal issues:

- News websites (AdelaideNow, ABC News, The Australian etc)
- Hard-copy newspaper
- Australian Parliament website/SA and/or NT Parliament websites–have a look at some of the bills currently before parliament and consider their impact on the legal system
- Australian Public Law Blog (AusPubLaw)
- Adelaide University Law Blog / Australian University Law School Blogs
- Legal Podcasts (The Law Report, The Lawyers Weekly Show, Just Cases, Trial by Podcast)

Part 1 – List at least 5 different legal issues that you've found which could potentially form the basis of an Inquiry:

Part 2 – Choose one and practise structuring it as a question for an Inquiry. Consider the question stem (how will it start?) and consider how to address both sides of the selected issue. Try drafting two or three different questions for the same topic.

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2. The quality and depth of research

The quality and depth of research is the second key element for success in the Inquiry.

While a Google search is a good start, it should not be the only way to locate suitable sources. Some general hints and tips to curating some good quality research:

I. Search Engines

It is not advisable to simply copy and paste a question into a Google search bar. It may seem counterintuitive, but the level of specificity will often not return as many search results. Instead, only include key words as this will yield better results.

Please see content from earlier in the chapter with regard to effective online searches for reliable sources.

Even better than search engines, check with school or the local librarians for access to online journals, encyclopedias and like programs for a broader range of research tools and sources.

II. A variety of sources

Another important consideration in the research process is to locate a wide variety of sources to explain and answer the inquiry question in a way which addresses multiple perspectives. While a few news articles can be helpful, they should not constitute the entirety of a bibliography.

When searching for sources, consider the following:

- Press conferences
- Hansard
- Legislation
- Case Law
- News reports (print and video)
- Podcasts
- Interviews (direct and/or recorded)
- Law Reports
- Speeches
- Academic Journals
- Videos
- Textbooks

A reminder – **always** consider the reliability and validity of the sources found in the researching phase of the Inquiry, as discussed previously in this chapter.

Be careful using Wikipedia, for example, as the fact it can be changed by anyone, means it lacks academic integrity. Wikipedia references at the end of each article can be used to check factual content, and these are appropriate additions for a reference list or bibliography.

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Focus Area 1: Sources of law

1.1 The Australian Legal System

- Rule of law
- Separation of powers
- Representative Government
- Responsible Government
- Judicial Independence

Inquiry Question:

Why are the following underlying principles of the Australian legal system important?

- Rule of law
- Separation of powers
- Representative Government
- Responsible Government
- Judicial Independence

Big Questions:

- Are the institutions of government fair and efficient? (Consider: fairness and efficiency)
- Is a power imbalance between a government and its people necessary for a democratic government to be effective and functional? (Consider: The empowered and the disempowered)
- How adequately does the Australian legal system achieve the rule of law?
- Do the institutions of government, and its laws, adequately reflect the people?
- Should Australia have a complete separation of powers?
- What is the distinction between rule of law and rule by law?

Rule of law

The rule of law is a broad concept. Observance of the rule of law is based on three premises: the institutions of government are bound by the constitution, all people are equal before the law, and individuals retain fundamental human rights.

The supremacy of constitutional law

All government institutions can only exercise power in accordance with constitutional law. All institutions and individuals are bound by constitutional law. Constitutional law is the people's safeguard preventing government bodies from exceeding their powers and encroaching on the rights and freedoms of the individual. This is upheld by the High Court – statutes can be challenged in the High Court if they are thought to be 'ultra vires' (outside the legislative power of the government according to the Australian Constitution).

Equality before the law

In all matters related to the exercise of government power, people must be treated equally. Institutions of government must, at all times, exercise their powers so people are equal before the law and that no section of the community or any individual is arbitrarily discriminated against. Parliaments are expected not to make laws that are contrary to this fundamental principle. No one is above the law whatever their social, economic or political position. Regardless of a person's status in the community – they could be the Mayor, a High Court Justice or the Prime Minister – they are subject to the law like every other citizen.

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Existence of and respect for fundamental human rights

Institutions of government must exercise power on the assumption individuals retain certain fundamental rights at all times and in all circumstances. Laws cannot be made to remove these rights, unless powerful reasons exist. For example, in common law, the presumption of innocence is a natural right which applies to everyone. No person can be punished for committing an offence against the State unless proven guilty at a trial according to law. To strip an individual of this fundamental right would give the State too many arbitrary powers over the affairs of the individual. Similarly, while a parliament could legislate to reinstate capital punishment, it would be seen as a breach of an inalienable right – the right to life.

The institutions of government perform important functions in facilitating the rule of law.

Parliaments

Parliaments perform an important role in facilitating the rule of law in Australia. They make laws consistent with powers prescribed in the Constitution. They also pass laws to assist the democratic process, such as electoral laws for the election of Members of Parliament. Furthermore, they pass laws to protect fundamental human rights, such as the Racial Discrimination Act 1975 (Cth).

Courts

As the institution that resolves legal disputes, courts in Australia perform an invaluable role in facilitating the rule of law. The High Court of Australia, in its original jurisdiction, resolves constitutional disputes regarding the validity of federal and state laws. This ensures parliaments exercise their powers in accordance with the Constitution. Courts resolve disputes by observing fundamental rights of the individual. For example, courts recognise and protect the presumption of innocence principle and give both parties to a legal dispute a fair and equal opportunity to present their cases.

Fast fact

Applications of the Rule of Law

- A separation of powers between the legislation, executive and judicious - serve as a system of checks and balances against the abuse of power
- An independent judiciary
- Open and transparent electoral processes including universal franchise and secret ballots
- Procedural fairness in judicial processes including independent and impartial arbiters, fair, prompt and continuous trials, the presumption of innocence, the right to silence, the right to legal representation, to know the allegations against you and to present your own case
- Democratic law making in accordance with strict rules
- Administration of law consistent with constitutional principles
- Laws applied equally and fairly and consistently to all as well as being accesible

Short Answer Questions

1. What is the rule of law?

2. Identify and explain the essential elements required for the rule of law to exist in Australia.

3. How do Australian Parliaments facilitate the rule of law?

4. How do courts facilitate the rule of law?

5. How does the rule of law protect the Australian people?

6. Discuss the importance of the rule of law in the Australian legal system.

C Collaborative Activity

In small groups, research to locate real life examples of the effective application of the rule of law in Australia and examples of where it is not effectively applied. Present a fully explained example of each to the class and share a copy of your explanation, along with an relevant links.

I Independent Activity

How could Australia more effectively uphold the rule of law? Make one fully explained recommendation for change.

Separation of powers

"If the legislative and executive authorities are one institution, there will be no freedom. There won't be freedom anyway if the judiciary body is not separated from the legislative and executive authorities."

Charles de Montesquieu in *The Spirit of Laws* (1748)

Montesquieu, a Frenchman, argued that if liberty and freedom are to be maintained, the three branches of government must be separated and entrusted to different people. He believed this would provide a safeguard against too much concentration of power in one government authority.

The separation of powers is a system whereby the three parts of government at the federal, state and territory tiers are divided into separate, but related, institutions: the legislative (the parliament), the executive (the government), and the judiciary (the courts).

**NB This concept does not apply at local government level.*

The three institutions of government which comprise the separation of powers:

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Legislative

This institution is the parliament. Its main role is to make law (in the form of statutes or Acts of Parliament). Australian parliaments are made up of elected members (MPs). This is an example of representative government.

Executive

This institution is the government. Its main role is to enforce the laws made by parliament. The government is formed according to the conventions of the Westminster system of responsible government. This arm also includes all of the administrative bodies vested with executive power, such as government departments.

Judiciary

This institution is made up of the various courts. Its role is to resolve legal disputes. Judges are appointed and act independently of the executive and legislative.

Short Answer Questions

1. What is the separation of powers?

2. What are the three institutions of government? What are their roles?

3. How does the separation of powers protect the community?

Example

The South Australian Parliament passed the *Road Traffic Act* to define unlawful motorist behaviour. The police, operating in the executive arm, apprehend motorists who break the road rules and charge them with traffic offences. The Magistrates Court, operating in the judicial arm, hears the complaints laid against offending motorists. If the offender admits guilt or is found guilty at a trial, the court can impose a sanction to punish him or her in order to deter other people from breaking the road rules.

C Collaborative Activity

In pairs, research and find an example – different to the one above – that shows how the separation of powers functions at the state or federal level. Share this example and explanation with the class.

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Representative Government

Representative government is system of government in which members of the community are elected as decision makers and law makers. In Australia's model of representative government, members of the community are elected to parliament as the sovereign decision-makers and law makers.

The following are key features which must exist for a genuine and effective model of representative government to function:

Rule of law

Citizens are equal before the law when they vote and stand for election. There must be strict rules regulating the electoral process law-making to ensure the legal and political rights of all citizens are treated equally.

Universal franchise

All eligible adults must be allowed to vote irrespective of their sex, race, cultural background or political beliefs. There must not be any artificial barriers against a person's right to vote. Voting is compulsory in federal and state elections in Australia.

When a section of the community is disenfranchised, the laws made may not effect their values and interests. For example, prohibiting Black Africans from voting in South Africa during the period of apartheid created a regime which fostered the living standards of the white community at the expense of the black community.

Regular elections

It is vital people's elected representatives are held accountable to voters at regular elections. As the length of tenure in parliament increases, there is the likelihood that MPs will act unilaterally and ignore the wishes of the electorate.

One vote/one value and the secret ballot

Every vote (ballot) cast should have no more value than any other one. If this fundamental principle is distorted, elected governments may not reflect a majority of support in the community. Voting should also be conducted in secret to prevent the likelihood of intimidation and corruption.

Salaries for Members of Parliament

To allow all sections of the community the opportunity to participate fairly and equitably in the democratic process, it is imperative that politicians are paid a salary for their services. If payment is not made, working class people could be denied the opportunity of standing for parliament to represent working people.

Parliamentary privilege

Full and frank debate on all issues before parliament, without fear of reprisal, is important to ensure that laws are made with all information being made available for consideration.

Right to protest, freedoms of association and political communication

The right to freedom of peaceful protest, association and expression must be protected by law. Without these freedoms, political ideas and debate may be stifled and the democratic process restricted.

Open parliamentary debates

People must have access to parliamentary sittings so they can make informed judgments about the workings of parliament and the standard of representation they are receiving.

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Short Answer Questions

1. Explain the principle of representative government.

2. How does Australia apply the concept of representative government?

3. What features must exist for Australia to adopt the principles of effective representative government?

Independent Activity

Critically analyse the extent to which the Australian legal system achieves representative government.

Responsible Government

Responsible government is system of governance in which the executive decides the policies of government and enforces parliament's laws. It is based on the principle that an elected legislative forum (parliament) meet to debate issues and make laws, with a separate body administering and enforcing those laws.

There are two main models of responsible government.

Constitutional monarchy

The Westminster system of responsible government was adopted by Australian colonies (which became the states) and the Commonwealth upon federation in 1901. This system incorporates the parliamentary democratic model.

The parliament is elected directly by the people, but the Executive Government is not. The executive is drawn from the elected members of the Parliament. As the Executive Government is determined in parliament, and not directly elected by the people, it is held directly responsible to the parliament. Therefore, the Executive Government is indirectly responsible to the people for governance of the nation. In this way, the government is democratically formed and accountable.

By convention, the Federal Government is chosen from elected members of parliament in the political party which attains the majority of seats in the lower house (House of Representatives). The leader becomes Prime Minister and nominates members as ministers in the Federal Cabinet. The term 'responsible' is important as it indicates that the Prime Minister and their ministers are directly responsible to the Parliament, because that was where the Government was formed.

In this system of responsible government the roles of head of state (British monarch represented by the Commonwealth Governor-General) and head of government (Prime Minster) are clearly separated.

The principles of responsible government exist predominantly through unwritten rules called conventions. The key principles of responsible government are the relationship between the legislature and the executive, the exercise of executive power, and the role of the Senate.

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Republic

The system adopted by the United States of America is the one example of a republic. In it, the head of state and the head of government are performed by the same person, a president. The President is elected directly by the people of the USA and cannot be a member of the legislature (the Congress). The President nominates members to the executive government, who also cannot be drawn from the Congress.

At a Glance

The following are the key features of responsible government in Australia

- A system of governance in which the executive determines the policies of government and enforces parliament's laws. The concept applies to the powers and roles performed by members of the executive arm.
- It is a system adopted from the British Westminster system and incorporates the parliamentary democratic model.
- The political party (or coalition of parties) which attains the majority of seats in the lower house (House of Representatives) forms the Government
- The leader of the majority party is commissioned as the Prime Minister and is the chief adviser to the head of state, the Governor-General. By convention, the Governor-General accepts the Prime Minister's advice provided three conditions are met:
    - The Prime Minister's party retains the support of a majority of seats in the House of Representatives
    - The Government can guarantee the passage of supply
    - The Prime Minister's advice is consistent with constitutional law
- The Prime Minister nominates MPs as ministers in the Federal Cabinet.
- The Prime Minister and ministers are directly responsible to the Parliament, because that was where the government was formed.

Relationship between the legislature and the executive

Ministers must be elected members of the parliament. This feature of the Westminster system has been codified in the State and Commonwealth Constitutions. All Ministers are directly accountable to the parliament for advice tendered to the Governor-General, and for the administration and enforcement of federal statutes. Every detail of a minister's public performance is subject to scrutiny by parliament through Question Time, grievance debates, the general debating stages of Bills, and in special committees established by the parliament.

Cabinet meets privately and its deliberations are confidential. At cabinet meetings, ministers may express quite strongly-held divergent views, but in public, Ministers present a unified voice on government policy. Cabinet solidarity is important because the government wants to display unity in its ranks, and preserve the confidence of its backbenchers, so it can govern for a full term. Cabinet solidarity also impacts on the ability of Australian governments to enter into agreements and treaties with foreign nations.

Exercise of executive power

By convention, the Governor-General must exercise their constitutional executive powers on the advice of the Prime Minister. The Governor-General is obliged to accept that advice provided three fundamental conditions exist:

- the Prime Minister and their government commands the support of a majority of seats in the House of Representatives
- the Prime Minister can guarantee the passage of the supply Bills through the parliament
- the Prime Minister's advice is consistent with constitutional law

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At a Glance

Conventions of responsible government

- The Prime Minister is the head of government and must sit in the House of Representatives to the right of the Speaker
- the Governor-General must exercise their constitutional executive powers on the advice of the Prime Minister
- The Speaker has unlimited access to the Governor-General so that they can identify which party leader has the confidence of the House
- Ministers can may be drawn from either house and sit on the front benches to the right of the presiding officer.
- the Senate is expected to pass the Government's supply Bills so that it is able to govern the nation.
- The High Court is independent and cannot give legal advice to the government.

The chain of accountability

- Every minister is allocated at least one area of government (responsibility portfolio) to manage, such as education, defence or social security.
- Each head of a government department is responsible to their minister for the departments administration.
- The minister, in turn, is responsible to the Prime Minister and Cabinet
- All ministers are held directly accountable to parliament and indirectly accountable to the electorate.

This chain of accountability consists of a complex web of checks and balances to ensure through every person who works in the executive arm conducts his or her affairs in accordance with the rule of law, and not by the arbitrary exercise of power.

Short Answer Questions

1. What is responsible government?

2. Under what conditions can a person become Prime Minister of Australia?

3. Outline the constitutional rules and conventions necessary for a government to be formed in the Commonwealth.

4. What is meant by the term 'chain of accountability'?

5. Explain the difference between representative and responsible government.

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Judicial Independence

An independent judiciary – a system of courts and judicial officers separate from the legislative and the executive – is absolutely crucial to the operation of a democratic society. This means judges, when presiding over cases in order to resolve legal disputes, must be absolutely free from interference and intimidation by external forces (including parliament and government).

To make this possible, a judge cannot be a member of the parliament of the government and of the judiciary, as this could call into question their independence.

Judicial independence is an essential element of the separation of powers. While the legislative and the executive have a close relationship in the Westminster system (due to the convention of responsible government), the courts must be completely separate and independent of the other two institutions of government. This complete separation is vital for the community to have confidence that cases are decided solely on merit, free from government and external interference.

Judges must make decisions based on merit, based solely upon evidence presented in court, legal precedents and relevant laws. They cannot be swayed by the opinions of outsiders, regardless of their position they are in society or how persuasive they might be.

To ensure the judicial independence of judges the following key features must exist:

Appointment and dismissal

There must be a clear division of roles regarding the appointment and dismissal of judges to prevent the possibility of one arm of government having complete control over the composition of a court. Federal judges are appointed by the government, but can be dismissed by the parliament. Grounds for dismissal are limited and specific. The Australian Constitution stipulates in Section 72(ii) that a federal judge can only be dismissed on the grounds of incapacity or misbehaviour. No federal judge has ever been dismissed. Prescribing the specific grounds for dismissal prevents the removal of judges for political reasons.

Permanency of tenure

Judges are appointed to their positions by the Executive Government. They have permanent tenure but must retire at 70 years of age. This is a constitutional requirement. An exception is made for Family Court Justices who must retire at 65 years of age. Most States have also enacted laws to make judges and magistrates retire at 70 years of age.

Giving judges permanency of tenure makes it less likely that decisions are influenced by those who appoint them to office.

Fixed remuneration

A constitutional rule prohibits judges' salaries from being decreased during their tenure on the Bench. This is to prevent the manipulation of salaries to such a low level that it would force judges to retire. Arbitrarily lowering a judge's salary interferes with that judge's ability to decide a case free from external pressure. Governments can, however, increase judges' salaries if they wish, which they do on a regular basis to make it attractive for good lawyers to accept appointments to the judiciary.

Judicial privilege

Judges must have freedom of speech while presiding on the bench and delivering written judgments. They cannot be sued for defamation or threatened with criminal prosecution but remain to strict judicial rules of propriety.

Free from influence

Judges must be absolutely free from interference and intimidation by external forces. A judge cannot be a part of any political party whilst simultaneously performing judicial duties, as it could jeopardise a person's independence. Judges must maintain independence from the two branches of government to maintain community confidence in the impartiality of the administration of justice.

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At a Glance

The strengths and weaknesses of the principle of judicial independence

STRENGTHS

- Only independently appointed judicial officers can bring about just outcomes to disputes after two competing cases have been presented to them.
- Community has greater confidence in judicial outcomes if convinced decisions are made independently of the other two arms of governance, parliament and government, and solely in accordance with law.
- Mechanisms exist in the Constitution to support community confidence that judges exercise independence – set age of retirement, fixed remuneration.
- Judges in lower courts are bound to comply with the doctrine of precedent (to be discussed in Chapter 1.5) so there is a greater chance of consistency and predictability in court outcomes
- Freedom of speech, but with strict rules to ensure professionalism of speech

WEAKNESSES

- Judges are appointed, not elected, so they are not held directly accountable to the community for their decisions
- As the High Court is the nation's superior court, there is no higher court to review its decisions
- Accountability to the community is limited
- The dismissal of judges is difficult and it is very subjective
- Judicial appointments do not reflect cultural or gender diversity in Australia
- Role as passive observers limited
- The set retirement age can also be a negative as it limits representation in the judiciary, particularly regarding experienced and qualified judges
- The high minimum wage could be an incentive for political bias as raises are funded by the partisan government

Short Answer Questions

1. Define the term judicial independence

2. Why is judicial independence so important?

3. How are judges appointed to and dismissed from the bench of a court?

4. Define permanency of tenure and outline one benefit

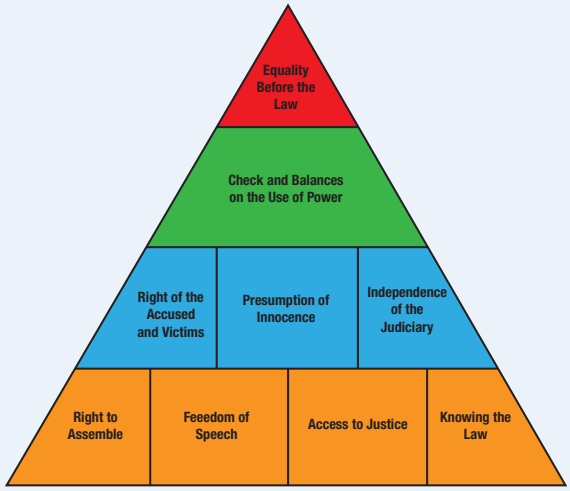
5. What protections exist to preserve judicial independence?

Response to sources

SOURCE A:

DIAGRAM: The Rule of Law Pyramid

Principles - Australia's Magna Carta Institute



SOURCE B:

Helpful online resources

EXPLANATION: The Australian Constitution Centre explaining the rule of law

https://www.australianconstitutioncentre.org.au/uploads/1/2/0/0/120053113/the_rule_of_law_in_detail.pdf

SOURCE C:

Helpful online resources

CASE: High Court Cases which involved the rule of law

https://www.australianconstitutioncentre.org.au/the-rule-of-law-ndash-the-government-overreached-when-it-banned-the-communist-party.html

SOURCE D:

EXTRACT: The following extract is from, "The Stolen Generation' (source: Wikipedia)

The **Stolen Generations** (also known as **Stolen Children**) were the children of Australian Aboriginal and Torres Strait Islander descent who were removed from their families by the Australian Federal and State government agencies and church missions, under acts of their respective parliaments. The removals of those referred to as "half-caste" children were conducted in the period between approximately 1905 and 1969, although in some places mixed-race children were still being taken into the 1970s.

A minority of historians dispute that substantial numbers of mixed-blood Aboriginal children were forcibly taken from their families. They contend that some children were removed mainly to protect them from neglect and abuse. Official government estimates are that between one in ten and one in three indigenous Australian children were forcibly taken from their families and communities between 1910 and 1970, affecting all regions of the country.

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Response to sources (continued)

Emergence of the child removal policy

Numerous 19th- and early 20th-century contemporaneous documents indicate that the policy of removing mixed-race Aboriginal children from their mothers related to an assumption that the Aborigines were dying off. Given their catastrophic population decline after white contact (population shrank from 1,250,000 in 1788 to 50,000 in 1930), whites assumed that the full-blood tribal Aboriginal population would be unable to sustain itself, and was doomed to extinction. The idea expressed by A. O. Neville, the Chief Protector of Aborigines for Western Australia, and others as late as 1930 was that mixed-race children could be trained to work in white society, and over generations would marry white and be assimilated into the society.

European Australians believed that their civilisation was superior to that of Aborigines, based on comparative technological advancement. Some adherents to these beliefs considered any proliferation of mixed-descent children (labelled "half-castes", "crossbreeds", "quadroons", and "octoroons") to be a threat to the nature and stability of the prevailing civilisation, or to a perceived racial or civlisational "heritage" The Northern Territory Chief Protector of Aborigines, Dr. Cecil Cook, argued that "everything necessary [must be done] to convert the half-caste into a white citizen"

Walter Baldwin Spencer reported in the 1920s that many mixed-descent children were born to Aboriginal women and white fathers; the latter worked on construction of The Ghan railway and left the women and children when the project was completed

Sources Analysis Questions:

1. What is the significance of the case presented in **Source C**?
2. Compare and contrast **Sources A and B.** What are the similarities and differences? To what extent does **Source A** support **Source B**?
3. Discuss **Source D** with regard to tension between the empowered and the disempowered.
4. With reference to the sources and to your own knowledge,, critically analyse how effective Australia has been in upholding the rule of law.

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1.2 Parliament

SACE Considerations for Chapter 1.2

Big Questions

- Is a power imbalance between a government and its people necessary for a democratic government to be effective and functional?
- Do the institutions of government, and its laws, adequately reflect the people?
- Are the institutions of government fair and efficient?

Competing Tensions to be considered

- Fairness and efficiency
- The empowered and the disempowered

Inquiry Question

- What is the structure, composition and role of the Commonwealth, and one state or territory, parliament?

Overview

The Australian system of government was designed with three tiers, or levels; federal, state and territory, and local. Each of these tiers has a legislature, or law-making body, that has the power to make laws in their own area (jurisdiction). This chapter will explore the federal parliament, created upon federation in 1901, and the South Australian and Northern Territory parliaments. Local lawmaking will be explored later in the book.

State parliaments around Australia pre-date the Australian federal parliament. Prior to federation in 1901, each of the six colonies had created their own systems of responsible government operating in accordance with powers in state constitutions. South Australia achieved a system of responsible and representative government by 1856.

Because state parliaments pre-date federation, they differ in design from the federal parliament, and that of the self-governing territories, such as the Northern Territory, who did not attain a legislature until 1948.

Legislative power exercised by federal and state parliaments when lawmaking are outlined in the Australian Constitution. The allocation of lawmaking powers between the state and commonwealth tiers of government is known as the **doctrine of the division of powers**. When writing the draft of the Australian Constitution, the founding fathers had to balance the allocation of powers given to the commonwealth with the wishes of the prospective states, especially smaller states not keen to federate. Therefore there were few enumerated powers given to the commonwealth. What was not written specifically in the constitution became the responsibility of the states (residual powers). As the Northern Territory did not exist at the time of federation, all of its lawmaking powers are determined by the federal government.

The Commonwealth Parliament

The Commonwealth (federal), parliament, is comprised of two houses (referred to as a 'bicameral' system), and a Queen's representative. Our model of government (a Constitutional Monarchy) was largely adopted from the British Westminster system, and subsequently shares many similar features. The structure of the Commonwealth parliament is outlined in Sections 1 and 2 of the Constitution.

The three elements of the Commonwealth parliament:

- Lower House (House of Representatives)
- Upper House (Senate)
- Queen's representative (Governor-General)

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The House of Representatives

The House of Representatives is the lower house of the federal parliament. Members of this house are elected on the principle of "one vote, one value" and the party gaining the majority of seat in this house (50% + 1) at an election, forms the government. There are currently 151 seats in the lower house, and this number is determined by the overall population of Australia. States and territories are allocated a certain number of these seats, based on their individual populations.

For example, with a state population of approximately 7.5 million people, NSW has 47 allocated seats in the lower house. With a state population of approximately 1.7 million people, SA has only 10 seats in the lower house.

Each of these seats corresponds to a single member electorate - a geographic area on a map in which voters are grouped together to elect one person to represent them in the lower house. Each electorate has approximately the same number of voters, in order for representation in the lower house to be equal. In 2020, there were approximately 110,000 voters in each federal electorate. These electorates are determined by the Australian Electoral Commission. Members are voted into the lower house through the preferential voting system, and serve terms of three years, unless there is an early election, they retire, or they are removed from office in special circumstances.

Currently, the winning party at an election must win at least 76 seats in the Lower House. The leader of this party becomes the head of the government, known as the Prime Minister, and selects government ministers in accordance with their party's policy. The party/parties that lose the election form the Opposition. Their party leader becomes the Opposition leader, and they choose a Shadow Ministry to mirror the government ministers.

At a Glance

What happens if no-one wins a majority of seats?

Where a party does not hold a majority of seats after an election, they may join one another to reach the number of seats necessary to govern. This is called a coalition government. For example, the Liberal Party of Australia, and the National Party are currently a coalition. Under this arrangement, the leader of the National Party is the Deputy Prime Minister of Australia while the leader of the Liberal Part is the Prime Minister.

Another way of forming a government which winning a majority of seats at the election is by forming a minority government. We have seen this recently in 2010 with the formation of the Gillard Labor Government.

At the 2010 Federal Election, both the Labor Party and Liberal/National Coalition won 72 seats each. This is called a hung parliament as neither party reached a majority of seats alone, and was the first hung parliament since 1940. Six crossbenchers declared their support for the Labor Part under Julia Gillard, and two chose to support the Liberal/National Coalition under Tony Abbott. With a final result in 76-74, this allowed Ms Gillard to govern with a minority government.

Fast fact

It can be argued that Julia Gillard has been our most productive Prime Minister in terms of legislative output. Her Labor minority government passed more pieces of legislation than any government before hers, or since.

Definition

What is an electorate?

An **electorate** is an invisible boundary drawn on a map, to create groups of voters that are approximately the same size. These groups of voters then must choose one person to represent them in parliament at an election. These elections are undertaken with a preferential voting process. The preferential voting system is simple; from a list of candidates, the candidate who receives more than half of the vote (50% + 1) is elected to represent that electorate for the next election cycle.

In Australia, we use these electorates, known as single-member electorates, to elect people to sit in the Lower Houses of parliament at both state and federal level.

To elect people to Upper Houses across Australia, the electorates are "state-wide". This simply means that the whole state becomes one electorate, and all registered voters in the state, choose their upper house representatives from one long list.

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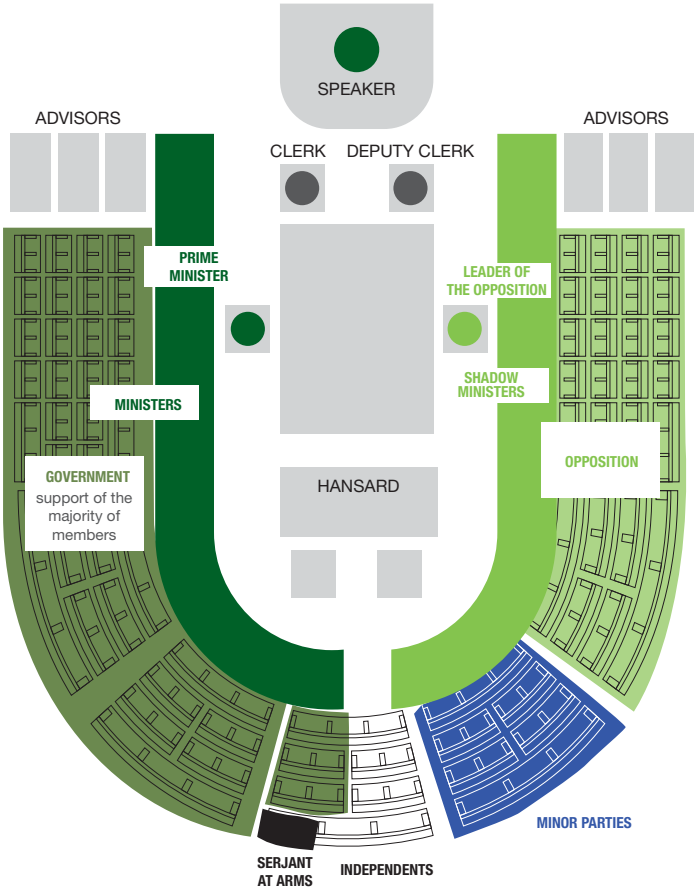
The physical structure of the House of Representatives, down to the colour of the seats and carpet, has largely been taken from Britain. The colour of parliamentary lower houses (both at state and federal level), is green. The chair, or leader of the lower house, known as the Speaker (and usually drawn from the majority party), is seated at the front of the chamber, in the centre. The majority party, who have formed government after an election, sit to the Speaker's right, and the Opposition (party with the second highest number of seats) sit to the Speaker's left. Independents and minor party members sit in the cross-bench.

HOUSE of REPRESENTATIVES



The Senate

The Senate is the upper house of the federal parliament. Constitutionally, its total composition should be approximately half the number of the House of Representatives. Each state has 12 senators regardless of population size, while both the ACT and NT are granted two seats each. Senators are elected on 6 year terms (double that of the lower house to provide stability) through a proportional voting system, electing Senators from a single, state-wide electorate. Equal representation of each of the states is modelled on the American Senate. The fact that the Senate has almost equal powers to that of the House of Representatives, is also a feature adopted from the American system.

Like the lower house, the physical structure and decor of the Senate has been borrowed from the British Westminster system. The colour of the parliamentary upper houses (both state and federal), is red. The chair, or leader of the Senate is called the President. Their role is the same as that of the Speaker. Members from the majority party who have formed government will sit to the right of the President, and members from the Opposition will sit to the left. Independents and minor party members sit in the cross-bench.

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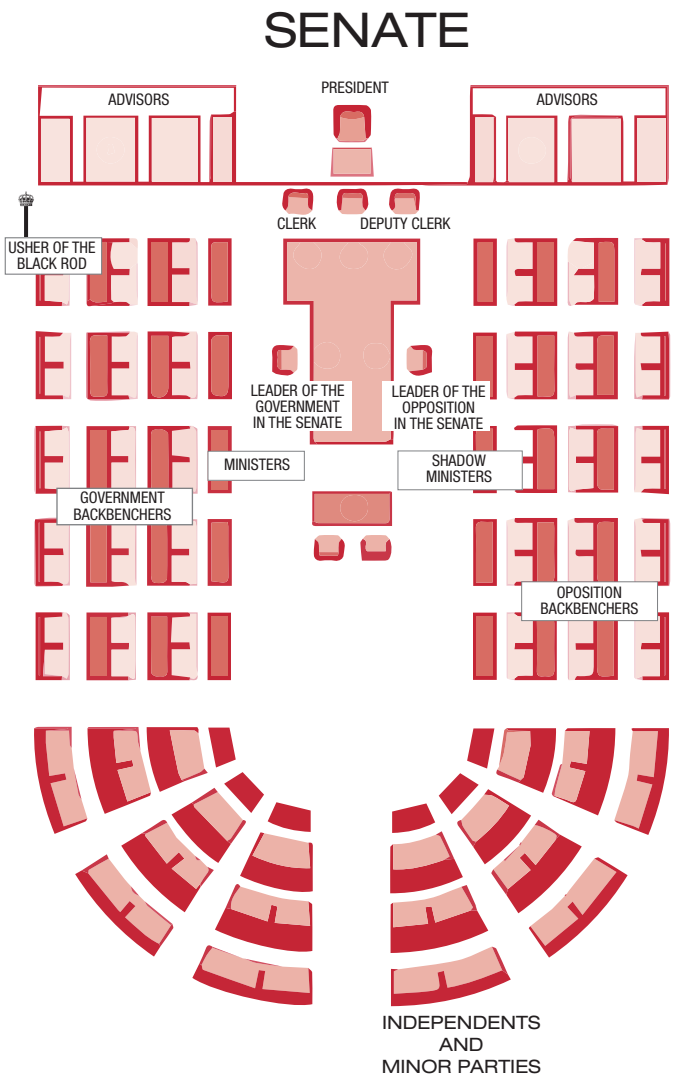

The founding fathers intended for the upper house to be a "state's house", where each state would have the opportunity to vote in their state's favour, preventing the passing of discriminatory laws or laws that took away their power. In practise, the emergence of political parties in the early 1900's has resulted in strict party discipline and voting along party lines, rather than interests of the state. In some cases, this has resulted in some votes to remove state power and grant it to the Commonwealth.

Did you know?

There is no mention of Prime Minister, political parties or the Cabinet in the Australian Constitution.

The Queen's Representative

The Queen is represented in the federal parliament by the Governor-General. The Governor-General has several roles and responsibilities. However, these are largely administrative in nature; the Governor-General is not allowed to participate in debates or vote on bills. Instead, they convene and dissolve parliament. Most significantly, the Governor-General must sign and assent to all bills after they pass parliament, in order for them to become law.

It is important to note that the Governor-General is not politically aligned. As they are appointed to represent the Queen, they are a feature of the structure of the government, but not a political representative of a particular party.

Key Pieces of Legislation

- *Commonwealth of Australia Constitution Act 1900 (UK)*
- *Commonwealth Electoral Act 1918 (Cwth)*
- *Senate (Representation of Territories) Act 1973 (Cwth)*

The South Australian Parliament

The South Australian parliament is similar in structure to that of its federal counterpart. It also has three key elements:

- The Lower House (House of Assembly)
- The Upper House (Legislative Council)
- Queen's representative (Governor)

House of Assembly

The House of Assembly currently has 47 seats attached to single-member electorates. Like the federal parliament, the party that wins the majority of seats (50% + 1 = 24) in the House of Assembly becomes the government for a 4-year term. The House of Assembly also uses a preferential voting system to elect its members (MPs), and the decor is green..

The leader of the winning political party becomes the head of the government, known as the Premier. The Premier determines who they wish to serve as ministers in their government. The Government will sit to the right of the Speaker, who chairs the parliament. Seating in the house is consistent with the layout of Commonwealth Parliament.

Legislative Council

There are 22 seats in the Legislative Council, with 11 members elected at each general election. Members of the Legislative Council (MLCs) sit for 8 year terms. Consistent with the upper house at federal level, the Legislative Council has red decor.

MLCs are elected to the Council with a proportional voting system that elects members from a single, state-wide electorate. The Council is chaired by a President, and seating is consistent with the layout of the Commonwealth Parliament.

The Queen's Representative

In South Australia, the Queen is represented by the Governor. The Governor has a similar role to that of the Governor-General; their workload is largely ceremonial and administrative - particularly in regard to the role they play within the parliament. The Governor will dissolve the parliament before an election, summons MPs to attend sittings of parliament, and prorogue parliament between sessions. They must also sign all bills that have passed the parliament in order for them to become law.

Key Piece of Legislation

- *Constitution Act 1934 (SA)*

The Northern Territory Parliament

The Northern Territory has had a parliament (legislature) since 1948. This was initially created by the federal government through the passing of the *Northern Territory (Administration) Act 1947*, which created a single house of parliament, comprising 13 members (only half of whom were elected), and an Administrator to represent the Queen. This was called the Legislative Council.

It was not until 1974 that the legislature was entirely elected by the people, and was renamed the Legislative Assembly. In 1978, the Northern Territory was granted self-governance through the passage of the *Northern Territory (Self-Government) Act 1978*

The parliament of the Northern Territory is a unicameral (one-house) parliament, but now has 25 seats, with its members elected from electorates, for terms of 4 years. In the same manner as the state and federal parliaments, the political party that wins the majority of seats at an election forms government, and elects its own Speaker. Rather than the title of Premier, the leader of the Government is named the Chief Minister.

The Northern Territory parliament exercises similar legislative power to that of the Australian states; however, the Commonwealth parliament has the ability to make laws for them, or alter powers of the Legislative Assembly. As the Northern Territory was created by federal legislation, their government and parliament, are subject to limitations.

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The Queen's Representative

In the Northern Territory, the Queen's representative is referred to as the Administrator of the Northern Territory. It is similar to the role of state Governor. They are appointed by the Governor-General to be a representative of the federal government, in the Northern Territory parliament. The reason for not having a direct representative of the Queen in the Northern Territory parliament is that the Northern Territory is not a state, and was created after federation by the federal government.

Key Pieces of Legislation

- *Northern Territory (Administration) Act 1947 (Cwth)*
- *Northern Territory (Self-Government) Act 1978 (Cwth)*
- *Referendums Act 1998 (NT)*

Fast fact

Interested in finding your elected representative?

There are several ways in which you can find who your elected representative is, for both state and federal parliaments. While a quick Google search may get you the information you require, if you're unsure of your electorate, visiting official websites will be more efficient.

For all students: To find out who represents you in the House of Representatives, visit the Australian Electoral Commission website: https://electorate.aec.gov.au/

For students in South Australia: To find your elected representative in the SA House of Assembly, visit: https://www.ecsa.sa.gov.au/map

For students in the Northern Territory: To find your elected representative in the NT Legislative Assembly, visit: https://ntec.nt.gov.au/Electoral-divisions/find-my-electoral-division

What is the purpose of parliament?

As stated in the overview, the state and federal tiers of government in Australia have a legislature (parliament) that makes laws. However, there are additional, important roles that are performed by the parliament, at both state and federal level.

Democratic function

By engaging in regular elections, as per the conventions of representative government, the community upholds our democratic process, by choosing people to make laws on its behalf.

Additionally, adopting the British Westminster system of responsible government, means the Executive Government is formed from the majority party from the lower house of parliament. The parliament, therefore, plays a significant role in the formation of Executive Governments in Australia. Ministers must be drawn from both houses of parliament. The leader of the party, and subsequently, leader of the Government, must be elected to the lower house. This practise applies at both state and federal level.

Legislative function

The main purpose of parliament is to create laws, or legislation. This process will be discussed in more detail in the following chapter.

Section 51 of the Australian Constitution prescribes the powers the Commonwealth can exercise with respect to lawmaking. Powers not enumerated (written) in this section are powers the states may exercise. Other constitutional provisions identify powers only the Commonwealth can use (also known as exclusive powers) and areas in which no parliament can make laws (prohibited powers). This power-sharing arrangement between the federal and the state governments is known as the division of powers.

Supplying function

One important area of lawmaking for the parliament relates to supply, or money bills. Supply is a term that describes the money bills put forward by the Treasurer on behalf of the government each year, dictating how

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government money will be collected, and spent. This is more commonly known as the Budget. These bills must be passed at both state and federal level. The Budget must be introduced in the lower house of parliament, as per Section 53 of the Constitution, and cannot be amended by the Senate. It is expected that the Senate will follow Westminster conventions and pass the supply bills, but it is not legally bound to. The Senate can choose to reject a supply bill, or send it back to the House of Representatives with suggested changes.

Supply bills are incredibly important, as without legal permission for government spending, the country cannot be governed. The Senate has only blocked the passage of supply once in Australian legal history. This occurred in 1975, when the Liberal Coalition through control of the voting numbers in the Senate continues to shuffle consideration of supple bills to the bottom of the parliamentary agenda. This tactic meant that supple bills remained in the upper house and were not passed, making it impossible for the Labor government to govern. The Governor General, Sir John Kerr, controversially dismissed the government and appointed a caretaker Liberal government, provided they would guarantee a double-dissolution election, agree to pass supply, and make no new decisions until the election was decided.

Scrutinising function

The parliament performs a very important function in scrutinising lawmaking from the other two branches of the separation of powers; the Executive, and the Judiciary. The process and effectiveness of this scrutinising function will be explored in more detail, later in this topic.

The parliament can also scrutinise itself, when it comes to the passing of legislation. The upper houses at both state and federal level act as a house of review for public bills coming up from the lower house. This process is most effective when the Government does not hold a majority in both houses. Unicameral parliaments (such as Queensland and the Northern Territory) do not have this function.

Short Answer Questions

Consider the following "Big Question" from the beginning of the Chapter, before you answer the questions below:

Is a power imbalance between a government and its people necessary for a democratic government to be effective and functional?

1. Identify the key differences between the federal parliament and the parliament of either South Australia or the Northern Territory.

   What do you think are the reasons for these differences? Explain.

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2. What are the benefits of a federal system with multiple tiers of governance?

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3. How does Australia's current system of government uphold democratic principles? In which ways does it deny democratic principles?

4. Rank the functions of parliament in order of important. Justify your response.

C Collaborative Activity

Consider the following "Big Question" from the beginning of the Chapter:

Are the institutions of government fair and efficient?

In groups, create a table of all the institutions and/or elements of government and parliament that you can think of, under the headings below:

Institutions/elements of parliament that promote fairness and efficiency	Institutions/elements of parliament that encourage disadvantage and inefficiency

As you complete the table, consider the following questions that may inform your group selections:

- How do you define the terms, "fair" and "efficient"?
- Do features meeting the definition of fairness, and efficient automatically make them "good" features, or, for example, could an element of good "efficiency" also lead to discrimination, disadvantage or autocracy rather than democracy?
- Should fairness and efficiency be our primary concerns when critically analysing our institutions of government, or are there better criteria for us to consider?

Consider the following "Big Question" from the beginning of the Chapter:

Do the institutions of government, and its laws, adequately reflect the wishes of people?

As a group, research the current demographic make-up of either the:

- Federal Parliament (both Houses)
- South Australian Parliament (both Houses)
- Northern Territory (Legislative Council)

C Collaborative Activity

Consider the proportion of men and women, ages of elected members, cultural background, and religious background (if available). Fill in this information below:

Parliament Chosen: .....

Number of Members (total): .....

Sex	Men	Women

Cultural Background	Caucasian Australian	Aboriginal/Torres Strait Islander	Other cultural background

Religious Affiliation	Christian/ Catholic	Muslim	Jewish	Non-religious	Other	Religious affiliation unknown

Age	18-30	31-40	41-50	51-60	61-70	70+

When you have this information, compare that to the following information about the demographics of Australia, from the Australian Bureau of Statistics census in 2016:

Australians in 2016

- Men made up approximately 49% of the population, and women 51%
- The average age of an Australian is 38 years old
- Approximately 27% of Australian citizens were born overseas
- 2.8% of Australians are Aboriginal or Torres Strait Islander
- Approximately 57% identify as Christian, another 8.2% as belonging to other religions, and 29.6% of Australians identified as "non-religious" (or did not answer the question.

Data sourced from the Australian Bureau of Statistics:

https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036

Questions

1. How does your research into the demographic make up of the parliament compare with the demographics of the Australian voting public? What are the similarities and differences?

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2. Do you think the discrepancies in our parliamentary representation and population demographics require addressing? Why, or why not?

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3. Compile a list of changes that could be made to the electoral or parliamentary processes that would make the parliament more accurately representative of the Australian people.

Essay Questions

Select a question from the list below to address as an essay response:

1. To what extent is our current model of responsible government effective at creating a parliament and government that accurately reflects the Australian people and their wishes?
2. "The Federal government is not effectively held to account by the parliament." Using examples, evaluate this statement.
3. "Fairness is a more important component of our institutions of government than efficiency." Using examples, evaluate this statement.

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1.3 Legislation

SACE Considerations for Chapter 1.3

Big Questions

- How adequately do laws provide for future generations?
- Are the institutions of government fair and efficient?
- Are laws responsive to change?
- Is the law fair if it is subject to interpretation?
- How adequately does the Australian legal system achieve the rule of law?
- Do the institutions of government, and its laws, adequately reflect the people?
- Do people influence laws, or do laws influence people?

Competing Tensions

- Rights and Responsibilities
- Fairness and Efficiency

Inquiry Question

- How and why are laws made by the Commonwealth, and one state or territory, parliaments and delegated bodies?

Key Definitions

Bill: a proposed law that is presented to the Parliament for debate and enactment.

Act: a bill that has passed both Houses of Parliament in exactly the same form, and has been assented by the Queen's representative.

Public Member's Bill: a bill that is presented to the Parliament by a member of the government (usually a Minister), in order to achieve the government's legislative program.

Private Member's Bill: a bill that is introduced by a member that is not a Minister. This includes government backbenchers, Opposition members and Independents; this also includes Ministers that are not acting in their ministerial roles, and simply for their local electorate.

MPs: members of parliament.

Deadlock: when the House of Representatives passes a bill, and the Senate then rejects that bill twice, with a lapse of at least three months between each attempt. Outlined in s57 of Constitution.

There are also many interchangeable terms/names for a piece of **legislation**. Some are listed below:

- an Act of Parliament
- Parliament-made-law
- Enacted law
- Codified law
- Statute law

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Introduction

The primary role of the Parliament is to make law on behalf of the community. Parliament creates new laws, adapts and repealsexisting laws. Their legal authority to do so comes from the Constitution.

The **doctrine of the division of powers** refers to the legislative power sharing arrangements between the Federal and State parliaments, and is outlined in the Australian Constitution.

The Constitution determines powers each parliament may exercise. Anything included in the Constitution is called a specific power. At the time of federation, as many specific powers were able to be exercised by both the Commonwealth and the States simultaneously, such powers are also concurrent.

Section 109 (known as the inconsistency rule) of the Constitution, States that where the laws of the Commonwealth and States clash, federal law will prevail to the extent of the inconsistency. For example, until 1961, the Commonwealth had not made law outlining marriage. To this point in time, marriage was covered by State law. With the passing of the Marriage Act 1961 (Cwlth), it meant that there were inconsistencies between State and Commonwealth law. With the application of s109 of the Constitution, it rendered the State law invalid.

Parliaments are our sovereign law-makers, but they can also delegate some of their lawmaking power to the Executive Government. This will be discussed in more detail in the next Chapter.

Parliament-made-law prevails over judge-made-law and delegated legislation when there is a conflict, highlighting its sovereignty as our primary source of law. The only exception to this rule is that the Federal Parliament cannot overrule a High Court interpretation of the Constitution. This will be discussed further in Chapter 1.5.

Supervision of all forms of lawmaking will be covered in Chapter 1.6.

What factors lead to the initiation of legislation?

C Collaborative Activity

Brainstorm a list of factors/processes/principles that you think may lead to the Parliament creating new laws.

(Hint: by considering the 'Big Questions' at the beginning of this chapter, you may get some ideas about the inspiration for new laws.)

- .....
- .....
- .....
- .....
- .....
- .....
- .....
- .....

The parliament makes laws in response to a variety of factors. Some of these are explained below:

Political party policies

Each political party has a set of beliefs that dictate the type of policies they wish to pursue, and ideas they wish to implement into law, with the intention of creating a better, fairer, and more prosperous society. These beliefs form the foundation of their legislative agenda and often affect promises made at an election.

People choose to align themselves with a particular political party, as their core beliefs resonate with their own, and they wish to see these ideas implemented into policy and law. Most of our elected politicians are aligned with one of our major parties.

The range of political parties reflect different perspectives about how to effectively run the nation, and which ideas and strategies will be most successful. In reality, there is a lot of common ground between the major political parties.

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The three largest political parties at Federal and State level are the:

- Australian Labor Party
- Liberal Party of Australia
- National Party of Australia

The largest political parties in the Northern Territory are:

- Country Liberal Party
- Territory Labor Party
- Territory Alliance

Some current minority parties at state and federal level include:

- Australian Greens
- Centre Alliance
- SA Best
- Advance SA

Independent Activity

Using the internet, Google each of the main political parties in your area to find out what their core beliefs are, and some of their key policy ideas.

- Which of the main parties has policies or beliefs that match up closely with your own?
- Which party is the furthest away?

Electoral Mandate

When campaigning before an election, each of the main political parties will make promises about the types of laws they wish to introduce, or changes they would like to make to our legal system, to encourage people to vote for their party. An election win is viewed as a mandate for the change promised, as the majority of the public are in favour of these changes. Even though voters select local members, decisions about voting preferences are often determined by which party each represents.

Court Decisions

A significant part of the Parliament's workload comes from responding to court decisions. The parliament may not like the way that a court has interpreted and applied their legislation, and so will amend the law in order to stop similar decisions being made in the future (known as **remedial legislation**), or favour a court decision so much that they choose to create a piece of into legislation (known as **complementary legislation**) to complement the decision.

Examples of remedial legislation:

Sentencing (Miscellaneous) Amendment Act 2018 (SA)

The *Sentencing (Miscellaneous) Amendment Act* was proposed shortly after the *Sentencing Act 2017 (SA)* was passed. Changes to sentencing laws in South Australia, meant Magistrates and District Court judges were sentencing a much larger proportion of offenders to home detention, rather than jail. In response to significant public backlash, the Amendment Act was passed to restrict the usage of home detention orders for serious offenders.

Youths Sentenced As Adults Act 2017 (SA)

This law was proposed and passed after a high profile South Australian case, during which a teenager killed a mother of two in a high-speed car accident. Limited by the *Young Offenders Act 1993 (SA)* at the time, the judge sentenced the teenager to approximately two years in detention, as rehabilitation was the primary consideration prescribed in legislation. This caused public outrage, and changes to the sentencing of youths were passed the following year.

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Example of complementary legislation:

Native Title Act 1993 (Cwth)

A very famous example of the Federal Parliament creating complementary legislation is in regards to native title, after the Mabo (No.2) decision in 1992. As the High Court had introduced a new legal principle when creating native title in Australia, the Parliament wrote the Act to provide context and guidance to the court decision.

Investigative Committees

Parliamentary Committees

Parliaments create committees to investigate areas of government performance, areas of law or policy, or proposed new laws. Parliamentary committees are compromise of a combination of members of the government, opposition and cross-benchers. Depending on the type of committee, some will have members from both Houses, while others will be limited to one house. The secretary of the committee is usually drawn from parliamentary staff support tanks.

These committees investigate issues, hear from stakeholders, can compel people to testify, and allow for public consultation. These committees then report with their findings to the parliament , in order for the parliament to make an informed decision.

Helpful online resources

Interested in finding out more about Parliamentary Committees?

Australian parliaments publish information about their current committees and inquiries so that the public can view the work that is being done, and in many cases, allows for the public to make submissions into these inquiries.

Australian Federal Parliament:

https://www.aph.gov.au/Parliamentary_Business/Committees

South Australian Parliament:

https://www.parliament.sa.gov.au/Committees/Committees-Home

Northern Territory Parliament:

https://parliament.nt.gov.au/committees

Executive Committees

Executive committees are created by the government in order to investigate a specific issue of prominence. Membership is usually comprised of experts in the relevant field, rather than MPs. Additionally, these committees are often chaired by judges or other prominent Australians. They report directly to the government, who determine whether or not their report is made public.

An example of an executive committees is a royal commission. An example of a prominent royal commission in Australian history is the Royal Commission into Aboriginal Deaths in Custody undertaken in the 1980s. This remains a significant cornerstone in politics and recommendations to advance reconciliation.

Helpful online resources

To find out more about royal commissions at the federal level, please visit:

https://www.royalcommission.gov.au/

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Pressure Groups

While individual people may not feel that they have the ability to persuasively lobby the government in order to change the law, they can form common interest groups in order to campaign for legal change. These are known as pressure groups. They can take many forms, and can be of varying sizes.

Some examples of pressure groups:

- Workers Unions
- Environmental organisations (such as Greenpeace)
- Registered religions
- Private, special interest organisations, such as:
    - Law Reform Institutes
    - Anti-Cancer Foundation
    - Women's Electoral Lobby

Independent Activity

Refer to your list of policies and beliefs that influence lawmaking at the beginning of this topic, and answer the following questions.

1. How much overlap is there between your list and the content of the workbook? Which of these influences on lawmaking represent new learning for you?

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2. Discuss whether or not the voting public have an adequate say in the direction of a government's legislative agenda? Explain.

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3. Identify one other way in which voters could have a greater influence on laws being made by the parliament? Explain your idea below.

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Types of Bills

A bill is a proposal for a new Act of Parliament. Different types of bills can be categorised according to its content, or the person responsible for its introduction.

Bills introduced by a member of parliament

A bill introduced by a Minister in the Government is known as a **public bill**. These are the most common types of bills introduced into the parliament for two reasons - the government generally has a majority in the lower house of parliament, and most ministers are drawn from the lower house. Party discipline means voting along party lines in most cases, meaning that a bill will easily pass the lower house.

A bill proposed by anyone else (or a Minister not acting in their role as a minister) is referred to as a **private members' bill**. These bills are less frequently introduced, and less likely to be successful, as they do not have the support of the Government in the lower house. Such bills usually address controversial issues, or social and/or moral issues. Voting on these bills is often not subject to strict party discipline, with members voting accordance with their own conscience on the matter.

Some recent examples of private members' bills:

- *Statutes Amendment (Decriminalisation of Sex Work) Bill 2018* (SA) (defeated in lower house)
- *Death with Dignity Bill 2016* (SA) (defeated at third reading stage by 1 vote)
- *Australian Bill of Rights 2019* (Cwth) (reached second reading stage, but removed from schedule)

Note that bills can still be introduced by members of the upper house. These are less common given that most ministers are drawn from the lower house.

Bills by Content

The more common types include:

- Original bill - a bill that proposes a law that is brand new
- Amending bill - a bill changing an existing piece of legislation. The word 'amendment' is commonly in the title
- Repealing bill - a bill removing and/or replacing an existing law
- Consolidating bill - a bill joining many pieces of legislation together into one Act. The word 'consolidating' is also often in the name of the bill
- Constitutional alteration bill - a bill that proposes a change of wording to the Australian Constitution, often referred to as a referendum bill
- Supply/Money bills - these bills authorise government spending, and the collection of taxation. These bills can only be introduced in the lower house, and cannot be amended by the upper house - only accepted or rejected. Another common name for this type of bills is an Appropriation bill.

How are laws made by the Commonwealth Parliament?

Australia's parliamentary law-making system closely resembles that of Britain. We have very specific and strict procedures that must be followed in order for a law to be passed. These requirements are prescribed in the Australian Constitution, and other legislation.

A significant majority of bills are introduced in the lower house of parliament, as this is where the majority of Ministers sit, and public bills need to be introduced by the relevant minister.

A key fact to be aware of - a bill will not become an Act until it has passed both Houses in exactly the same form, and assented by the Governor-General.

Key Pieces of Legislation

- *Commonwealth of Australia Constitution Act 1900 (UK)*
- *Acts Interpretation Act 1901 (Cth)*

The law-making process can be broken into three general stages:

- Pre-parliamentary stage
- Parliamentary stage
- Post-parliamentary stage

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Example of lawmaking process

Should the parliament wish to introduce a new law called the Social Media (Over 40s Ban) Bill 2021, the lawmaking stages would occur as follows.

Pre-Parliamentary Stage

Before a bill is presented to the parliament for consideration, it must first be developed. Each political party has their own policies and practises about how bills are developed in preparation for their presentation to the parliament. Once a party has developed an idea for a bill, they need to get the bill **drafted**.

Details of the proposed bill are sent to the **Office of Parliamentary Counsel** to be drafted. This ensures that the bills are written correctly by experts in legislative drafting.

Once drafted, it will be sent back to the Cabinet (if it was commissioned by the government) for approval, before it is introduced to parliament.

Example: In a Cabinet meeting, the Minister for Industry, Science and Technology introduces a proposition to ban social media usage for Australian citizens over the age of 40. They argue that this will help maintain social cohesion, as there will be less fighting on the internet, and more productivity in workplaces. Cabinet agrees, and the minister contacts the Office of Parliamentary Counsel providing detailed instruction.. The Office drafts the bill, and sends it back to the minister. The minister presents the completed bill to be approved by the Cabinet. Cabinet approves, and the Prime Minister advises all party members that they must vote in favour of the bill when it reaches parliament.

Parliamentary Stage

The parliamentary stage has many steps. Once all the steps have been completed in the originating house (the house in which the bill was first introduced), then the steps need to be repeated in the reviewing house.

In the example above, the minister for Industry, Science and Technology sits in the lower house, and therefore, this is where the bill will be introduced.

Giving Notice

The minister for Industry, Science and Technology gives a notice to the Clerk of the House of Representatives, stating that they wish to introduce the *Social Media (Over 40s Ban)* bill into the House. The Clerk will then place the bill on the Notice Paper for introduction, usually with other proposed bills.

First Reading

The Clerk will announce the notice, and the minister for Industry, Science and Technology will stand, and read aloud the short title for the bill. The minister hands the Clerk a signed copy of the bill, and an explanatory memo (which explains the purpose of the bill) having moved that they have leave to introduce the bill. The Clerk will then read the long title of the bill to the House, and then make the bill, and the memo available to all other members of the House. At this stage, this information is made available to the public.

Second Reading

This stage often immediately follows the First Reading. After the bill and memo are made available to the House, the speaker calls the minister for Industry, Science and Technology, who moves the bill to be read a second time. They provide a speech in favour of their bill or table a memo, or both. This is designed to encourage their colleagues to pass it through the House.

There is typically an adjournment here, to allow all members of the House of Representatives to go away, read the information, and consider it. The Opposition will take this time to consider how they will respond as a party to this proposal.

After some time has passed, the bill will reappear on the schedule to undertake the **Second Reading Debate.** This is the stage where the most comprehensive debate and discussion of all elements and principles occurs. The Shadow Minister for the Opposition (in this case, the Shadow Minister for Industry, Science and Technology) will often present the Opposition's perspective. After this, members will speak in turn to contribute to the debate. This stage of debate has no time limit. At the end of this stage, a vote will be taken to see if the House has agreed to the bill in principle (which, as the government holds the majority, will pass). This affirmative vote means that this stage is complete. Once approved, the bill becomes the business of the House.

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How does the voting occur?

There are two primary ways in which voting occurs in the parliament.

On-the-voices

This is the most common way for a vote to take place. An 'On-the-voices' vote will occur when the Speaker or President says to the House, "All those in favour of the bill say "Aye", and all those against say "No". The presiding officer who has called the vote will then make a determination about which side has received the most votes, and will inform the House about whether the motion has passed. As a matter of course, they usually say "The ayes have it".

Division

A division is a formal vote, where the names and record of the vote are officially recorded into Hansard. A division is called when the 'On-the-voices' result is challenged by MPs.

When a division is called (usually by a member of the Opposition), a timer begins and bells are rung throughout Parliament House to call MPs back to their chamber for the vote. When the timer runs out, the doors are locked, and the vote will only be taken from the people in the House.

At this point, the House will divide to vote. The 'Ayes' are directed to move to the right of the Chair, and the 'No's' to the left. The Clerks will then instruct the parliamentary whips to count and record the votes. The result will then be read to the House by the Presiding Officer, who records the result to the House.

The importance of MPs being available for divisions was made apparent to the public in 2016, when, for the first time in 50 years, the (Turnbull Liberal) Government lost a vote in the House of Representatives as three of their colleagues were locked out. One had left parliament early, and was half-way home!

In addition to how the votes are counted, there are two principle ways in which a politician can cast their vote.

Along political party lines

This simply means that a political will vote on a bill the way that their party leader has instructed. Members of the government will vote in favour of government bills. A vote against their own party, could potentially put their position in the party in jeopardy and result in disciplinary action. This act of voting differently to your party is referred to as 'crossing the floor'.

Conscience vote

This is as it sounds. A conscience vote allows MPs to vote along their own personal beliefs, rather than being told how to vote by their party leader. Members may choose to vote in accordance with their own beliefs, or may choose to vote along the lines of what their constituents want. Conscience votes are usually reserved for controversial issues, or matters that are morally or ethically difficult. The 2016 bill to introduce euthanasia laws in South Australia is an example of the use of a conscience vote.

Consideration in Detail

The purpose of this stage is to consider the bill in great detail. Each clause of the bill is examined individually, and members of the Opposition and cross-bench may suggest changes and amendments. The debating and speaking procedures in this stage are less formal.

The Shadow Minister for Industry, Science and Technology may propose an amendment to the bill that states that Australians over the age of 40 can use social media on the weekends, rather than a complete ban.

When an amendment is proposed, the Chair will hold a vote to see if the amendment passes, and, if it does, how it will be added into the bill. This process repeats until the entire bill has been considered.

This entire stage can be skipped, if the House agrees that the bill does not need to be examined in detail. If no one objects to skipping the Consideration in Detail stage, then the bill will go straight from the Second Reading to the Third Reading Stage. At each stage, a vote is taken.

Third Reading Stage

This is the final stage in this House, and is undertaken as a formality. Debate at this stage is rare. The Clerk will read out the long title of the bill and the House votes, with a result taken, 'on the voices'.

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Transmission to the House of Review

After the bill has passed the first House, it is then sent to the second House for review. In this case, as the *Social Media (Over 40s Ban)* bill has passed the House of Representatives, it now progresses to the Senate.

The Clerk will place the bill in a special folder, for delivery to the Senate by the Sergeant-at-Arms. The Speaker encloses a message with the bill asking that the Senate consider the bill.

Reviewing House (Senate)

The minister for Industry, Science and Technology sits in the House of Representatives, and so are not in the Senate to help guide it through the second stage. The minister will find another minister from their party to 'take over' the bill in essence, to ensure a member of the government assists the passage of the bill passed through the Senate.

The debating stages are essentially the same as the original House:

- First Reading
- Second Reading
- Committee of the Whole
- Third Reading

A second reading speech is not given in the reviewing House, as senators can read the original speech from Hansard.

The main difference in the reviewing House is the **Committee of the Whole** stage. Many bills, particularly controversial ones, can be referred to select, standing or reference committees to consider the bill in more detail. These committees are made up from members from both major parties, and members of the cross-bench. These committees will ask stakeholders, experts, and members of the community to answer questions, or provide information about the proposed bill. When the committee has completed its review, it will submit a report to the Senate for it to consider.

Example: The *Social Media (Over 40s) Ban* bill is a controversial bill, because some groups in society feel like their civil rights are being infringed. A Senate Committee is set up to scrutinise the bill in detail. The Committee hears from civil liberties groups, reads petitions submitted by Australian citizens over the age of 40, speaks with representatives from workers unions, CEOs of major businesses, and representatives from the Australian Productivity Commission. At the end of this review, the Committee recommends that some major amendments be made to this bill.

Due to the concern from the Senate Committee, the Senate amends the *Social Media (Over 40s ban)* bill, stating that they feel that it is currently in breach of several civil rights of Australian citizens.

Did you know?

The reviewing function of the Senate works best when the Government does not have a majority of seats in this House. Without an automatic majority vote, the Government will often have to compromise or make adjustments to their bills, in order to get support from either the Opposition, or a number of cross-benchers in order for the bill to get majority support.

Due to failing to pass the bill in the Senate, the bill is returned with the suggested amendments to the original House, the House of Representatives, to allow for debate and adoption of changes.

- If the House fails to agree to the amendments, then the bill has failed, and may be abandoned or shelved.
- If the House of Representatives agrees to the amendments bill from the Senate, the law will pass, having now passed both Houses in the same form.

Once the bill has passed both Houses, the Governor-General will **assent** the bill to become an Act of Parliament on the advice of the presiding officer of the originating House (in this case, the Speaker from the House of Representatives). This is accompanied by a certificate from the Solicitor-General who confirms that the bill is a valid exercise of Commonwealth Power. The assent is then published in the Government Gazette and may include a proclamation and commencement date. Although extremely rare, the Governor-General can refuse assent.

Post-Parliament Stage

After the bill has been assented by the Governor-General, it moves onto the **proclamation stage**. After assent, the bill will be returned to the relevant Minister, who will then tell the Governor-General when to proclaim the Act.

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The bill is not officially an Act until it is proclaimed in the Government Gazette. This is how the government officially notifies the public that the law has changed.

At Commonwealth level, an Act can come into force in by:

- Its date of assent
- A date that was prescribed (written into) the Act
- A date of proclamation set by the Governor-General.

The process for passing bills is very similar in **South Australia** and the **Northern Territory.** One key difference with the Northern Territory parliament is that it is unicameral, meaning that bills need to only pass one House in order to become law.

Did you know?

Queensland also has a unicameral parliament (they abolished their upper house in 1922). Where Commonwealth seeks to have uniform laws passed by the states, the Queensland parliament is used, and then others follow using the bill before the parliament as 'template' legislation. This was useful after the Port Arthur massacre in the 1990's when the Commonwealth was attempting to have all states make consistent laws in relation to gun ownership.

Independent Activity

Locate the website for either the Federal, or State or Territory government, and find the page outlining the bills currently before the parliament. Choose **one** that is of interest to you, and then address the questions below:

1. What is the title of the bill you've chosen?

2. Which House of Parliament was it introduced to?

3. Who introduced this bill, and what type of bill is it?

4. How far through the parliamentary process has this bill proceeded? List the stages it has been through, and in which House(s)?

5. Give a brief overview of this bill. What is it trying to achieve? (Hint: Check the long title of the bill)

6. Do you think this bill will become law? Justify your answer by discussing its current status, identifying what type of bill it is, and your understanding of voting and committee practises.

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What happens if the two Houses of Parliament can't agree on a bill?

In some instances, the Houses do not come to an agreement on bills. One House will continue to pass a bill, but the House of review will continue to reject it. There can be many reasons why this may occur.

There are two common ways to describe this circumstances:

Parliamentary Deadlock

A deadlock describes a situation, where a bill is passed in the House of Representatives twice, but rejected by the Senate, twice, with at least a three month gap between attempts. This must occur within the same term of parliament.

The process to resolve deadlocks is outlined in s57 of the Australian Constitution, and only apply to bills that are introduced into the House of Representatives.

Disagreement

A disagreement occurs when the Senate obstructs the passage of a bill, but the deadlock requirements of s57 have not been met.

Resolving Deadlocks and Disagreements at Federal level

There are a couple different ways that a **disagreement** can be resolved.

- Compromise
- Abandonment

Resolving a **deadlock**, however, can take another form, in addition to the two methods above. If the Government does not want to abandon their bill, and is not willing to compromise in a way that is acceptable to the Senate, the Prime Minister can ask the Governor-General to use the **double dissolution** mechanism.

The **double dissolution** mechanism is also outlined in s57 of the the Constitution, and was included by the Founding Fathers as a way to resolve disputes between the Houses. There are four stages to the mechanism:

Stage 1

- The House of Representatives passes a bill
- The Senate rejects the bill, fails to pass it; or makes amendments to it that the House of Representatives does not agree to
- The House of Representatives allows at least three months to pass before they reintroduce the bill to the House, and pass it again
- The Senate again rejects or fails to pass the bill, or makes amendments that the House of Representatives will not agree to.

At this point, the Constitutional requirements for a deadlock have been met. This situation is also known as a 'Constitutional trigger' for a double dissolution. At this point, the Prime Minister has discretion to seek a double dissolution election. This cannot occur within six months of the date of their term.

Stage 2

- The Prime Minister advises the Governor-General to dissolve both Houses of Parliament, and to call an election.

This is different to a normal election, as all members of both Houses are up for re-election, rather than the House of Representatives, and half the Senate, as at a normal election.

If, at Stage 2, the Government is defeated and they lose the election, the bill will automatically lapse, and will not be re-introduced. However, if the Government is re-elected at the double dissolution election, then they move onto Stage 3.

Stage 3

- The House of Representatives will pass the same bill again without amendments.
- The Senate rejects or fails to pass the bill again, or makes amendments to the bill that the House will not accept.

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Stage 4

- The Prime Minister will ask the Governor-General to call for a **joint sitting of parliament.** This is where all elected members, of both the House of Representatives and the Senate all come together into one House (the House of Representatives). They then hold one final vote - if an absolute majority of Members and Senators pass the bill at the joint sitting, the bill is then assented and proclaimed so that it can become law.

It is common for the Government to hold an overall majority in both Houses, hence a vote by 'joint sitting' will usually be in their favour. Only one joint sitting of parliament has ever been held, and that was after the double dissolution in 1974. Prime Minister Gough Whitlam managed to pass six bills through during this joint sitting.

A quick history of Australian double-dissolutions

In Australia's legal history, there have only been seven double dissolution elections held. They occured in: 1914, 1951, 1974, 1975, 1983, 1987, and 2016.

Largely, they have not proven to be very effective at resolving deadlocks.

- In 1914, 1975 & 1983, the Governments lost the election, and their bills lapsed.
- The successful passage of bills that triggered these elections were only achieved in 1951 and 1974.

The federal government investigated ways to change the system for resolving deadlocks in the early 2000s due to these perceived inefficiencies, but these reports and suggested reforms never progressed. In Prime Minister Howard's tenure (1996-2007), there were occasions where a number of double dissolution triggers existed without being invoked.

C Collaborative Activity

With the people around you, create a list of reforms that could be made to our systems for resolving deadlocks and disagreements to improve the system we already have.

Some members of your group may wish to look at the government reports commissioned in the early 2000s to get some ideas.

Use the space below to outline and summarise your changes, and then be prepared to share your plans with the rest of the class.

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Resolving Disagreements and Deadlocks in South Australia

The method for resolving disagreements and deadlocks in South Australian parliament differs from the Commonwealth, with some academics suggesting that the South Australian process is preferable.

Abandonment

If the lower house (House of Assembly) cannot get a bill through the Upper House, they may choose to simply abandon the idea, and try again later, when they are more likely to be successful.

Manager's Conferences

This is a form of consensus. This is a conference, consisting of five different members of each House (referred to as managers), where they meet outside of the parliament to discuss the disagreement or deadlock. This is an informal meeting and is most often successful in reaching a compromise between the conflicting parties.

Double Dissolution (but not really)

The South Australian Constitution provides for a double dissolution mechanism, to cater for the resolution of parliamentary deadlocks but only in relation to 'bills of special importance'. Standing orders of both Houses require a conference of managers to occur if an Act has been passed by the Assembly, and refused by the Council. This conference usually results in a compromise by the Government, or the bill being cast aside. Hence, there is yet to be a double dissolution election in South Australia.

Short Answer Questions

1. Identify one factor that leads to the initiation of legislation, and explain how it influences the parliament.

2. Which type of bill is more likely to become an Act - A Public bill, or a Private Member's bill? Explain.

3. When would the parliament use a conscience vote?

4. What is the purpose of Parliamentary Committees?

5. Outline the role of the Governor-General in law-making.

6. Why is South Australia using a double dissolution to resolve a deadlock not a practical solution?

Long Answer Questions

1. Outline two different types of reforms that would allow better representation of minority groups in the legislative process. (1-2 paragraphs)

2. Do we need parliamentary committees in both Houses for the legislative process? How does this doubling up of processes impact principles such as fairness and efficiency? (1-2 paragraphs)

3. How does the legislative process uphold Rule of Law? (1-2 paragraphs)

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Essay Questions

1. 'The Senate should be abolished to make federal law-making more efficient.' Using examples, evaluate this statement.
2. 'The principles of representative and responsible government are effectively upheld through our current legislative process.' Using examples, evaluate this statement.
3. 'Does our current legislative process allow for laws to be responsive to change?' Using examples, evaluate this statement.'

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1.4 Delegated Legislation

SACE Considerations for Chapter 1.4

Big Questions

- Are laws responsive to change?
- Are the institutions of government fair and efficient?
- How adequately do laws provide for future generations?
- Do the institutions of government, and its laws, adequately reflect the people?

Competing Tensions

- Rights and responsibilities
- Fairness and efficiency

Inquiry Question

- How and why are laws made by Commonwealth, and one state or territory, parliaments and delegated bodies?

This becomes

- How and why are laws made by delegated bodies?
- What is the relationship between the three institutions of government and delegated legislation?

In Australia, a large body of law is made by delegated bodies. They operate as part of the executive. An example of delegated legislation is council regulations. They have had this power to make law delegated to them by the parliament. This is done via Enabling Acts.

There are different forms of delegated legislation. Delegated legislation is a term used to describe a range of statutory instruments including regulations, statutory rules, by-laws, notices, and ordinances.

There are a range of delegated bodies (also referred to as delegated authorities or subordinate authorities).

Fast fact

Examples of delegated bodies:

- Local Government Councils (e.g. the Mitcham City Council)
- Government Departments (e.g. the Transport SA)
- The Executive Council
- The police (e.g. the South Australia Police or SAPOL)
- Government Statutory Authorities
- Professional and Sporting bodies

Delegated bodies desire the power to make delegated legislation from enabling acts.

Fast fact

Examples of enabling acts:

- The Local Government Act 1999
- The Dog and Cat Management Act 1995
- The Education Act 1972
- The Fisheries Management Act 2007

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In South Australia, the authority will appear in the enabling Act.

There might also be sub-sections which detail the extent to which this power can be exercised.

By convention, regulations are proclaimed at Executive Council by the Governor (state) – or the Governor-General (Commonwealth) or the Administrator (Northern Territory) – based on the advice of their Ministers.

It is important to acknowledge the jurisdiction of delegated powers is limited to what is outlined in the relevant Enabling Act and delegated legislation requires ministerial approval and is subject to parliamentary review. This will be explored further, later in the text.

Who can make delegated legislation?

Local Government Councils

Enabling Acts passed the South Australian Parliament, such as the *Local Government Act 1999*, delegate law-making powers to local government councils.

> **4—Interpretation**
>
> (1) In this Act, unless the contrary intention appears—
>
> ***regulatory activity*** means an activity which involves the making or enforcement of by-laws, orders, standards or other controls under this or another Act;

Other Enabling Acts cover specific areas. For example, *The Dog and Cat Management Act* 1995.

Government Departments

Government departments are responsible for administering a particular area of government. They are staffed by public servants and exist at federal and state level. For example, the federal Department of Immigration has been actively making delegated legislation in response to asylum seekers coming to Australia. The state Department of Health has been active in making delegated legislation in response the Covid-19 pandemic.

Government Statutory Authorities

Government Statutory Authorities are government agencies established by an Enabling Act. They act independently of day-to-day ministerial control to perform a specific function. For example, in South Australia, Adelaide Metro (as part of the state government Department of Planning, Transport and Infrastructure) runs Adelaide's public transport system (integrating trams and trains with buses) and makes regulations regarding public transport.

Professional and Sporting Bodies

A number of professional and sporting bodies are formed by Enabling Acts or have powers they can exercise under statute law. These bodies can make regulations that have the force of law. For example, the South Australian National Football League (SANFL).

Short Answer Questions

1. What is a delegated body?

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2. From where do delegated authorities get their power to make delegated legislation?

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3. What are the common types of delegated legislation?

4. Who can make delegated legislation?

Independent Activity

Go to www.legislation.gov.au and find an Enabling Act (the list earlier in the chapter might help). What power does the Act provide? What is the extent or limits of this power? Remember to quote the relevant section.

Fast fact

How regulations are made

Regulations are made by the following process:

- Parliamentary Stage:
  - Parliament must pass an enabling Act with a regulatory power; parliament has also passed guiding legislation
- Executive Stages:
  - Community consultation – delegated authority consults with the 'community' the regulation will affect
  - Drafting of the regulation – the Office of Parliamentary Counsel draft the regulation in consultation with the delegated authority
  - Executive approval – the Minister and/or Cabinet approves the draft regulation.
  - Proclamation and gazettal – the regulation is proclaimed by the Queen's representative at Executive Council and the regulation's proclamation is published in the Government Gazette.
  - Tabling of the regulation in parliament – the regulation is tabled in parliament within 14 days.

Parliamentary stage

Parliament must pass an Enabling Act with a regulatory power. For example, the South Australian Parliament passed the *Dog and Cat Management Act 1995* which outlines the general principles regarding dog and cat management, but delegates law making powers to local councils to complete the administrative details for their own areas.

The South Australian Parliament has also passed guiding legislation. This includes the *Subordinate Legislation Act 1978* to prescribe how delegated legislation must be made, and the *Acts Interpretation Act* to outline the legal language each must contain.

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Executive Stages

Community Consultation

Often, the delegated authority will consult with the community the regulation will affect. In many cases, consultation is obligatory under the *Subordinate Legislation Act 1978*. This is dependent upon the nature of the regulation. For example, regulations made to address emergency situations do not need to involve community consultation, whereas changes to lower speed limits in suburban streets require council consultation with its ratepayers.

Drafting of the Regulation

Cabinet will grant drafting approval to the Office of Parliamentary Counsel (OPC). The OPC will consult instructing officers of the delegated authority. The OPC employs legally trained personnel who draft the regulation into the correct legal form. This ensures the regulation is within the power delegated in the Enabling Act, is consistent with the purposes and intent of the Enabling Act, contains only matters appropriate to a regulation, and is not inconsistent with other state or federal Acts and the state or Australian Constitution.

The regulation will be endorsed as 'settled' once in a satisfactory form. It will then be returned to the Minister or Cabinet (together with the docket containing the original instructions and a Certificate of Validity certifying the proposed regulations are intra vires (within the powers) conferred by the Act under which they are being made, i.e. that are not *ultra vires* the Act (beyond the powers).

Executive Approval

After the regulation is settled, the Office of Parliamentary Counsel prepares a Cabinet submission for approval of the settled regulation and a report to the Legislative Review Committee. While an individual Minister may approve a regulation under certain circumstances, important regulations (such as those changing taxes, public fees or charges) usually require Cabinet approval. Ministerial or Cabinet approval is necessary because the Executive Government is held accountable for the regulation on the floor of Parliament during Question Time or through motions for disallowance.

Proclamation and Gazettal

Once Ministerial or Cabinet approval has been received, a regulation is proclaimed in Executive Council and published in the *Government Gazette*. This is public notification the regulation will come into effect.

Regulations come into operation 28 days after proclamation (according to the *Subordinate Legislation Act 1978)* or such later date as is specific in the regulation. An earlier date can be specified for the regulation but only if the responsible Minister agrees that it is necessary. For example, if regulations are required for the purposes of an Act to come into operation, if the regulations impose a financial charge, if regulations correct an error or an inaccuracy in a proclaimed regulation, or if the regulation revokes another regulation.

Tabling of the Regulation in Parliament

Regulations must be tabled in parliament within 14 days of proclamation (a statutory obligation provided in the *Subordinate Legislation Act 1978)*. This gives parliament the opportunity to scrutinise each regulation. While parliament may have delegated the power to a delegated authority to make the regulation, it is ultimately held accountable to the community. If parliament takes no action over a regulation, it is presumed that it approves of it.

Independent Activity

On an A4 piece of paper, or using your device, create a flow-chart detailing the process of making a regulation.

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Fast fact

Why delegated legislation is made

There are a number of reasons why parliament delegates law-making power to the executive:

- Decentralises law-making
- Relieves the workload of parliament
- Technical expertise
- Quick response to emergency situations
- Administrative convenience
- Political considerations

Decentralises Law-Making

Law-making power is delegated to elected local councils to make laws meeting local needs. Councils are better placed to consult with their constituents. They are also in a better position to enforce and supervise their own laws. Furthermore, locally made laws are more likely to be accepted and respected by the community they affect. Parliament sets out the basic principles of law but allows councils to decide the detail. For example, the *Dog and Cat Management Act 1995* outlines the broad principles of the law, but it delegates the control and management of dogs and cats to councils.

Relieves the Workload of Parliament

Parliament is a costly institution to operate, consuming a lot of time and resources. It has a huge workload and is unable to adequately address all of the demands placed on it by the community. Parliament focuses on the important social issues and principles of law and delegates law-making power to delegated bodies to address the technical and administrative details. For example, the *Education Act 1972* administers public education in the State and relies upon a vast volume of regulations to carry out day to day running of schools.

Technical Expertise

While people elected to Parliament have certain skills and experiences, Parliament is not the forum to make laws on a broad range of technical issues. It lacks the time, breadth of expertise and appropriate resources to perform this role. For example, under the *Fisheries Management Act* 2007, in order to preserve the State's fishing stocks, the Fisheries Division of the Department of Primary Resources decides when fish can and cannot be caught and in what sizes.

Quick Response to Emergency Situations

Regulations can be made quickly to address emergency situations as they arise. The parliamentary process necessary to amend an Act is slow to initiate, expensive and cumbersome. For e*xample,* regulations can be made quickly in response to infectious diseases (such as the SARS Virus in 2003 or COVID-19 in 2020).

Administrative Convenience

In order to stay relevant and up-to-date, many matters of government require constant review and up-dating. Parliament is not the appropriate forum to do this. For example, changes to the fare schedules of public transport, registration and licensing fees, nursing home rates, watering days during the times of drought, diesel fuel rebates and court fees are generally determined by regulation, rather than legislation.

Political Considerations

Governments can use delegated legislation as a *back-door* method of making law. This might be because they face a hostile *upper houses*, or they might wish to evade the scrutiny of parliament in the reading stages of a bill. For example, regulations can be made using the *Migration Act 1958*. In this situation, critics may argue delegated legislation is undemocratic.

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C Collaborative Activity

In small groups, discuss the extent to which it is appropriate for parliament to delegate law-making power to the executive. Make sure you discuss both the positives and the negatives. Report back to the class.

Short Answer Questions

1. What laws govern the making of regulations in South Australia?

2. In which branch of government are regulations made?

3. What is an enabling (or parent) Act and why is it necessary?

4. Who formally drafts regulations?

5. What role does a Minister or Cabinet play in the making of regulations?

6. When does a regulation become a law?

7. Why must regulations be tabled in parliament?

Long Answer Questions

1. How does delegation improve the efficiency of parliament?

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2. Explain and evaluate 3 reasons why unelected government agencies delegated the power to make regulations.

3. What advantages do regulations provide emergency situations?

Essay Question

'Delegating lawmaking power to the executive breaches democratic principles.'

Using examples, evaluate this statement.

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1.5 Court Hierarchy

(Commonwealth, South Australia, Northern Territory)

SACE Considerations for Chapter 1.5

Big Questions:

- Do people influence laws, or do laws influence people?
- Are laws responsive to change?
- Do judges have too much power?
- How do courts balance the need to facilitate predictability, certainty and fairness, whilst also re-examining established legal principles to ensure a progressive society?
- Is the law fair if it is subject to interpretation?
- Should judges make law?
- Does the court hierarchy facilitate just outcomes?

Competing Tensions

- Certainty and flexibility

Inquiry Question

- What is the structure and purpose of one state or territory court hierarchy?
- How and why are laws made by the Commonwealth, and one state or territory, courts, including the High Court?

Key Definitions

Binding Precedent – A decision made by a superior court which all lower courts in the same hierarchy must follow.

Persuasive Precedent – A legal principle which does not have to be followed because it was created by a court of lessor or equal authority, or by a superior court in a different hierarchy.

Original Jurisdiction – A court where a case is heard for the first time.

Appellate Jurisdiction – A court which hears an appeal.

Courts of General Jurisdiction – These courts hear a wide range of civil and criminal cases. The main court hierarchies in each state are examples of courts of general jurisdiction.

Additionally, law made by judges is known by a variety of names:

- Case Law
- Common Law
- Judge-made-law
- Precedent
- Unenacted Law
- Legal Principles

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Introduction

The primary role of the judiciary is to bring just outcomes to legal disputes. In reaching an outcome, judges are limited to consideration of evidence provided during a trial or hearing and legal principles from previous cases. It is through the process of deciding an outcome to a dispute that law is made by judges. This is referred to this as, "case law" or "common law".

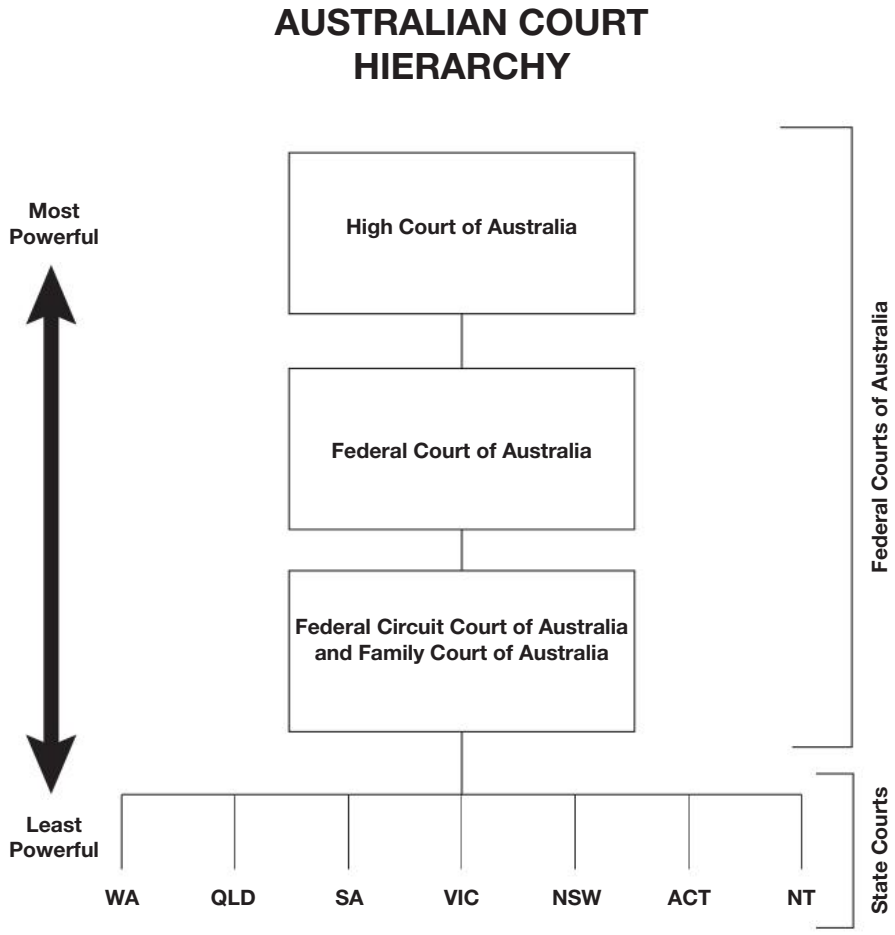
As Australia is a federation, it has separate federal, state and territory court systems. They are connected through appellate processes, and the application of precedents established in superior courts.

Australian courts also have multiple jurisdictions (power to hear cases). The jurisdiction of a court is determined by the type of dispute it hears, for example, civil and criminal courts. Civil and criminal courts are further categorised by the complexity of the case and amount of damages being sought and severity of the offending respectively. Additionally, the jurisdiction of a court is determined by its speciality–courts hearing lots of different types of cases (courts of general jurisdiction), and courts hearing one type of case (courts of specialised jurisdiction).

Court Hierarchy

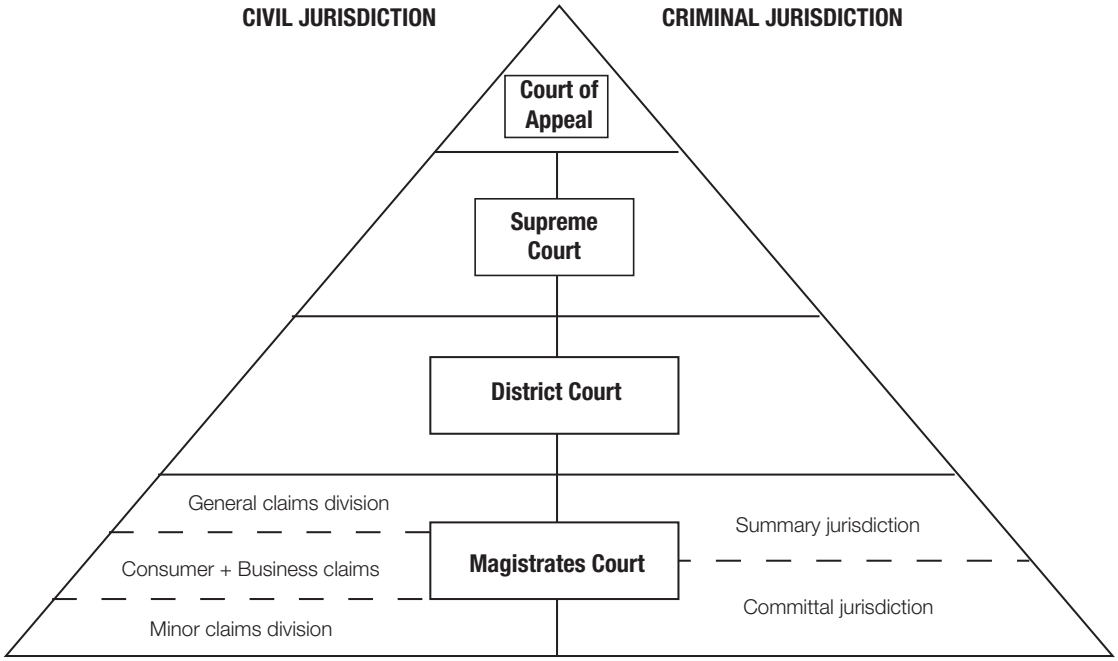
In Australia, courts exist at both federal, state and territory.

The Australian court hierarchy looks like this:



The South Australian court hierarchy looks like this:

SOUTH AUSTRALIAN COURT HIERARCHY



The existence of the courts in a hierarchical structure, allows for the application of the doctrine of precedent which will be discussed later in this chapter.

Structure of the South Australian Court Hierarchy

In South Australia, there are three courts of general jurisdiction: the Magistrates, District and Supreme Court. Each of these courts hears both civil and criminal matters. Both the District and Supreme Court have appellate jurisdiction with respect to some matters. (Note the names of some courts have changed to reflect recent changes to the court structure and jurisdiction within South Australia.)

Magistrates Court

Criminal jurisdiction

The criminal jurisdiction of the Magistrates Court hears two general types of disputes:

- Summary (minor criminal) offences where the maximum sentence for each is two years imprisonment; for example, drink driving, using bad language in a public place, theft. These cases are usually dealt with quite quickly and sometimes an accused chooses to represent themselves without the presence of a lawyer.
- Indictable (more serious) offences where the maximum penalty is potentially more than two years imprisonment. Where such a matter is heard by the Magistrates Court in the first instance, a preliminary hearing will be conducted to determine if the defendant needs to be committed to trial in a higher court.

Civil jurisdiction

The Magistrates Court has the following divisions in its civil jurisdiction:

- General Claims: This court can hear claims of up to $100,000 (including Motor vehicle claims).
- Consumer and Business Claims: This court can hear disputes between landlords and tenants (commercial), disputes about domestic buildings and warranties on second-hand vehicles.
- Minor Claims Division: This court hears claims for amounts up to $12,000. This division is less formal in its processes, and legal representation is generally not allowed (with a few exceptions).

For practical reasons, the Magistrates Court also has the power to hear a range of Commonwealth matters.

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District Court

Criminal jurisdiction

The criminal jurisdiction of the District Court hears a wide variety of cases. Examples range from arson, to serious assaults, kidnapping, sexual offending and causing death by dangerous driving. Cases are heard by a single judge, and the defendant has the option of trial by jury. The maximum penalty awarded in the District Court is a sentence of life imprisonment.

Civil jurisdiction

The civil jurisdiction of the District Court also hears a wide range of cases. District Court judges have very similar powers to a Supreme Court justice, so they can hear almost any case that is beyond the scope of the civil jurisdiction of the Magistrates Court, except the most complex of cases.

Appellate Jurisdiction

The appellate jurisdiction of the District Court is limited. It can hear appeals from some specialised tribunals, and some jurisdictions of the Magistrates Court.

Supreme Court

Criminal jurisdiction

The Supreme Court hears the most serious cases in South Australia, in their original jurisdiction, for example, murder and treason. Cases are heard by a single justice. The maximum penalty is a term of life imprisonment without the possibility of parole. Trial by jury is optional.

Civil jurisdiction

The civil jurisdiction hears only the most complex civil cases in its original jurisdiction, and there are no definable limits on damages in civil cases. There are no jury trials in this jurisdiction. All civil cases in South Australia proceed through case-management to streamline cases and attempt resolution before trial using alternative dispute resolution methods (these are discussed further in Focus Area 2).

What is Case Management?

Most court jurisdictions practise some form of case management to finalise legal disputes as efficiently as possible.

Case management shifts some of the responsibility from the parties to the dispute in order to streamline the process, and keep it moving forward. Practically, this means there is more frequent use of pre-trial conferences and directions hearings to attempt to resolve any issues before trial.

Case management is designed to:

- Bring about quicker resolution to legal disputes
- Encourage parties to engage in alternative dispute resolution where possible
- Save both parties time and money
- Reduce reliance on an overburdened court system

An example: The South Australian Courts Administration Authority has a system of case management for civil matters allowing on-line lodgement of claims and documentation known as Electronic Case Management System (ECMS).

Miscellaneous jurisdiction

The Supreme Court has jurisdiction over matters not allocated to other courts, such as probate (wills) and admiralty cases.

Appellate jurisdiction

Recent legislative change in South Australia has altered the structure of the appellate jurisdiction of the Supreme Court. The *Supreme Court (Court of Appeal) Amendment Act 2019 (SA)* has created a specialist appeals court in South Australia. It remains a division of the Supreme Court.

Judges have been appointed on a permanent basis to the new court, which began sitting on January 1st, 2021. This specialist court has allowed for consistency and specialisation in decision-making. This is in contrast to South Australia's previous system, where Supreme Court justices sat in the appellate jurisdiction on rotation.

At the beginning of 2021, five Justices have been appointed to the Court of Appeal. All Justices appointed to the Court of Appeal are able to sit across other court jurisdictions as necessary, but Supreme Court Justices sitting in

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the original jurisdiction do not have the ability to sit in the Court of Appeal. The Chief Justice may sit in the Court of Appeal if required.

Appeals to the Supreme Court are not automatically granted. The parties must apply to the appellate court and provide an argument explaining why they should be granted an appeal; these arguments must be related to an issue of law, and/or an issue of fact in the original trial.

Parties wishing to take their cases beyond the appellate courts in South Australia must apply for special leave to appeal to the Full Court of the High Court of Australia. This is also not automatic, and the Full Court of the High Court can refuse an application if they believe it is without legal merit.

Specialised Courts in South Australia

In addition to the courts of general jurisdiction, South Australia has courts of specialised jurisdiction, some of which are listed below:

- Youth Court
- Environment, Resources and Development Court
- Coroner's Court

There are also a number of specialised tribunals and commissions.

The different South Australian courts have been created by key pieces of legislation including:

- *Magistrates Court Act 1991 (SA)*
- *Youth Court Act 1993 (SA)*
- *District Court Act 1991 (SA)*
- *Supreme Court Act 1935 (SA)*

Helpful online resources

Want to learn more about the South Australian Courts? Visit their website:

http://www.courts.sa.gov.au/Pages/default.aspx

Structure of the Northern Territory Court Hierarchy

There are two tiers, or levels of generalised jurisdiction courts in the Northern Territory. They are the:

- Local Court
- Supreme Court

Both of these courts hear both civil and criminal matters.

Local Court

The Local Court (formerly known as the Magistrates Court), primarily deals with less serious criminal offending, and minor civil matters.

Criminal jurisdiction

The criminal jurisdiction of the Local Court hears summary (minor) criminal offending, such as drink driving, stealing and assault. There is also a committal jurisdiction hearing indictable matters in their first instance to determine if a *prima facie* case exists in order for the case to go to trial in the Supreme Court.

Civil jurisdiction

The civil jurisdiction of the local court sits with one judge, and no jury. They hear claims with monetary awards between $25,000 and $100,000 (cases with claims of less than $25,000 are heard by the Small Claims Division of the Northern Territory Civil and Administrative Tribunal (NTCAT). The local court can also hear a range of civil cases related to family matters and property law.

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Supreme Court

The Supreme Court deals with serious criminal offending, and complex civil matters. This is the most superior court in the Northern Territory.

Criminal jurisdiction

The Supreme Court has sole jurisdiction of all indictable offences under Northern Territory law. Similar in function and procedure to the South Australian Supreme Court, defendants have the choice to be tried with a jury, or by judge alone. The maximum penalty awarded by the Supreme Court is life imprisonment.

Civil jurisdiction

The Supreme Court technically has jurisdiction over all civil matters, but typically cases under $100,000 will be dealt with by the Local Court. All civil cases go through case management, to attempt to resolve these cases before they get to trial.

Courts of Specialised Jurisdiction

Similarly to South Australia, the Northern Territory has courts of specialised jurisdiction to hear specific types of cases. Some examples are:

- Youth Justice Court
- Work Health Court
- Northern Territory Civil and Administrative Tribunal (NTCAT)
- Coroner's Office

The different Northern Territory courts have been created by key pieces of legislation including:

- *Supreme Court Act 1979 (NT)*
- *Local Court (Civil Procedure) Act 1989 (NT)*
- *Local Court (Criminal Procedure) Act 1957 (NT)*

Helpful online resources

Want to learn more about the Northern Territory Courts? Visit their websites:

Local Court: **https://localcourt.nt.gov.au/**

Supreme Court: **https://supremecourt.nt.gov.au/**

Structure of the Australian Federal Court Hierarchy

The structure of the federal court hierarchy primarily comes through Chapter III of the Australian Constitution, 'The Judicature', as well as laws passed by the Commonwealth Parliament.

There are four courts in the Federal Court hierarchy of Australia. They are:

- High Court of Australia
- Federal Court of Australia
- Family Court of Australia
- Federal Circuit Court of Australia

High Court of Australia

The High Court of Australia is the most superior court in Australia; it sits at the top of the federal court hierarchy. It consists of one Chief Justice, and six other Justices. The High Court sits in order to resolve disputes in its two jurisdictions.

Original jurisdiction

The original jurisdiction of the High Court is concerned with hearing constitutional disputes. It sits as a Full Bench with seven Justices. All constitutional interpretations heard here are final, and cannot be overturned by an Act of Parliament.

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Some recent interesting cases from the original jurisdiction of the HCA:

- Love v Commonwealth; Thoms v Commonwealth [2020] HCA 3

Appellate jurisdiction

The appellate jurisdiction of the High Court sits as either a bench of five or seven Justices to hear appeals from superior state and federal courts. Appeals from all branches of law (with the exception of constitutional law) will end up here. The appellate jurisdiction of the High Court forms the majority of the court's workload.

Appeals to the High Court are not automatic. People must apply for permission to appeal to the High Court; this is known as a 'special leave' application. Justices sit as a panel of three to determine which appeals will be heard by the High Court, and which appeals will be rejected. Only a small amount of appeals are accepted.

Some recent interesting cases from the appellate jurisdiction of the HCA include:

- Pell v The Queen [2020] HCA 12
- The Queen v Abdirahman-Khalif [2020] HCA 36

Federal Court of Australia

The Federal Court is a superior court of record, and a court of law and equity, and sits in all capital cities in Australia. The Court's jurisdiction is quite broad. It covers most areas of federal civil law, as well as some summary and indictable criminal matters. A single Justice sits in this jurisdiction. Some examples of the types of cases the federal court can hear are:

- Bankruptcy
- Industrial relations
- Corporations (appointing liquidators, corporate management and misconduct)
- Maritime claims
- Native Title claims
- Intellectual property claims
- Taxation

The Full Court of the Federal Court has appellate jurisdiction covering a significant number of courts, tribunals and areas of law. The Full Court sits as a panel of three justices.

The Court hears appeals from the single Justice of the Federal Court, as well as cases from:

- State Supreme Courts
- the Administrative Appeals Tribunal
- the Federal Circuit Court (although not in Family Law matters)
- National Native Title Tribunal

Judges of the Federal Court may hold additional judicial appointments. Many of the current Federal Court judges hold an additional commission or appointment. There are currently 53 Judges of the Federal Court.

Family Court of Australia

The Family Court began hearing family law cases in early 1976. It is a superior court of record hearing complex Family Law matters, and consisted of one Chief Justice, a Deputy Chief Justice and other judges. However, due to legislative change in February 2021, the Family Court was merged with the Federal Circuit Court, and no longer exists as a separate entity.

Federal Circuit Court of Australia and Family Court of Australia

Formerly known as the Federal Magistrates Court, the Federal Circuit Court of Australia was created in 2000 to help the Federal Court and Family Court of Australia with their workload. Subsequently, their jurisdiction does overlap with these two Courts. The Federal Circuit Court is an inferior court and hears less complex cases.

The majority of the workload of the Court is made up of bankruptcy, migration and family law. Students may wish to examine changes to the Court in 2021, they can view the Federal Circuit and Family Court of Australia Act 2021.

The Federal Circuit Court of Australia has no appellate jurisdiction.

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The different federal courts have been created by key pieces of legislation including:

- *The Commonwealth of Australia Constitution Act 1900 (UK)–Chapter 3*
- *Judiciary Act 1903 (Cwth)*
- *Federal Court of Australia Act 1976 (Cwth)*
- *Family Law Act 1975 (Cwth)*
- *Federal Circuit Court Act 1999 (Cwth) (formerly the Federal Magistrates Court Act)*

Helpful online resources

Want to learn more about the Federal Courts? Visit their websites:

High Court of Australia: **https://www.hcourt.gov.au/**

Federal Court of Australia: **https://www.fedcourt.gov.au/**

Federal Circuit Court of Australia:

http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/home

Why are courts organised into hierarchies?

There are several reasons why courts are organised into hierarchies (different levels). Arranging courts into a hierarchy allows for the process of appeal–the legal right of a losing party to test the decision of the original court in an appellate court.

Judicial Review – The Appeal Process

The principle of judicial review stands at the pinnacle of the separation of powers, and helps to uphold the rule of law. While not expressly outlined in the Australian Constitution, the High Court has ruled anyone with legal standing can have their grievances decided in a court of law. Any individual or organisation can test the exercise of power in an independent judiciary.

Courts in Australia have adopted the adversary system of trial in both the criminal and civil jurisdictions, which requires each party to prepare and present their own case. This case is heard by a single judge, in adherence to strict rules of evidence and procedure. As the outcome of each case is largely determined by the application of law by a single judge, the right to appeal to a higher court needs to exist to ensure no mistakes were made in the original trial.

Appeals are typically heard by a panel of judges in a higher court in the hierarchy assigned appellate jurisdiction to hear cases from lower courts. The panel of judges will consider the issues of law and fact presented in the initial trial to determine if there has been an error made, or whether a miscarriage of justice has occurred. Recently in South Australia, a specialised Court of Appeal, staffed with appeal justices, has been created to hear appeals from lower courts.

Either party to a dispute can launch an appeal; however, any appeal must have a basis in an issue of law or an issue of fact. Parties cannot simply appeal a decision of a court because they are unhappy with the outcome.

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Specialisation of Courts

Arranging courts into a hierarchy, allows for judges and magistrates to specialise in their particular areas of law. This subsequently promotes quicker, and more efficient resolution of disputes, due to their familiarity with the law, and through hearing cases of a similar nature.

For example, a Magistrate sitting in the Adelaide Magistrates Court, may hear multiple drink driving each day. This results in familiarity with this area of law enabling quicker and more consistent resolutions.

A number of specialised courts exist within the general court hierarchy. Courts such as the Youth Court, Coroner's Court, and the Environment, Resources and Development Court, for example, allow for judges to become specialists in specific areas of law, making the legal system more efficient and more consistent as judges become experts in their own areas.

Doctrine of Precedent

Arranging courts into a hierarchy allows for the practical application of the doctrine of precedent (discussed later in this chapter). This practise states all decisions made in a superior court in the hierarchy must be followed by all inferior courts within the same hierarchy. This allows for consistency and predictability in the legal system.

Administrative Efficiency

The court hierarchy allows for administrative efficiency through its structure.

Minor, and less complex cases are heard in inferior courts such as the Magistrates Court, where they are resolved quickly. There are multiple Magistrates Courts in South Australia (and Local Courts in the Northern Territory), to allow for a high volume of cases to move through the courts on a daily basis and be resolved at a minimal cost to the community.

At the apex of the court hierarchy, there are fewer superior courts. These courts, such as the South Australian Supreme Court, hear the most serious and complex civil and criminal cases, and are staffed by experienced justices. As these courts are more expensive to operate, there are less of them.

Short Answer Questions

1. Explain the difference between a court of general jurisdiction and a court of specialised jurisdiction.

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2. Explain the difference between a court of original jurisdiction and appellate jurisdiction.

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3. What is the difference between a court of civil jurisdiction, and a court of criminal jurisdiction?

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4. If a trial was originally held in the District Court of South Australia and the defendant wished to appeal their guilty verdict, where would the appeal be heard? Explain.

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5. Outline the two jurisdictions of the High Court of Australia.

6. What are the main factor(s) that determine where a civil case will be heard in a state court hierarchy?

7. How does the doctrine of judicial review uphold rule of law?

Judicial Independence

Judicial independence means judges must be free from any interference, intimidation and pressure from any external forces when deciding cases. An independent judiciary is imperative for a functioning democracy as people need to feel assured disputes are being resolved fairly, without bias and without government interference. Hence judicial independence offers protection of liberty for the community at large.

One way to uphold judicial independence is to prevent judges from holding a position in the legislature or the executive government. This forms the cornerstone of the separation of powers. While under the British Westminster system the legislative and executive arms are connected, the judiciary in Australia remain completely separate and independent.

When deciding a case, judges must only consider the evidence and the legal submissions before them presented by both parties to the dispute. This will include judicial guidance and precedents. Judges cannot consider the opinions of any outsiders, regardless of their position in society, or the persuasiveness of external arguments. Judges are decision makers and the quality of their decisions will be determined by the quality of the information presented to them in court by the competing parties.

To guarantee the independence of federal judges, the following key features must exist:

1. Specific rules around appointment and dismissal

To avoid one arm of the government having too much control over the appointment of judges to the bench, there are specific protections around the appointment and dismissal of judges. Federal judges are appointed by the government, but can only be dismissed by the parliament as a whole.

The grounds for dismissal for judges are quite narrow. This is a protection for judges, as it means they cannot be fired from their jobs because politicians or the public disagree with their decisions. Section 72(ii) of the Australian Constitution states judges can only be dismissed for proved misbehaviour or incapacity. The *Crimes Act 1914 (Cth)* outlines some of the offences judges can be charged with which could result in their removal from the bench. No federal judge has ever been dismissed in Australia.

2. Permanency of tenure

Judges are appointed to their positions by the executive government. All judges have permanent tenure but must retire at the age of 70. This is a requirement at both federal and state level. The Australian public approved this change at a referendum in 1977, and the states followed by passing similar legislation. This requirement is written into section 72 of the Australian Constitution.

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Permanency of tenure is considered a protection of judicial independence as judges do not have to worry about losing their jobs through making unpopular decisions. It also stops judges from needing to make decisions designed to ensure reappointment to their positions.

3. **Fixed remuneration**

A constitutional rule prevents the salary of a judge being lowered while they are on the bench. This prevents the parliament from lowering a judge's salary to the point where they would be forced to quit or retire. It also prevents the parliament from arbitrarily lowering judge's salaries or doing this in order to penalise them for an unpopular decision.

The parliament can choose to raise the salaries of judges, which they do regularly, in order to attract the best lawyers to positions in the judiciary.

4. **Judicial privilege**

Judges need to have freedom of speech while undertaking their role in order to deliver their judgments, without the fear of being sued for defamation, or potentially facing criminal prosecution. Judges are still required to follow professional standards, however, when considering the way they behave in the role.

Tony Rossi: An independent judiciary cannot come at a cost

April 23, 2017 (Tony Rossi – Head of the Law Society of SA)

Opinion

AN independent judiciary is a cornerstone of our justice system. There must be no impediment to a judge acting without fear or favour. They need to make decisions without influence (either overtly or through subconscious bias) on the basis of the available facts. To ensure this, judges are appointed with security of tenure.

The Government recently appointed deputy presidents Mark Calligeros and Steve Dolphin of the South Australian Employment Tribunal as judges of the District Court.

For more than two years, they were presiding over cases without security of tenure.

This was in circumstances of the State Government frequently being a party in the case and the tribunal being funded directly by the Attorney General's Department.

Their appointment as judges is both appropriate and important because anyone who appears in a court must have confidence in the independence of the judge presiding.

However, inconsistently, the Government introduced a law to provide for judicial registrars in the Supreme, District and Magistrates Courts.

They can be appointed for only up to seven years unless the term is extended by the head of the court to which they are appointed.

The judicial registrars can hear full contested civil and criminal trials as directed by the head of the court. The only restriction is that, if there is a finding of guilt and possibility of a jail sentence, a judge with security of tenure undertakes the sentencing process.

The Government has argued that, because the extension of the seven-year term is at the discretion of the head of the court, the judicial registrar is independent.

However, retired and current High Court Justices Heydon and Gageler in two separate, recent papers emphasised that an independent judge is someone who can act independently, not only of the potential influence of Government but also of fellow judicial officers.

When the Bill was first debated, the Liberal Party did not support the suggested role. It was notably after the Chief Justice wrote to the Attorney General indicating support of the Bill that the law was passed.

In this way, unusually, a letter from the Chief Justice was used in the political process to support a contention that the heads of jurisdictions can ensure the independence of judicial registrars.

Seeking independence in relation to Government does not address the concern of a lack of independence from influence, even subconsciously, from the head of court nor the important principle that justice must not only be done, it must be seen to be done.

With the courts besieged by case overloads and hamstrung by inadequate Government funding, it is easy to see the attraction of judicial registrars as a way to ease the pressure.

But, while they may provide a cost saving compared to judges, it is another example of justice on the cheap and at the expense of fundamental legal principles designed to ensure justice.

** Tony Rossi was president of the Law Society of SA at the time of this article's publication **

Article accessed from: https://www.adelaidenow.com.au/news/opinion/tony-rossi-an-independent-judiciary-cannot-come-at-a-cost/news-story/0b29fe992e6cfa875b94318569ec3b03

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Independent Activity

1. Discuss whether or not the appointment of temporary judicial registrars in South Australia is a threat to judicial independence, or a necessary part of our judicial system.

2. Is judicial independence protected if a judicial registrar is independent of the executive and legislature, but under the direction of other members of the judiciary? Provide your reasoned opinion.

3. Do you consider the letter from the Chief Justice in support of the bill a breach of judicial independence? Explain.

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How do judges make law?

Law made by judges is known as case law. Unlike parliament, judges do not have the power to make laws about whatever they want, whenever they want. A judge can only make law to help resolve an issue before them in a matter under consideration.

Judge-made law can be created in two fundamental ways:

1. Judicial Pronouncement

Also known as the creation or extension of common law principles, this is where a judge creates a new principle where there is no current statute or common law in place to address and resolve the legal dispute. In these situations, judges will use past precedents to guide them in their decision making. Alternatively, if there are no relevant precedent cases, then a judge will create brand new case law to resolve the dispute before them. An example of this is the case of Donoghue v Stevenson 1932, which created a whole new branch of law.

2. Statutory interpretation

This is a process by which a judge gives meaning to the words or phrases in legislation in order to resolve a legal dispute. The meaning given to words or phrases can create new legal principles. There are a number of rules guiding judges when doing this, which will be discussed later.

Elements of a Judge's decision

When a judge resolves a dispute, there are two elements to be addressed. Each court case involves issues and questions of law, and issues and questions of fact.

Issues and questions of fact

These are the questions helping to determine, "What happened?" in the context of the case before the court. These questions of fact help the court to arrive at the truth of what actually occurred with regard to the allegations made. The issues and questions of fact are answered through the evidence given by witnesses.

In a civil case, the judge is the determiner of fact after weighing the evidence. In a criminal case, a jury will be the determiner of fact, if the accused has chosen to have a jury trial. In the absence of a jury, the judge will be the determiner of fact. The ultimate 'fact' determined at a trial, is whether or not an accused is guilty or not guilty of the allegations against them.

While issues and questions of fact are important in each individual case, to determine guilt or liability, they are not relevant to future cases, and are not included in case law.

Issues and questions of law

These are issues and questions only a judge can decide. They refer to the interpretation of statutes, and the application of case law. A question of law is decided by a judge through their application of a precedent, or through creating a new one. Subsequently, questions of law are the foundation of the case law process.

When a judge makes a decision and forms new case law, there are two elements to their decision. They are the *ratio decidendi* and *obiter dictum*. The 'ratio' is the reason for the decision, explaining their application of the law and how they have reached their decision. It is the 'ratio' of a decision which forms the new case law. The 'ratio' of a case is not always easy to find.

'Obiter dictum' are remarks made to provide further context to the decision, and loosely translate to remarks 'by the way' or examples. These do not form a part of precedents binding future courts, though they may be of persuasive influence. For example, when the High Court of Australia created the principle of native title in Mabo v Queensland (2), they referenced persuasive precedents from the United States and Canada. This gave context to their decision making but was not a part of their application of the law.

When creating case law, judges apply the doctrine of precedent.

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Doctrine of Precedent

The doctrine of precedent states decisions made in previous judgments of courts must be followed in future cases with similar fact situations to ensure the same decision will be reached. This ensures the legal system is predictable, fair, consistent and upholds human and legal rights.

The doctrine of precedent gives practical application to the legal principle of *stare decisis* (to stand by things decided). It ensures like cases are treated in a like manner. Following this principle fosters a system of consistency and certainty. This principle is applied to case law, statutory interpretation, sentencing, and awards of damages.

The doctrine of precedent is only applied in cases with similar material facts, or similar issues of law. If there are significant differences between cases, there is enough flexibility for a judge to avoid following the precedent when determining the case before them.

A precedent decision is an original decision on an issue or question of law, as demonstrated below in Donoghue v Stevenson.

Donoghue v Stevenson 1932

Mrs Donoghue went out one day to a cafe with a friend, and her friend purchased a bottle of ginger beer for her. Mrs Donoghue drank her ginger beer, but as the glass was opaque, she didn't see the decomposed snail at the bottom of the glass until she'd nearly finished it. After consuming the drink, Mrs Donoghue became quite sick.

As she had not personally purchased the bottle of ginger beer which made her ill, under the law at the time, she had no legal relationship with the manufacturer (Mr Stevenson). This meant that she had no legal avenues to pursue a claim of negligence under contract law as it existed. After failing to have lower courts find in her favour in this dispute, Mrs Donoghue took the matter to the House of Lords.

The House of Lords was asked to depart from settled law in this area in order to create a new legal principle, and create a new legal relationship between manufacturers, and their ultimate consumers.

Up until this point in time, this principle was largely unnecessary due to the nature of the economy. As most people purchased their goods directly from the producers themselves, the law of contract was sufficient to resolve most disputes of this nature.

The House of Lords found in Mrs Donoghue's favour, effectively creating the tort of negligence and the concepts of legal neighbour, and duty of care. Additionally, the authority stated for a negligence case to exist:

- A duty of care must be owed between legal neighbours
- The duty of care must be breached either through an action, or failure to act
- Any harm caused by this breach of duty of care is foreseeable to a reasonable person.

The principles in the Donoghue v Stevenson case only applied to soft drink manufacturers and their consumers. These principles were expanded in subsequent cases, for example, in:

- *Grant v Australian Knitting Mills* with respect to items of clothing,
- *Shaddock v Parramatta City Council* and *Hedley Byrne v Heller* with respect to the giving of financial advice, and,
- *Coffey v Jaensch* with respect to actions for nervous shock.

In each of these cases, reference was made to principles established in Donoghue v Stevenson.

Did you know?

It was never actually proven in court that Mrs Donoghue consumed the remains of a snail, or that drinking parts of a decomposed snail made her ill.

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Independent Activity

Donoghue v Stevenson is a precedent case noted for giving rise to the law of negligence. Subsequent cases have further broadened and developed negligence law.

Choose one of the cases below, and undertake some research.

1. Give a brief overview of the case
2. Explain the how this case built upon the foundation of Donoghue v Stevenson

Cases:

- Grant v Australian Knitting Mills 1936 Privy Council
- Hedley Byrne & Co Ltd v Heller & Partners 1964 House of Lords
- Jaensch v Coffey 1986 Full Court of the High Court
- Kavanagh v Akhtar 1998 New South Wales Court of Appeal
- Oyston v St Patrick's College (No. 2) 2013 New South Wales Court of Appeal

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There are two main types of precedents:

Binding Precedent

A binding precedent is made by a superior court in a hierarchy; for example, the High Court of Australia, or the Supreme Court in a state hierarchy. The doctrine of precedent states all lower/inferior courts in a hierarchy must follow the decisions of higher courts, in order to foster consistency in decision making.

Persuasive Precedent

A persuasive precedent is made by a court in a different hierarchy from where a case is being heard. Judges may use these decisions to provide guidance when determining their own cases. Similarly, superior courts are not bound by decisions made by inferior courts in the same hierarchy, but they may also be used to provide guidance. Persuasive precedents can also come from courts overseas, for example, in Mabo v Queensland (No. 2), the High Court of Australia made reference to cases from the United States of America and Canada in their decision.

Departing from Precedents

Judges do not have to follow precedent decisions in all cases, however. They can depart from precedent in the following ways:

1. Reversal – a decision can be overturned (reversed) on appeal in a higher court.

Case Example: The Wik People v The State of Queensland and Ors 1996 High Court of Australia

The Full Bench of the High Court overturned a decision by the Full Court of the Federal Court which held Native Title could not co-exist with pastoral leases in Queensland.

2. Distinguishing – if there are enough material differences between the facts of each case, the precedent does not need to be followed.

Case Example: Thomson v Nix 1976 WA Supreme Court

The WA Supreme Court chose not to follow the *Searle v Wallbank* rule (an owner is not responsible for any injuries caused by straying livestock) in this case due to significant material differences between the injuries caused in the original case and the Thomson case, and it would be inappropriate to consider it an authority.

The case of Searle v Wallbank involved a cyclist colliding with a horse on a country road at night. The case of Thomson v Nix involved a sealed highway with good visibility.

3. Overruling – A superior court changes a decision in a later case with similar details.
4. Disapproval – A court of equal standing may choose not to follow a precedent as they disagree with it or determine following a precedent may lead to an unjust outcome.

   General disapproval occurs when a coordinate court or lower court disapproves of another court's decision, but chooses to follow it anyway.

Case Example: SGIC v Trigwell and Ors 1978 Full Bench of High Court of Australia

In this case, the Full Bench of the High Court disapproved of the *Searle v Wallbank* rule (mentioned previously in the example above) that had been applied in this South Australian case. However, they still followed it, as the *Searle v Wallbank* rule had been made in the House of Lords in England, a superior court to the High Court. While arguably leading to an unjust outcome, the Justices stated that it was not their role to change bad law, and that it was the parliament's responsibility.

Statutory Interpretation

Statutory interpretation occurs when a judge gives meaning to the words in a statute. It is the interpretation of words and phrases which creates case law.

So, why do statutes need interpreting?

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Courts are required to interpret statutes for two main purposes.

1. **Parliament-made-law is unintentionally unclear or vague**

   In some instances, the law made by parliament is unintentionally unclear, and a judge or magistrate must make a determination about what they think the parliament intended when writing a particular law. There are also some examples that parliament may not be able to foresee, and may be missing from legislation. For example, in R v McGuiness, a judge was required to determine whether or not a driver under tow was a driver according to the *Road Traffic Act 1961 (SA)*. The parliament had not foreseen this issue, and therefore it was not addressed in the Act.

2. **Parliament-made-law is intentionally unclear or vague**

   In other instances, the parliament deliberately makes statutes unclear to allow flexibility for judges when determining the outcome of cases. For example, some of these terms may be: "fit and proper", "adequate", "due care", etc.

   Having statutes which are deliberately unclear or vague in their wording also allows for changes in societal values, so judges can make decisions appropriate to the time.

How do judges interpret statutes?

There are guidelines judges are required to follow when interpreting statutes. Guidance for this process comes from both case law, and the parliament.

Parliamentary guidance

Guidance from the parliament comes in two forms: internal and external guidance.

- **Internal guidance** is where parliament writes definitions of terms into pieces of legislation. These can usually be found at the beginning of Acts in the interpretation section, or division clause where the parliament has defined some key legal terms which will appear throughout the document.
- **External guidance** comes from Acts specifically written to help judges interpret legislation. The *Acts Interpretation Act* is an example of external guidance for judges. There are *Acts Interpretation Acts* at both state and federal level.

Case Law Guidance

In addition to the guidance of parliament, courts have developed their own rules (or maxims) of statutory interpretation to help them when interpreting written law. Some of the general rules appear below:

- **The literal rule** – the literal rule allows judges to interpret the words as they appear in the legislation, and in the context in which they appear. This rule promotes the idea the parliament knows what they wanted the law to say, so it should be assumed the literal and obvious meaning of the law is how it was intended to be read and applied.
- **The golden rule** – this rule allows for judges to avoid using the literal rule when interpreting statutes if the literal rule would result in an absurd or unjust outcome. For example, in a situation where a statute made it an offence for someone to be found 'in the vicinity of a the Woomera Rocket Range', a defendant who was found inside the fenced establishment was held to be in breach because the court interpreted the words to mean, 'in or around the vicinity of a prohibited area'.
- **Ejusdem generis rule** – this rule is in regards to where words of a particular meaning are followed by words of a general meaning, the general words are limited to the same kind of words. For example, if a statute said, "house, room or other like place", a garage or shed could be interpreted as an "other place". An example of this rule in use is R v Brislan; Ex parte Williams (1935) High Court.
- **The mischief rule** – this rule allows the judge to look at the law overall to determine what mischief or behaviour the law was trying to correct or prevent and interpret the law in that context.
- **Canons of construction** – rules created by judges to guide them when there are no other existing rules to help in that context. This allows judges to make certain assumptions when interpreting the law, such as:
  - The parliament would not deliberately take away someone's rights, or
  - If the parliament has passed complementary legislation, it is reflective of their approval of a court's decision.
  - Judges also simply use common sense when interpreting statutes to ensure the intentions of parliament are upheld.

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Short Answer Questions

1. Describe two ways in which a judge can make law.

2. Explain the difference between a binding and persuasive precedent.

3. What is judicial independence, and why is it important?

4. Why are courts arranged in a hierarchy?

5. What are the benefits of the doctrine of judicial review in the case law making process?

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Long Answer Questions

1. Are judges too rigidly bound by the doctrine of precedent? Explain your answer.

2. Should judges be able to make broader principles of law rather than those who simply resolve the dispute in front of them?

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Essay Questions

1. Judges should not be permitted to make law, as they cannot be held democratically accountable for those laws. Using examples, evaluate this statement.
2. Judges do not make law, they only apply it. Using examples, evaluate this statement.

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1.6 Supervision of Lawmaking

SACE Considerations for Chapter 1.6

Big Questions

- How effective are the mechanisms for supervising the exercise of power by government institutions?
- Is the law fair if it is subject to interpretation?

Competing Tensions

- Certainty and flexibility
- Fairness and efficiency

Inquiry Question

- How and why are laws supervised?

Why are laws supervised?

The separation of powers doctrine provides a safeguard against too much concentration of power in one government authority. The supervision of laws made by each of the institutions of government (the legislature, executive and judiciary), by themselves, and the other institutions of government, is important in ensuring power is not concentrated in one institution. The constitutional system ensures there are checks and balances to prevent unlawful use of power, to minimise mistakes and oversights, and to change unpopular or unnecessary laws.

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How are laws supervised?

At a Glance

Supervision of lawmaking?

Legislation is supervised…

…by the legislature (parliament) via:

- Bicameral scrutiny
- Committees
- Amendment Bills
- Parliament could repeal the Act
- Sunset provisions
- Question time

… by the executive (government) via:

- Responsible government
- Administrative tribunals
- The Office of the Ombudsman
- Freedom of information and public scrutiny

… by the judiciary (courts) via:

- Judicial review
- Statutory interpretation

Delegated legislation is supervised by…

… by the legislature (parliament) via:

- Enactment
- Responsible government
- Disallowance procedures

… by the executive (government) via:

- Responsible government
- Administrative tribunals
- The Office of the Ombudsman
- Freedom of information and public scrutiny
- Sunset provisions (to compel review of a regulation after a specific time period)

… by the judiciary (courts) via:

- Judicial review
- Statutory interpretation

Case-law is supervised…

… by the judiciary (courts) via:

- Judicial review
  - Departure from precedent
  - Reversal
  - Overruling
  - Distinguishing
  - Disapproval

… by the legislature (parliament) via:

- Guiding legislation
- Remedial legislation
- Complementary legislation

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How is legislation supervised?

Parliamentary Supervision

At a Glance

Legislation is supervised by the legislature (parliament) via:

- Bicameral scrutiny
- Committees
- Amendment Bills
- Parliament could repeal the Act
- Sunset provisions
- Question time

Legislation is supervised by the legislature (parliament) in a number of ways.

Bicameral scrutiny

Requiring legislation to pass through both houses of parliament in the same form before it can become law provides a significant level of supervision and scrutiny; the upper house performs a particularly effective scrutinising role.

Committees

A system of parliamentary committees exists in both houses of parliament ensuring parliament is more transparent and accountable. These committees monitor legislation to hold the government to account. For example, Senate committees meet outside of the parliament and can examine Ministers, public servants or any relevant individual. They inquire and offer advice.

Examples of committees are:

- Senate Standing Committees on Foreign Affairs Defence and Trade
- Select Committee on Temporary Migration
- Senate Standing Committees on Environment and Communications

C Collaborative Activity

In small groups, go to **https://www.aph.gov.au/parliamentary_business/committees/senate** and choose a senate committee. Find out what its role is, who serves on it, and what it is currently considering. Share your findings with the class.

Amendment Bills

Parliament can pass a Bill to amend (make changes to existing) legislation. For example, the *Bankruptcy Amendment (Enterprise Incentives) Bill 2017 (Cwth)*, suggested changes to the Bankruptcy Act (1966) to reduce the default period of bankruptcy from three years to one year.

I Independent Activity

Go to **http://www.austlii.edu.au/** and choose a bill which has amended an Act. Summarise the purpose of the amendment.

Repealing an Act

Parliament can pass a motion to repeal an Act. For example, the *Local Government Act 1934* was repealed and replaced with the *Local Government Act 1999.* This process is often used where an act has become so outdated many changes are required and it is more efficient to create a new Act.

Sunset provision

The parliament can insert a sunset provision (or clause) into a new area of law. This guarantees that it will be reviewed after a specific period of its operation. This is used when the likely impact of the law involves uncertainties created by changes in technology or when sensitive personal circumstances are involved.

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Miscellaneous mechanisms

Other mechanisms used in parliament to supervise legislation include:

- Question time, when Ministers are held accountable for the enforcement and administration of legislation
- Petitions (tabled by members) from concerned citizens about the nature and effectiveness of legislation
- Grievance and urgency debates – individual members can expose weaknesses in legislation and suggest reform

Executive supervision

At a Glance

Legislation is supervised by the executive via:

- Responsible government
- Administrative tribunals
- The Office of the Ombudsman
- Freedom of information and public scrutiny

Responsible government

By convention, government Ministers are held accountable to the parliament for the administration of legislation within their portfolio (area of responsibility). Ministers oversee their portfolio (or Ministry) and are responsible for ensuring the effective and efficient administration of laws. They must have systems in place to make sure they are kept informed; they might need to takes steps or report to parliament.

Administrative tribunals

Administrative tribunals allow for the review of laws passed by governments. While they are not courts, administrative tribunals allow administrative decisions to be scrutinised by a separate body. They are granted this power not through any overarching law, but by the individual Acts which provide the framework for these decisions to be made. While administrative tribunals allow lawmaking to be supervised independently, they remain answerable to the courts. Examples include the Administrative Appeals Tribunal and the Social Security Appeals Tribunal. These tribunals often expose weaknesses in legislation governments must address.

The Office of the Ombudsman

Legislation is also supervised by the executive through the Office of Ombudsman. The office is created by statute and the Ombudsman is an official appointed to investigate complaints made by individuals against an individual, company, or organisation, regarding decisions made by government authorities.

For example, the Commonwealth Ombudsman was established as an independent government authority under the *Ombudsman Act 1976* (Cth). The Ombudsman has the power to examine administrative decisions of Commonwealth departments and authorities. Investigating these complaints identifies flaws in legislation and the government Ministers and parliament are advised. Despite the fact that the Ombudsman can only recommend changes to legislation, many of them have been accepted by parliament.

Independent Activity

Go to **https://www.ombudsman.gov.au/How-we-can-help/case-studies** and write a detailed summary of the case study on private health insurance.

Public Scrutiny

The public can help supervise law-making through challenging pieces of legislation in court. If an individual comes in contact with legislation they see unfair they are able to take it to court where it can be ruled *ultra vires*. The public can also hold lawmakers accountable at elections. If they are unhappy about the types of laws made or proposed to make, they are able to vote for a different party, which ensures accountability.

The media has a role to play in holding law-makers and their legislation accountable, involving freedom of information and access to legislation. The media are able to highlight faults in the law-making process, which holds it accountable. The High Court ruled that there is an implied right to freedom of political communication in the constitution in *Australian Capital Television v Commonwealth (1992).* This is an important case which ensures the freedom of the media and their ability to hold government accountable. Additionally the media are able to express these faults in a way which is understood by an average citizen.

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The public and the media are allowed to review government files, subject to exemptions, as a result of the Commonwealth's *Freedom of Information Act (1982)* and South Australia's *Freedom of Information Act (1991).*

Judicial supervision

At a Glance

Legislation is supervised by the courts via:

- Judicial review
- Statutory interpretation

The courts remain the final arbiters (umpires) of disputes between the individual and the state. The independence of the judiciary guarantees an impartial and objective review of legislation that is brought before the courts for adjudication.

Judicial Review

Judicial review also allows for individuals, companies, organisations or associations to challenge the validity of legislation in court. The High Court can declare legislation invalid if a parliament exercised power *ultra vires* the Constitution.

For example, the High Court declared legislation invalid in the *Boilermakers' case* in 1956 because it permitted an executive body to exercise judicial power contrary to the implied principle of judicial independence in Chapter I of the Australian Constitution.

Statutory interpretation

All State and Territory parliaments have passed statutory interpretation legislation (for example, the *Acts Interpretation Act 1901 (Cwlth))* which outlines statutory rules that courts must observe when interpreting statutes. The courts are continually asked to interpret statutes brought before them to resolve a dispute. By giving meaning to statutes, courts are able to change the nature of legislation which may, or may not, cause parliament to amend it.

Independent Activity

Go to **http://classic.austlii.edu.au/au/journals/MelbULawRw/2011/3.html** and summarise the rules of statutory interpretation.

How is delegated legislation supervised?

Like legislation, regulations are supervised by each of the three branches of government to guarantee they are achieving their intended functions and do not exceed their delegated powers. Many of the scrutinising mechanisms are very similar to those applicable to the supervision of legislation, but with minor differences in procedure. This section discusses the mechanisms that are unique to delegated legislation.

Parliamentary supervision

At a Glance

Delegated legislation is supervised by the parliament via:

- Enactment
- Responsible government
- Disallowance procedures

Enactment

Lawmaking is a primary role of Parliament. Parliament is the supreme law-making body and it reserves the legislative power to change the regulatory power of a delegated authority in the parent Act to broaden, limit or abolish it. Due to the bicameral nature of the legislature, legislation can be scrutinised by any member of parliament.

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Responsible government

By convention, Ministers of government are held accountable to the parliament for the regulations they approve. During question time or in general debate, weaknesses in regulations may be exposed that a Minister will be pressured to change or face the possibility of a disallowance motion.

C Collaborative Activity

In small groups, go to **www.theconversation.com** and search the site for articles relating to "ministerial responsibility". Find an example and share your findings with the class.

Disallowance procedure

The *Acts Interpretation Act 1901* (Cwlth) provides for the review of federal regulations. Regulations must be tabled in parliament within 15 sitting days of the regulations being passed. If this is not done, the regulation is void and cannot be enforced. After it is tabled in parliament, a regulation can be reviewed by any member of parliament. A member of parliament may move a motion of disallowance. This is a formal procedure where one House of Parliament can vote to disapprove a regulation and make it null and void.

Regulations can also be reviewed by a standing committee specialising in reviewing delegated legislation. The Senate has a Standing Committee on Regulations and Ordinances which studies all regulations to ensure they:

- are in accordance with the enabling Act;
- do not infringe unduly on personal rights and freedoms;
- do not deny a person natural justice; and
- are not more appropriate for parliamentary enactment.

If they are in breach of any of these, the committee decides whether they should be subject to disallowance by the Senate. The Committee will attempt to resolve any problems with a regulation by direct consultation with the responsible Minister. When a satisfactory explanation or ministerial undertaking is received, the Committee will not pursue disallowance.

In the South Australian Parliament, the Legislative Review Committee performs a similar role as its federal counterpart. Committee members from both Houses of Parliament scrutinise all regulations tabled in the State Parliament.

Both federal and state reviewing committees usually attempt to negotiate with the Minister concerned to reach an amicable resolution before the committee recommends a disallowance motion.

The disallowance mechanism is most effective in *upper houses,* such as the Senate (Commonwealth) or the Legislative Council (South Australia) when the government does not command a majority.

Executive supervision

At a Glance

Delegated legislation is supervised by the executive via:

- Responsible government
- Administrative tribunals
- The Office of the Ombudsman
- Freedom of information and public scrutiny
- Delegated authorities can exercise a sunset provision to compel review of a regulation after a specific time period.

These are the same for the supervision of delegated legislation as for legislation.

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Judicial supervision

Courts and judicial tribunals have a significant role to perform in the supervision of delegated legislation to guarantee that the rights and freedoms of the people are not unlawfully interfered with and that they are not denied natural justice.

At a Glance

Delegated legislation is supervised by the courts via:

- Statutory interpretation
- Judicial review

Statutory interpretation

Courts interpret regulations when resolving legal disputes, to give them meaning. Superior courts have created legal principles to guide lower courts when interpreting regulations. These interpretations are normally quite narrow, in order to protect the rights of people by restricting the power of the executive. These common law principals will evolve over time.

Doctrine of judicial review

Courts can declare regulations invalid if the delegated authority exercised power *ultra vires* the Enabling Act or because the regulation was not made properly. In other circumstances, a regulation can be declared invalid because it is inconsistent with other statutes or the Constitution, or it is considered an unreasonable intrusion on individual rights or freedoms.

For example:

South Australia v Tanner 1989 HCA

The South Australian Full Court of the Supreme Court held that a regulation made pursuant to the *Waterworks Act (1932)* was invalid because the government exercised an executive power *ultra vires* the Enabling Act. The regulation had been used by the South Australian Government to prevent the Tanner family from having an aviary in the Adelaide Hills because it was in the watershed area for a local reservoir.

On appeal in 1989, the Full Court of the High Court reversed the Supreme Court decision because the regulation had not been made ultra vires the Enabling Act.

How is case law supervised?

Supervision of case law

Case law is subject to supervision by superior courts and parliament.

Judicial review

At a Glance

Case-law is supervised by the courts via:

- Judicial review
  - Departure from precedent
  - Reversal
  - Overruling
  - Distinguishing
  - Disapproval

NB: The existence of a the court hierarchy to accommodates both the doctrine of precedent and the doctrine of judicial review.

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Departure from precedent

To prevent the application of a binding precedent which could bring rise to an unjust outcome, it is possible for lower courts to depart from the authorities created by superior courts. This can be achieved in a number of ways.

Reversal

This involves higher courts reviewing the decisions of lower courts when an appeal is taken to an appellate court. An appellate court can reverse (change) a precedent created in a lower court, considering it inappropriate or wrongly decided. For example, in the Wik case (*The Wik People v The State of Queensland and Ors 1996)*, the Full Bench of the High Court overturned a decision by the Full Court of the Federal Court which held that Native Title could not co-exist with a pastoral lease in Queensland.

Overruling

A superior court can 'overrule' a precedent created in a lower court in another case. For example, in *Brodie v Singleton Shire Council 2001,* Brodie sued the council following injuries sustained while driving a 22 tonne truck over a 50 year old bridge which had collapsed under the weight of the vehicle. The High Court held that the longstanding 'highway rule' – which gave legal immunity against civil proceedings to government highway authorities in respect to a failure to repair highways and other thoroughfares – should not apply as it was no longer good law. By overruling the old rule, the High Court held councils should be subject to the same general rules of negligence as everyone else.

Distinguishing

A lower court can 'distinguish' (not follow) a superior court's binding precedent by not following it because there are significant material differences in the facts. For example, in *Thomson v Nix 1976 (*WA), the Supreme Court did not follow the British *Searle v Wallbank* rule decided in the House of Lords in 1947, because there were significant material differences regarding injuries caused to a motorist by a straying animal and following the rule would have created an injustice.

Under the *Searle v Wallbank* rule, landowners were not deemed legally responsible for injuries caused by a straying animal, whether by negligence or not. In that case, a cyclist collided with a straying horse on a dark country road at night. By contrast, the Western Australian case involved fast cars on a sealed highway under good visibility conditions. The Court recognised the significant material differences and did not follow the *Searle v Wallbank* rule. The Court held that the rule was inappropriate to follow in relation to the circumstances in the case under consideration.

Disapproval

Disapproval can take three forms:

- Disapproval of a decision in a coordinate (or the same) court
- Disapproval of a decision in a different court hierarchy
- Disapproval of a decision in a coordinate or superior court which is still followed (general disapproval)

Coordinate court

A court disapproves of another coordinate court's precedent and does not follow it. As a general principle, the High Court is not bound by its own decisions. For example, in the Engineers case (*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd 1920),* the Full Bench of the High Court departed from its own conventions by not following the doctrines of implied prohibition and mutual non-interference. The High Court declared it disapproved of those doctrines and it would no longer follow them as they were regarded as unsound. Instead, the High Court would employ a more literal interpretation of the Australian Constitution. The High Court is unique because when the Full Bench disapproves of one if its previous decisions, it effectively overrules it and the latest decision acts as an authority to guide other courts.

Courts in other hierarchies

A court can consideration a relevant precedent from a court in another hierarchy but disapprove it and hence not follow it. For example, in *Bassell v McGuiness 1981* SA, the Full Court of Supreme Court disapproved a 1979 NSW Full Supreme Court case, *R v Martin*. In that case, the NSW Supreme Court held that a man under tow was not the driver of the vehicle because he had no control over the vehicle's moving force.

General disapproval

A coordinate or lower court disapproves of another court's decision but still follows it. For example, in *SGIC v Trigwell and Ors 1978,* the Full Bench of High Court of Australia (in a majority decision) disapproved of the *Searle v Wallbank* rule, but still followed it because it had been made by a superior court, the House of Lords in England. The Justices defended their decision by stating that it was the role of parliament, not the court's, to override the rule if it was inappropriate.

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Parliamentary review

At a Glance

Case law is supervised by the parliament via:

- Guiding legislation
- Remedial legislation
- Complementary legislation

As the sovereign law-maker, parliament reserves the authority to enact legislation to perform one of three fundamental roles:

Guiding legislation

Guiding legislation refers to the legislature in place which guides the lawmaking ability of other government bodies. For example, all parliaments in Australia have passed an *Acts Interpretation Act* to prescribe rules about how parliaments should construct statutes and judges interpret statutes.

Complementary legislation

This is legislation made in response to, and designed to complement, case law. This is to give it more general application in the community. For example, the *Native Title Act 1993* (Cth) was passed the Act as a direct consequence of the High Court's Mabo (No. 2) case in 1992. Once the High Court had created the native title rule, it was obvious that more formal mechanisms would be necessary to manage native title claims flowing from the Mabo decision. Another example is when the South Australian Parliament passed the *Criminal Law (Legal Representation) Act 2001* (SA) as a direct consequence of the High Court's *Dietrich v The Queen* decision in 1992. The High Court held that a trial for a serious indictable offence had to be stayed (deferred) if the accused person was denied legal representation through no fault of his own. The Act was designed to ensure legal representation is available to persons charged with serious offences so that the alleged offenders do not avoid scrutiny by the criminal justice system.

Remedial legislation

This is legislation designed to override case law that it deems is bad or inappropriate. For example, the *Wrongs Act Amendment Act* (No. 2) 1983 (SA) was enacted in direct response to the High Court's decision in *SGIC v Trigwell & Ors* in 1978. The High Court had followed the British *Searle v Wallbank* rule that landowners are not held legally liable for harm caused by their animals straying onto public thoroughfares. The Act compelled the courts to adopt the law of negligence in these cases. Parliament considered the *Searle v Wallbank* rule was bad law because it gave landowners immunity from civil action for harm caused by their negligent behaviour which allowed their animals to stray onto roads and highways.

Short Answer Questions

1. Outline two methods used by parliament to supervise legislation.

2. Outline two methods used by the courts to supervise case law.

3. Outline two ways in which parliament assists the courts to make good law.

4. Identify two rules of statutory interpretation, and outline how a court may use *each* rule to interpret regulations or legislation.

5. Outline *two* methods – other than those involving the judicial arm of government – of supervising regulations.

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Independent Activity

Write an extended response of 500+ words on the following:

Critically analyse the role of the judiciary in supervising law. Consider the tension between fairness and efficiency.

Points to consider (and elaborate upon) when discussing the EFFECTIVENESS of the judiciary:

- Judges are independent and conduct their affairs lawfully and objectively in accordance with the doctrine or precedent
- Judges must bring about lawful outcomes to disputes brought before them in accordance with law.
- The parties to a dispute must be afforded an equal and lawful opportunity to present their arguments to the court
- Any judicial decision regarding the supervision of legislation is subject to review in an appellate court
- Parliaments feel obligated to respond to legislative weaknesses exposed by courts when they resolve disputes
- The vast array of measures that exist to supervise legislation in all three arms of government.

Points to consider (and elaborate upon) when discussing the INEFFECTIVENESS of the judiciary:

- A matter must be brought to the court for it to be reviewed
- It is an expensive exercise to have a matter resolved in a court.

Independent Activity

Write an extended response of 500+ words on the following:

Critically analyse the effectiveness of the three arms of government in supervising legislation. Consider the tension between fairness and efficiency.

Points that could be analysed to confirm effectiveness

- The separation of powers is well ingrained in the Australian legal system
- The separation of powers has evolved into a structured and accountable system to make law (legislative arm), enforce and administer law (executive arm) and to resolve legal disputes (judicial arm)
- The three arms can only exercise power consistent with the rule of law, subject to judicial review in independent courts
- The separation of powers has broad community respect, shown by the fact that there have been no proposed constitutional changes to the system by referendum since federation in 1901
- The system incorporates a system of checks and balances which appear to have broad community respect and confidence.

Points that could be analysed to confirm a lack of effectiveness

- The heads of Government (Prime Minister and Cabinet Ministers) are not chosen by the people directly but rather by the political party with a majority in the lower house
- It has been suggested that leadership is determined by popularism driven by electoral polls and not sound principles of governance
- Executive Governments exercise tremendous power but are ineffectively held accountable to parliament and
- There is not equitable access to the courts to due to the costs involved

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1.7 Diverse Groups in Lawmaking

SACE Considerations for Chapter 1.7

Big Questions

- Are laws responsive to change?
- To what extent does case law and legislation adequately compensate for the lack of explicit human rights in the Constitution?
- How do courts balance the need to facilitate predictability, certainty and fairness, whilst also re-examining established legal principles to ensure a progressive society?
- How adequately does the Australian legal system achieve the rule of law?
- Do people influence laws, or do laws influence people?

Competing Tensions

- Power and the disempowered
- Rights and responsibilities

Inquiry Question

- How do the institutions of government protect the rights of groups and individuals in the Australian community, including Aboriginal and Torres Strait Islanders?

The Australian Constitution was not written with the intention of protecting human rights. At the time, it was thought that rights would be protected via legislation and common law. The Constitution was written to establish the institutions of government and to divide powers between the Commonwealth and the states. So, Australia does not have a bill of rights and, as a result, very few rights are explicitly protected by the constitution.

Fast fact

Explicit rights enumerated in the Australian Constitution

Section 51

'The Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

Subsection (xxxxi)

The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws.

*(Interpreted to mean people have the '**right to own property free from arbitrary acquisition by the State**')*

Section 80

The trial on indictment of any offence against any law of the Commonwealth shall be by jury *(Interpreted to mean people have **'right to trial by jury for a federal indictable offence'**)*

Section 92

Trade, commerce and intercourse among the States must be absolutely free *(Interpreted to mean people have **'freedom of interstate trade, commerce and intercourse**)*

Section 116

The Commonwealth shall not make any law for establishing any religion, or for imposing religious observance, or from prohibiting the free exercise of any religion…

*(Interpreted to mean people have **'freedom from and of religion'**)*

Section 117

Subjects of the Queen shall not be subject to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen in another State.

*(Interpreted to mean people have **'freedom from State discrimination'**)*

Section 7

Determines that the Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

Section 24

Determines that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

(*Sections 7 and 24 could be interpreted to provide a '**right to vote'** but there is currently no High Court decision on the matter*)

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Fast fact

Implied constitutional rights

These are rights and/or freedoms the High Court has held exist, by implication, in the Australian Constitution, although they are not explicitly written in the document. These rights are identified when the High Court sits in its original jurisdiction to give meaning to words and phrases in the Constitution necessary to resolve a constitutional dispute. For example: in *Australian Capital Television Pty Ltd v Commonwealth 1992 (the Adban case)* the High Court held there is an implied 'freedom of political communication' in Chapter 1 of the constitution, giving expression to the principles of representative government.

For more detail, go to: **http://classic.austlii.edu.au/au/journals/MelbULawRw/1992/27.pdf**

Australia could better protect human rights through a bill of rights. This which is a list of human rights and could exist as either a statute, via an act of parliament, or an inclusion in a Constitution, via a referendum.

A Statutory Bill of Rights can be enacted like any other ordinary legislation by a parliament with the appropriate jurisdiction. The advantage of the statutory approach is that parliament retain control over human rights and can amend or repeal the Act at its discretion. The disadvantage of a statutory bill of rights is the parliament can add or remove listed rights at its discretion.

A Constitutional Bill of Rights is a list of rights enumerated in a written Constitution. To include a Bill of Rights in the Australian Constitution, a successful referendum would have to be conducted.

The rights of the accused are protected in **the adversary system** (see chapter 2.6); these are important protections afforded to all groups and individuals in the Australian community. Rights protected in the adversary system include:

Fast fact

Rights protected in the adversary system:

- the presumption of innocence
- the burden of proof rests with the prosecution
- the right to remain silent
- the right to present one's own case in defence
- the right to have court proceedings conducted before an independent judge
- the right to select trial by judge or jury
- the principle of double jeopardy
- the right of appeal

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The Rights of Indigenous Australians

At a Glance

The Rights of Aboriginal and Torres Strait Islanders

- The doctrine of *terra nullius* allowed the British Government to colonise Australia and claim sovereignty over all lands, rivers and seas.
- The application of the doctrine of *terra nullius* led to the alienation of Indigenous Peoples from their traditional lands and culture.
- The Australian Constitution made Indigenous affairs a residual power of the States and discriminated against Indigenous Peoples in specific areas.
- The 1967 referendum made Indigenous affairs a specific power of the Commonwealth and repealed the discriminatory sections against Indigenous Peoples.
- Since 1967, the Commonwealth has taken an active role in administering Indigenous affairs.
- A variety of federal and state statutes have been passed since 1967 to give greater statutory protections to Indigenous Peoples.
- Developments have been made in court proceedings to address the unique problems faced by Indigenous Peoples.
- The High Court played a prominent role in giving Indigenous Peoples native title rights.
- The Commonwealth passed complementary legislation to allow Indigenous Peoples to claim native title.

Pre-1967

In 1788, Britain and other European acquired countries in three ways:

1. A colony was *conquered*. This meant that the Indigenous Peoples were defeated in battle and the colonists could lawfully take the land and impose their own legal system
2. A colony was created by *charter*, or agreement. The Crown, or British Parliament, could authorise someone to come to formal agreements, such as treaties, with the Indigenous Peoples
3. A colony was *settled*. This assumed that a land was without settled inhabitants or settled law

Australia (initially New South Wales) was settled under the presumption of *terra nullius.* This literally means "land belonging to no one", or unoccupied land, allowing the British to take ownership of the land for the Crown and impose their own legal system. While demonstrably false – the land was clearly occupied by Indigenous Australians with their own societal structures and laws – it was not ruled invalid until Mabo (no. 2) in 1992.

There was very little reference to Indigenous Australians in the Constitution, except to exclude them.

Section 51

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

Section 51(xxvi)

'The people of any race, **other than the aboriginal race** in any State, for whom it is deemed necessary to make special laws'.

Section 51 made Indigenous affairs a prohibited power of the Commonwealth, and therefore, a residual power of the states.

Section 127

'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, **aboriginal natives shall not be counted**'.

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The 1967 Referendum

The 1967 referendum, overwhelmingly supported by a majority of Australians, changed the Constitution – by repealing repealed section127 and removing the words 'other than the aboriginal race in any State' from section 51(xxvi) – so that the Commonwealth gained the power to legislate with regard to Indigenous Australians, along with all "races", and they could be included in the census.

The changes to the Constitution were made to:

- remove any perception of discrimination against Indigenous Peoples;
- meet the accepted social and moral standards of the international community regarding human rights; and
- transfer legislative power to the Commonwealth so that it can make national laws about Indigenous affairs.

After the 1967 referendum, Indigenous affairs became a specific power of the Commonwealth and, therefore, a concurrent power with the states. It was not the intention to remove the states from making laws about Indigenous Peoples.

Contrary to popular opinion, the 1967 referendum did not give Indigenous Peoples the right to vote. Some states, notably South Australia, gave Indigenous men limited voting rights in 1856, and Indigenous women the franchise in 1894. In 1962, Indigenous Peoples gained the same federal voting rights as all other adult Australians. The last state to grant Indigenous Peoples equal voting rights was Queensland in 1965. However, while voting was (and remains) compulsory for all non-Indigenous Australian citizens, enrolment and voting were not made compulsory for Indigenous Australians until 1984.

Impact of the Executive

Since 1967, the executive has impacted the rights of Indigenous Australians through the signing of United Nations (UN) conventions, such as the Convention on the Elimination of all Forms of Racial Discrimination in 1969. This led to the creation of the *Racial Discrimination Act* in 1975. This, in turn, impacted land rights when considered in the High Court cases *Koowarta* and *Mabo (No. 1)*.

Other ways the executive has had an impact are:

- Royal commissions and government inquiries. For example, the Royal Commission into Aboriginal Deaths in Custody, in 1987, and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families in 1995 (*The Stolen Children Inquiry*)
- The Northern Territory Intervention (2007)
- The National Apology (2008)

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Sources Analysis

The National Apology

Taken from **https://info.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples**

Prime Minister (Hon Kevin Rudd MP):

Mr Speaker, I move:

That today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history.

We reflect on their past mistreatment.

We reflect in particular on the mistreatment of those who were Stolen Generations–this blemished chapter in our nation's history.

The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.

We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.

We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.

For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.

To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.

We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation.

For the future we take heart; resolving that this new page in the history of our great continent can now be written.

We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians.

A future where this Parliament resolves that the injustices of the past must never, never happen again.

A future where we harness the determination of all Australians, Indigenous and non-Indigenous, to close the gap that lies between us in life expectancy, educational achievement and economic opportunity.

A future where we embrace the possibility of new solutions to enduring problems where old approaches have failed.

A future based on mutual respect, mutual resolve and mutual responsibility.

A future where all Australians, whatever their origins, are truly equal partners, with equal opportunities and with an equal stake in shaping the next chapter in the history of this great country, Australia.

C Collaborative Activity

In small groups, research the Northern Territory Intervention and evaluate its impact on the rights of Indigenous Australians. Report back to the class with a summary of the facts and a brief evaluation of the extent of its impact. A good starting place is: **https://australianstogether.org.au/discover/the-wound/the-intervention/**

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Impact of Parliament

Parliament has impacted the rights of Indigenous Australians through the passing of significant legislation. This includes passing a constitutional alteration Bill to conduct the 1967 referendum, which ultimately gave the Commonwealth specific power to pass legislation to protect the rights of Aboriginal People. Other **Commonwealth legislation** includes the *Racial Discrimination Act 1975,* the *Racial Hatred Act 1995* and the *Native Title Act 1993* (will be discussed later, as it was complementary legislation passed in response the landmark court case of *Mabo (No. 2)*).

Racial Discrimination Act 1975

The Commonwealth Parliament passed this Act in 1975 pursuant to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*. Its major objectives are to make discrimination against people unlawful on the basis of their race, colour or national or ethnic origin. The Act is designed to promote social equality as well as fundamental equality before the law, an essential element of Australia's adherence to the rule of law.

Racial Hatred Act 1995

This Act was proclaimed to commence in October 1995. This Act amended the *Racial Discrimination Act* and made it unlawful to do or say anything in public if it is reasonably likely to offend, insult, humiliate or intimidate another person or group of people.

Human Rights and Equal Opportunity Commission Act 1986

This Act created the Human Rights and Equal Opportunity Commission. One of its members, the Racial Discrimination Commissioner, administers the *Racial Discrimination Act* and the *Racial Hatred Act*. There is also an Aboriginal and Torres Strait Islander Social Justice Commissioner to oversee other issues regarding human rights regarding Indigenous People.

The **South Australian parliament** has also passed a number of relevant acts, including the *Equal Opportunity Act,* the *Racial Vilification Act*, and the *Aboriginal Heritage Act.*

Equal Opportunity Act 1984

The Act was passed by the South Australian Parliament in 1984 when it consolidated a number of discrimination Acts, including the South Australian *Racial Discrimination Act 1976*. The Act makes it unlawful to discriminate against Indigenous people in a range of areas including education, employment and the provision of goods and services. This means, for example, an Indigenous person cannot be refused entry to a hotel based purely on his or her race. The Act is administered by the State Equal Opportunity Commissioner and aggrieved persons can make application for hearings in the Equal Opportunity Tribunal if a complaint cannot be amicably resolved by agreement.

Racial Vilification Act 1996

This Act was passed to ensure that Indigenous people, and others, can live in a dignified and peaceful existence, free from vilification because of their race. Racial vilification against Indigenous people would include, for example, any public act which incites others to hate or ridicule them purely on the basis of their race. The Act allows civil claims to be made for, as well as criminal prosecutions fines for companies an individual. An individual can also be subject to a prison sentence. The Act is administered by the South Australian Equal Opportunity Commission.

Aboriginal Heritage Act 1988

The Act established a Committee, which includes Indigenous representatives, to advise the Minister on what measures should be taken to protect and preserve sacred Aboriginal sites, objects or remains. A Register of Aboriginal Sites and Objects is maintained by the Minister.

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Impact of the Judiciary

The judiciary has impacted the rights of Indigenous Australians through a number of significant cases, including *Koowarta*, *Mabo* Nos. 1 & 2), and *Wik*.

Koowarta v Bjelke-Petersen 1982, HCA

"A Wik man called John Koowarta and a number of other stockmen wanted to buy the Archer River cattle station using funds provided through the Aboriginal Land Funds Commission. The station was on their traditional lands.

Remington Rand, the American businessman who owned the pastoral lease, agreed to sell but the Queensland government blocked the sale, saying Aboriginal people already had enough land 'for their use and benefit'.

Mr Koowarta said this was racially discriminatory. In reply, Queensland said the *Racial Discrimination Act* wasn't a valid use of the constitutional powers of the Commonwealth."

Helpful online resources

ABC article:

https://tinyurl.com/yypjgwkj

The High Court found it was within the Commonwealth's *external affairs* power to sign the UN's *Convention on the Elimination of all Forms of Racial Discrimination* and, as a result, the *Racial Discrimination Act* was *intra vires.* As Queensland's blocking of the sale was found to be inconsistent with the *Racial Discrimination Act,* it was ruled invalid due to the inconsistency rule (section 109) Australian Constitution..

Mabo v Queensland (No 1) 1988, HCA

In May 1982, Eddie Mabo and four other members of the Meriam community commenced a legal action claiming native title to the Murray Islands—a group of three islands off the north-east tip of Cape York in Torres Strait. In 1985, the Queensland Government (while Sir Joh Bjelke-Petersen was Premier) attempted to pre-empt the case by having the State Parliament pass the *Queensland Coast Islands Declaratory Act 1985*. The Act declared that, upon the islands being annexed, they were 'vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever'. This Act, until removed, barred Eddie Mabo from pursuing his land claim in the High Court. In May 1985, Eddie Mabo instigated proceedings in the original jurisdiction of the High Court to have the Queensland Act declared invalid because it was in conflict with the Commonwealth's *Racial Discrimination Act 1975*. The High Court held that the Queensland Act and the Federal Act were both valid exercises of their respective Parliaments' powers. However, the two Acts were inconsistent with each other and according to the inconsistency rule in section 109 of the Constitution, the Queensland Act was declared invalid. This decision enabled Mabo to continue to pursue his land claim in the High Court.

Mabo v Queensland (No 2) 1992, HCA

On 3 June 1992, a majority decision of the Full Bench of the High Court, 6–1, held that the Meriam people were entitled as against the whole world to the possession, occupation, use and enjoyment of the Murray Islands. In making this decision the High Court overruled the legal doctrine of *terra nullius* and replaced it with a new form of common law land title, called 'native title'.

The High Court held that native title is defined according to the traditional laws and customs of people having a relationship with the land. Native title may be held by an individual, group or community. It is akin to a property right; it can be defended in courts but it is inalienable, meaning it cannot be transferred, other than to the Crown or according to traditional law.

The High Court held where native title was not extinguished explicitly by British, colonial, State or Commonwealth statute or common law, the remaining Indigenous Peoples still retained a right to claim native title. The High Court outlined ways that native title could be extinguished, including:

- valid exercise of a sovereign power, such as the legal recognition of freehold title, appropriation of land for the Crown, for example, roads, railways, and other permanent public purposes
- voluntary surrender of native title to the Crown
- the relevant clan or group ceasing to acknowledge laws and customs, losing its connections with the land, or on the death of the last member of the clan.

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Parliament response to the Mabo case

The confusion and uncertainty created by the Mabo case required a national response to accommodate the flood of native title claims which the High Court's decision would create. The Keating Labor Government negotiated with representatives of Indigenous Peoples and Torres Strait Islanders, industry, and with State and Territory Governments, with the view to enacting national legislation which would facilitate an orderly, uniform and workable approach to native title claims by Indigenous Peoples.

Native Title Act 1993

On 23 December 1993, the Commonwealth Parliament passed the *Native Title Act*. The Act established a National Native Title Tribunal (NNTT) and prescribed the criteria that must be used to approve applications for native title over traditional lands by Aboriginal and Torres Strait Islander Peoples. The Tribunal would register native title claims and mediate any disputes involved in their resolution. The Federal Court would give legal effect to any native title agreement reached between the interested parties.

The Wik People v The State of Queensland and Ors

The Thayorre People v The State of Queensland and Ors

The Wik Case 1996

On 30 June 1993, before the *Native Title Act* became law in December 1993, the Wik people made a claim for native title in the Federal Court of Australia to land on Cape York Peninsula in Queensland. The Thayorre People joined the action, claiming native title rights to an area partly overlapping the Wik people's claim. The land claimed by the Wik people and Thayorre people included land where two pastoral leases had been granted by the Queensland Government. The Wik/Thayorre peoples argued that native title could co-exist with pastoral leases. On 29 January 1996, Justice Drummond in the Federal Court made a decision that the claim of the Wik and Thayorre Peoples could not succeed over the areas as they were subject to pastoral leases. The judge's reason was that he considered that the grant of pastoral leases under Queensland law extinguished any native title rights.

The Wik people ultimately appealed the decision in the Full Bench of the High Court. In a 4–3 majority decision, the High Court held native title could co-exist with pastoral leases.

The decision did not grant the Wik people native title. They still had to prove their case for native title through the NNTT and the Federal Court. The High Court clarified a legal issue by creating a general rule that native title and pastoral leases could co-exist, but where native title is inconsistent with a pastoral lease (that is, where there was a conflict), the pastoral lease would prevail.

Short Answer Questions

1. Explain *two* impacts the executive has had on the rights of Indigenous Australians since 1967.

i) .....

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ii) .....

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2. Explain *two* impacts the parliament has had on the rights of Indigenous Australians since 1967.

i)

ii)

3. Explain *two* impacts the judiciary has had on the rights of Indigenous Australians since 1967.

i)

ii)

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Essay Question

(800+ words): "The High Court's Mabo decision clearly highlighted that Australia's democratic institutions cannot be relied upon to protect the interests of minority groups in Australian society."

Using examples, evaluate this statement.

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Independent Activity

Indigenous Peoples and the court system

Go to **http://www.courts.sa.gov.au/Community/Pages/Aboriginal-Programs.aspx**

Identify one Aboriginal program in South Australian courts and explain how it may have a positive impact on Indigenous Australians.

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The Desire for Change

Source: The Uluru Statement from the Heart

Taken from: **https://ulurustatement.org/the-statement**

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

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Response to Source Question:

Explain what is being asked for in the 'Statement from the Heart'.

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.. ..

.. ..

I Independent Activity

Consider whether or not further changes are required to protect the rights of Indigenous Australian. You may consider one of the following:

- Acceptance of customary Aboriginal law
- Representation in Parliament
- Don Dale Detention Royal Commission
- High imprisonment rate of Indigenous offenders

Independent Inquiry: Diverse Groups

Select one of the following diverse groups:

- Women
- Children
- Refugees and Asylum Seekers
- LGBTIQ+
- Non-English Speakers

How adequately does the Australian legal system protect their rights? Consider the constitution, the adversary system, actions of the executive, legislation and case law.

C Collaborative Activity

Socratic Class Discussion

Consider the following issues:

- Representation of minorities in Parliament
- Support for disadvantaged people in the criminal and civil justice system
- Delivery of support services in the community for disadvantaged people
- Laws and policies affecting refugees and asylum seekers
- Consequences of the signing and incorporation (or not) of treaties

Does Australia adequately protect the rights of diverse groups in the community?

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Source A

From the *Sex Discrimination Act 1984 (Cwlth):*

An Act relating to discrimination on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy, breastfeeding or family responsibilities or involving sexual harassment

Recognising the need to prohibit, so far as is possible, discrimination against people on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs:

Affirming that every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law, without discrimination on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

Part I—Preliminary

1. Short title

   This Act may be cited as the *Sex Discrimination Act 1984*.

2. Commencement

   This Act shall come into operation on a day to be fixed by Proclamation.

3. Objects

   The objects of this Act are:

   (a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments; and

   (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and

   (ba) to eliminate, so far as possible, discrimination on the ground of family responsibilities in the area of work; and

   (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and

   (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

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Source B

Taken from: **https://archive.crin.org/en/library/legal-database/minister-state-immigration-and-ethnic-affairs-v-teoh.html**

Title:

Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh

Court:

High Court of Australia

Date:

April 7, 1995

CRC Provisions:

Article 3: Best interests of the child;

Article 5: Evolving capacities of the child;

Article 9: Protection from separation from parents against the child's will

Case Summary:

Background:

The Immigration Minister of Australia ordered that Mr. Teoh, a Malaysian citizen with family and children in Australia, be deported from Australia on the basis of his conviction for heroin importation and possession. Mr. Teoh appealed this verdict to the Federal Court of Australia, which overturned the deportation order, and the High Court of Australia was then called to review the case.

Issue and resolution:

Best interests of the child and international obligations. To what extent does the Convention on Rights of Child ("CRC") apply in Australian law given that Australia has ratified the Convention but has not yet incorporated CRC's provisions into its national law by statute. The Court held that the ratification created an expectation that in all actions concerning children, the best interests of the child would be a primary consideration.

Court reasoning:

Ratification of a convention is a positive statement by the Australian government to the world and its people that it will act in accordance with the Convention. This positive statement creates an expectation that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children in proceedings that involve them as "a primary consideration." This does not necessarily mean that all decisions must be made in line with the best interests of children, but the best interests must be considered and all parties affected by the case must be allowed to speak on the subject. Reviewing the Immigration Minister's decision, it is clear that the best interests of the children were not treated as a primary consideration and that there was no opportunity to contest his decision. Therefore, the appeal from the Federal Court's decision, which sought to sustain the Immigration Minister's recommendation that Teoh be deported, was dismissed.

Source C

An extract from the *Racial Discrimination Act 1975 (Cwth)*

An Act relating to the Elimination of Racial and other Discrimination

WHEREAS a Convention entitled the "International Convention on the Elimination of all Forms of Racial Discrimination" (being the Convention a copy of the English text of which is set out in the Schedule) was opened for signature on 21 December 1965:

AND WHEREAS the Convention entered into force on 2 January 1969:

AND WHEREAS it is desirable, in pursuance of all relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration, to make the provisions contained in this Act for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention:

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Source C (continued)

BE IT THEREFORE ENACTED by the Queen, the Senate and the House of Representatives of Australia, as follows:

Part I — Preliminary

1. Short title

   This Act may be cited as the *Racial Discrimination Act 1975*.

2. Commencement

   (1) Sections 1, 2 and 7 shall come into operation on the day on which this Act receives the Royal Assent.

   (2) The remaining provisions of this Act shall come into operation on a day to be fixed by Proclamation, being a day not earlier than the day on which the Convention enters into force for Australia.

Source D

Response to Sources

(a) Who is protected in Source A?

(b) What is the significance of the decision in Source B?

(c) Outline *two* rights protected in the sources.

(d) Could there be a negative impact on rights as a result of Source D? Give a reason for your answer.

(e) With reference to the sources, outline two features the protection of rights in Australia

(f) With reference to the sources, explain one way in which the parliament has protected human rights.

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(g) A society is only as civilised as its treatment of the most vulnerable. With reference to the sources, discuss whether or not Australia adequately protects the vulnerable. Consider the concepts of fairness and efficiency in your answer.

(h) Do some groups have more power than others in the Australian legal system? Consider the tension between the empowered and the dis-empowered. (20 lines)

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(i) With reference to the sources and your own knowledge, critically analyse the extent to which the Australian legal system has protected the rights of diverse groups in °Australia.

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Essay Question

'The three arms of government in Australia adequately protect the rights of diverse groups in the community.'

Using examples, evaluate this statement. 80 lines

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1.8 Evaluation of Lawmaking

SACE Considerations for Chapter 1.8

Big Questions

- How effective are the mechanisms for supervising the exercise of power by government institutions?
- Is the law fair if it is subject to interpretation?
- Are traditions worth maintaining?
- How adequately does the Australian legal system achieve the rule of law?
- Do the institutions of government, and its laws, adequately reflect the people?
- Should Australia have a complete separation of powers?

Competing Tensions

- Certainty and flexibility
- Fairness and efficiency
- Competing rights and responsibilities

Inquiry Question

- What is the relationship between the three arms of government, and the laws they make?
- What are the strengths and weaknesses of different lawmaking processes and the laws that result?

Introduction

Every system of government has its strengths and weaknesses. This chapter is going to explore the strengths and weaknesses of Australia's structure of government, and the way each branch of the legal system makes law.

Students will be required to use what they have learned about how law is made by each branch of the government in previous chapters to inform their analysis and evaluation.

How are the branches of government related?

The Australian legal system is divided into three branches–the Legislature, the Executive and the Judiciary. This structure is also known as the separation of powers, and is outlined in more detail in Chapter 1.1.

Each of these branches has the ability to make law. The Legislature (Parliament) and the Judiciary are the two primary sources of law in Australia. Law made by Executive bodies is not considered a primary source of law in Australia, as their lawmaking authority is determined by the Legislature.

Each branch of the legal system is additionally able to supervise the laws made by not only their own branch, but the other branches of the legal system as well. This ensures each branch of the government is held to account for the laws they make; it is a significant protection from "bad" laws, and also to stop branches from acting outside of their power.

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Strengths and weakness of lawmaking processes

Each branch of the separation of powers, and the types of laws they make, have strengths and weaknesses. Each of these will be considered below.

Parliament-made-law

Strengths of parliament made law

Rule of Law

Parliament upholds rule of law in a multitude of ways. Firstly, as a democratically elected forum, it allows the general public to have a say in the creation of laws as a form of indirect democracy. Secondly, the parliament is bound by legal rules and conventions, as well as the conventions of constitutional government. Lawmaking by the parliament, therefore, upholds rule of law by ensuring powers exercised during the lawmaking process follow rigorous steps to protect against arbitrary use of power.

Representative Government

All members of parliament are democratically elected by the general public, and are held to account through the principles of representative government. Decision making is a shared responsibility, and through collaboration across major and minor political parties' laws, a significant number of different perspectives are considered during the lawmaking process.

Members of parliament, particularly the government who sets the legislative agenda, are held to account through regular elections, allowing the public to determine who they wish to make laws on their behalf, and whose electoral mandates they wish to see fulfilled.

Sovereignty of Parliament

Parliament is the sovereign lawmaker in Australia. They receive their authority from the Constitution, and their democratic approval from the public. This is a fundamental protection for the community and differs from the situation in England where an unwritten constitution effectively gives the British Parliament far-reaching powers. The parliament is not bound by their previous Acts, or by the courts (with the exception of High Court interpretations of the Constitution), and subsequently have the ability to make laws in areas of which they see fit, and with the protection of parliamentary privilege.

Parliament's sovereignty also affects the way legislation interacts with other types of laws in Australia's legal system. As the Executive's lawmaking authority comes directly from the parliament, they have the ability to change the level of lawmaking power the Executive possesses, and the laws they are able to develop. Parliament also has the ability to create remedial and complementary legislation to make changes to case law if they feel the laws developed by the courts need changing to ensure just outcomes.

Responsible Government and Parliamentary Review

All bills presented to the parliament pass through the bicameral system, so while the Executive chooses the legislative agenda, their bills must be critiqued and debated by the Opposition, as well as Independents and minor parties. This is a strength of legislation, as it forces debate and criticism, and suggestions for improvement (if necessary) before a law is passed. It also allows for multiple perspectives to be considered during lawmaking, provided, of course, the Government does not have a majority in both Houses.

Ministers are also held responsible on the floor of the parliament during Question Time for their departments, and legislation made under their portfolio.

Comprehensive Lawmaking

Parliaments have the time and flexibility to develop law to their own schedule, as opposed to judges (unelected officials), who may need to develop law quickly to resolve the case in front of them. Subsequently, parliaments have the time to research and consult before putting forward their bills to the parliament. Often, the parliament will ask either parliamentary or senate committees to research areas of law before a bill is drafted to ensure their bill is informed and comprehensive.

This comprehensive development process allows the parliament to make considered decisions, which is important, as it is the parliament which sets the acceptable standards of behaviour for society.

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Parliamentary privilege

All members of parliament are offered parliamentary privilege while debating in their chambers. This is largely outlined by the *Parliamentary Privileges Act 1987 (Cth)*. The intention of this rule is to allow for robust and frank debate on issues arising while a bill is being debated, and to ensure all perspectives are considered, without politicians fearing they may be sued for an opinion perceived as controversial or offensive.

This privilege covers elected members of parliament while they are in the parliamentary chambers undertaking their role as lawmakers, but not while they are outside of it.

Weaknesses of parliament made law

Disenfranchisement of minorities

There are criticisms that minority groups are not adequately represented in our system of representative government. While all Australians have an elected representative in both state and federal systems of government, the majority of elected representatives are white men. With few elected members with different cultural backgrounds, few Indigenous representatives, and only approximately 35% of federal members being women, it is clear the current parliament does not accurately reflect the diversity of Australian society in its chambers.

This lack of diversity in perspectives and opinions has resulted in many issues for minority groups (such as land and voting rights for Indigenous Peoples) not being addressed for too long.

Considering bills must gain a majority vote in both houses of parliament in order to become law, it is understandable why minority groups can be overlooked. While smaller parties can allow for more diverse perspectives being introduced into parliament (usually in upper houses), unless they make up the balance of power, the impact they can make on most public bills is minimal.

Time consuming and expensive

The bicameral nature of Australia's parliaments means laws are heavily scrutinised, but also means the process for passing most laws is quite slow; especially if committees are set up to investigate the potential area of law. In addition to being time consuming, these processes are quite expensive.

Conflict between responsible government and parliamentary review

The bicameral nature of the parliament allows for proper scrutiny of bills; however, this process can be exploited by the Opposition for political gain. When a public bill is passed through the lower house where the government has a majority, bills can be repeatedly rejected by the upper house. As outlined in Chapter 1.3, this creates a constitutional trigger for a double dissolution election, at the behest of the Prime Minister.

Additionally, by denying passage in the upper house, the Opposition and minor parties are able to negotiate significant changes to the bill which may be contrary to government intention, and electoral mandates.

Did you know?

It is quite often cited Gough Whitlam was dismissed as Prime Minister because the Opposition continually blocked passage of his supply bills through the upper house, meaning he could not guarantee supply. However, the Senate never officially blocked the passage of the bills, or directly rejected them. They simply kept deferring them (or shuffling them to the bottom of the agenda) instead, meaning the bills never came before the Senate. As the government couldn't guarantee supply (because the Senate wouldn't address it), the Governor-General was left with no other course of action than to intervene. Rightly or wrongly, there has however, been much contention about the way this occurred and whether or not information sought was in accordance with accepted conventions.

Politically, use of the bicameral system in this way favoured the Opposition, with Whitlam dismissed and then Governor-General Sir John Kerr installing Opposition Leader, Malcolm Fraser, as care-taker Prime Minister until a general election could be called on the proviso supply was approved, and no new laws were passed. Fraser, and the Liberals, won the subsequent election by a wide margin.

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Sensitivity to electoral backlash

Politicians are often accused of being slow to change the law, particularly in areas considered to be controversial (such as same-sex marriage and euthanasia), as they fear they will lose the support of the public, and subsequently, lose their seat at the next election. This results in laws being changed slowly. While it can be argued no law should be rushed through to ensure they are written properly, it also means the parliament is changing laws many years after public sentiment has changed.

The legalisation of same-sex marriage plebiscite held in 2017, was a tool used by the federal government to gauge the sentiment of the Australian voting public. With the results tallied at 61% of votes in favour of the legalisation of same-sex marriage, the Australian federal parliament held a conscience vote to pass the legislation in December, 2017. Australia's Liberal Prime Minister at the time, Malcolm Turnbull, repeatedly stated he wanted to hold a plebiscite to ensure change in the law would be supported by the majority of Australians.

Parliamentary Privilege

While it is appropriate to allow politicians to examine all perspectives while debating new laws, parliamentary privilege can be abused, and allow untested accusations and a range of unverified information into the public sphere, without any recourse for people or groups involved.

There have been several controversial uses of parliamentary privilege in recent political history.

- In 2011, Nick Xenophon, a former South Australian Senator, used parliamentary privilege to repeat allegations of sexual assault against a man in Adelaide. As they were repeated under parliamentary privilege, Xenophon could not be sued for defamation, and because the media reported on allegations made in this circumstance, they too were protected from defamation proceedings under the principle of qualified privilege.
- Similarly, in 2016, Senator Derryn Hinch used his parliamentary privilege to name several sex offenders whose names had been suppresed by the courts. His justification was he felt the courts had failed to protect the community, by failing to identify the convicted offenders to the public.

C Collaborative Activity

Do you think Parliamentary Privilege is a worthwhile practise?

In groups, undertake some research into the principle and practise of parliamentary privilege in Australia. You may wish to look at the legislation that outlines its use, some examples of how Australian politicians have used it, or examine its origins from the British Westminster system. You may even wish to consider how it is implemented in governments overseas.

Below, **create a 1-2 paragraph argument either in support of keeping parliamentary privilege, or removing it from the Australian legal system**.

Note: you are only required to address one side of the argument, not both.

Once you have completed your argument, try and find another group who have chosen to argue the opposite side of the argument to you. **Below, summarise their main arguments.**

C Collaborative Activity (continued)

If you cannot find another group who has put forward an alternate opinion, **write down some of their arguments below not considered/addressed by your group.**

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Delegated Legislation

Strengths of delegated legislation

Many of the strengths of delegated legislation are most evident when directly compared to the process for passing legislation. For example, delegated legislation is quicker and cheaper to pass than legislation, as the process for passing delegated legislation is much shorter, and has fewer checks and balances to pass in its development.

Again, when compared to parliament-made-law, delegated legislation is often developed by experts in the field that the regulations are required. This results in delegated legislation specific and tailored to what each executive body needs. Parliament-made-law often does not have this advantage. While legislation is drafted by legal experts, they are not necessarily experienced in the area about which the law is being made.

The speed with which delegated legislation can be made is another benefit made readily apparent in the last 12 months, through the Covid-19 pandemic. Australia's response, at both federal and state level, has demonstrated the speed at which delegated law can change. This has helped Australia manage the pandemic particularly well, by changing a myriad of laws within 24 hours, in some instances. The processes of parliament are simply too long and complex to be able to pass laws at the same speed.

Weaknesses of delegated legislation

Undemocratic Lawmaking

One significant downside of delegated legislation is it can be considered undemocratic. As our democratically-elected parliament chooses to delegate some of their legislative authority to unelected officials, it is a direct contravention of what the public expect when it comes to lawmaking. While the parliament has the ability to supervise the regulations being passed, it is still an example of law being made by appointed officials, rather than democratically elected parliamentarians.

Complexity of the Law

As society has become more complex, our legal system has similarly become more complex in order to address the changes in our business, relationships, economy and technology. The increasing amount of regulations required to keep up with a rapidly progressing society has resulted in a complicated legal system which is difficult to access and understand.

With the increase in the amount of delegated legislation comes an increase in the difficulty of enforcing these regulations. This, in turn, requires further bodies to keep track of rule-breakers, making the system increasingly complex.

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Independent Activity

Delegated Legislation

Does the Executive have too much lawmaking power?

While delegated legislation may not normally be front of mind on a day-to-day basis, the Covid-19 pandemic in 2020 has been a visible reminder of the impact of delegated legislation on everyday lives, and the power of delegated authorities.

Consider the types of restrictions introduced and enforced in 2020 in your state or territory. Write a list of 6 different examples below:

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Short Answer Questions

Consider the following questions about delegated legislation:

1. To what degree did these regulations impact day-to-day life?

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2. Do you think the delegated authorities who created these regulations had too much legislative power in these circumstances? Explain.

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3. Identify one strength and one weakness of the process of these Covid-19 law changes if they were instead passed as bills, rather than regulations.

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4. With some Internet research, find one piece of delegated legislation. Write down the name of the regulation/direction, and outline the changes this regulation made:

   (ie – *Emergency Management (Stay at Home No. 3) (Covid-19)(Revocation) Direction 2020)*

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5. When considering the regulation above, consider to what degree this lawmaking was:

   (a) Democratic
   (b) Accessible to the public (easy to find and understand)
   (c) Of benefit or detriment to the public's faith in the actions of the Executive

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Judge-made-law/Case Law

Many of the features of case law can operate as a strength, and a weakness, depending on the circumstances of the case or the way you consider a principle, so many of the following features will be discussed as both strengths and weaknesses below.

Strengths of judge-made-law

Doctrine of Precedent/Principle of stare decisis

Strict adherence to the doctrine of precedent fosters consistency in the legal system. People are able to predict case outcomes, and the law is applied uniformly within the court hierarchy. Following the doctrine of precedent, allows the general public to have faith in the judicial system, and the application of laws without bias.

Judicial Review

The existence of a court hierarchy means judge-made-law can be challenged in a higher court where an individual or group believes an error in law has been made. Appellate courts have the authority to hear challenges to new laws by members of the public.

Judicial Independence

Case law is made by judges who are independent from the other branches of government, as well as influence from any external sources. This means law is made based purely on the merits of the case presented in a court. This allows for law free from bias, politics, or small groups of wealthy individuals or private interest groups.

Creation of new law

Judges are able to create new legal principles immediately in order to resolve a dispute before them, should there not be any appropriate or current relevant law. This allows for judges to create just and timely outcomes and bring finality to the dispute.

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Accessible law

The creation of case law is made with input from the general public where cases require case law to be developed in order to reach a resolution. Through legal counsel, people may present legal arguments about why a law should be developed or changed.

The public can also access law reports and case law online.

Weaknesses of judge-made-law

Doctrine of Precedent/Principle of stare decisis

While the doctrine of precedent is a significant strength of the case law system due to its consistency in the application, this can also lead to weaknesses. If the courts adhere to a precedent which has resulted in unjust outcomes, or have applied a precedent inappropriately, unjust outcomes can occur.

For example, it can be argued the High Court should have departed from the *Searle v Wallbank* rule in the *SGIC v Trigwell & Ors* 1978 case, as it resulted in an unjust outcome forcing state parliaments to enact remedial legislation to ensure the unjust application of precedent would not continue.

Judicial Review

While the process of judicial review allows for challenges and review of laws made by judges, it is not available to everyone, due to costs involved in the process.

Judicial Independence

The independence of the judiciary is clearly a strength of case law, as it allows for laws to be made on legal merit. However, the independence of the judiciary comes at a cost. In order for judges to be completely independent, they are appointed to their positions, rather than elected, which results in a system of non-democratic lawmaking.

Judges are unable to be held to account by the general public through this system of independence. If there is a complaint made about a judge, this review is undertaken by other (more senior) judges; an internal form of review, rather than by an independent arbiter.

Judges can be dismissed by the parliament on grounds of misbehaviour and incapacity. However, very few judges have ever been dismissed under these criteria; and even so, these dismissals were for the behaviour of the judges involved, and not laws they made.

Fast fact

Curious to see what it takes to be dismissed as a judge in Australia?

You may wish to Google the circumstances surrounding the dismissal of Justice Boothby (South Australia), and Justice Vasta (Queensland).

Additionally, Justice Lionel Murphy of the High Court of Australia was facing charges of attempting to pervert the course of justice in the mid-1980s, amongst others. There were a series of Senate Committees set up to investigate, and he was acquitted at his second trial before it was announced he had been given a terminal cancer diagnosis. He died before it was decided whether to investigate any of the other accusations against him.

Very few judges have been removed around Australia. Most resign before they can be removed for their misbehaviour or incapacity.

Retrospective Lawmaking

Judges can only make law after an event has occurred, and a party has approached the court to resolve a conflict. This can potentially become problematic, as behaviour lawful at the time it was committed can retrospectively be determined unlawful.

Inaccessible law

While everyday people can be involved in the creation of case law, it is not easy law for the general public to access, or understand. Most Australian citizens do not have the education or training necessary to access case law, or understand how it is applied, or its significance.

Additionally, due to the time and costs involved in pursuing the creation of case law through the courts, it is prohibitive to many.

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Independent Activity

Case Law

Choose a case from the list below, and familiarise yourself with the basic facts of the case through some research. Alternatively, your teacher may also suggest some cases for you to examine.

Using the facts of the case as the basis of your answers, address the questions below:

Case choices:

- Donoghue v Stevenson (1932)
- SGIC v Trigwell & Ors (1978)
- Commonwealth v Introvigne (1982)
- Mabo v Queensland (2) (1992)
- R v Carroll (2002)
- Love v Commonwealth/Thoms v Commonwealth (2020)

1. Give a brief (2-3 sentence) outline of the case you have chosen:

2. What was significant about the decision made by the court in this case?

3. Identify one strength of this new law being developed by the courts.

4. Would it have been better if this law had been made by the parliament? (Consider and compare the strengths and weaknesses of parliament and judge made law in your answer.) Justify your response.

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Analysis of Lawmaking Methods

This section is going to focus on the comparison between our two main sources of law–Parliament, and the Courts.

Fundamental similarities between legislation and case law

There are many fundamental similarities between case law and legislation. Some of them are they both:

- Are binding on all citizens
- Continue on permanently, unless overturned, amended or changed lawfully
- Prescribe standards of acceptable behaviour
- Aim to achieve social cohesion
- Get their authority from the Australian Constitution
- Have jurisdictional limits on where their laws apply

In addition to their similarities, legislation and case law are made to complement each other. While parliament made law is sovereign, the parliament has allowed for significant branches of civil law to exist as case law, for example, to cater for the level of complexity involved in resolving these disputes. The parliament has the ability to step in and create remedial or complementary legislation when they feel they need to, but largely choose to leave this branch of law to the courts.

Fundamental differences between legislation and case law

There are several key areas in which legislation and case law differ. Some of these are:

- Parliament is a democratically elected lawmaker, whereas judges are appointed to their positions.
- Parliamentarians are held to account through regular elections. Judges are not held accountable to the people for their law making decisions; and are rarely removed from their positions.
- Parliaments can make laws about whatever they like, whenever they like, as long as it is within their authority. Judges can only make laws concerning the resolution of the case before them.
- Parliament has the ability to delegate some of its lawmaking authority. Judges do not have the ability to do this.

As sovereign lawmaker, parliament-made-law holds more authority than case law, and will override it in a conflict (with the exception of High Court interpretations of the Constitution).

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Should Judges make law?

Independent Activity

Using the content from earlier in this chapter, in addition to Chapter 1.5, fill in the table below with reasons about why judges should, and should not, make law.

You can choose to include the strengths and weaknesses of judge-made-law, as well as some examples of cases studied so far. You may wish to also consider the comparison between case law and parliament made law when filling in this table.

Should Judges make law?	
"Yes" Arguments	"No" Arguments

After completing the table, which of these two arguments is the most persuasive, in your opinion? Explain.

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End of Chapter Activities

Long Answer Questions

1. Do the strengths of parliament-made-law outweigh the weaknesses? Explain.

2. Do the strengths of case law outweigh the weaknesses? Explain.

3. No lawmaking in Australia is truly democratic. Argue.

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4. How could the shortcomings of delegated legislation be addressed to improve it as a lawmaking process?

Essay Question

Choose one of the questions below to address as an essay response. Don't forget to consider:

- Both sides of the question
- How you are going to connect each argument back to the question
- Your use of evidence and arguments to support each paragraph

1. "The supervisory role of each of the three arms of government ensures effective lawmaking in Australia." Argue.
2. "All law in Australia should be made by democratically elected representatives." Argue.
3. "Lawmaking by the Executive is necessary to complement the laws made by judges and parliaments." Discuss.
4. "Australia should only have one source of law". Using examples, evaluate this statement.

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2.1 Features of the Adversary System

SACE Considerations for Chapter 2.1

Big Questions

- What is justice?
- Is being fair and lawful the same thing?
- Are the rules of evidence too strict to allow just outcomes?
- Should juries be used in the justice system?

Competing Tensions

- Fairness and Efficiency
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Question

- What is the role of the following in the adversary system, and why are they important?
  - Burden and standard of proof
  - Rule of law
  - Role of the judge
  - Role of parties, witnesses and other participants, including juries
  - Rules of evidence and procedure

Definitions

Admissible evidence – evidence relevant and permitted to be presented at a trial. This is often referred to as 'Best' evidence.

Adversary system of trial – a system of trial derived from England where two opposing parties present conflicting cases, upholding strict rules of evidence and procedure, to an independent judge or jury to determine fact and come to a legal resolution.

Burden of proof – the responsibility placed on the party who has begun legal action to prove their claim before the court.

Inadmissible evidence – evidence not allowed to be presented at trial, due to concerns about its relevance, provenance or accuracy.

Inquisitorial System of trial – a justice system operating widely around the world in contrast to the adversary system of trial, with a key common feature being an investigative judge who is in control of the process.

Jury – a group of citizens who have been randomly selected from the electoral roll to hear a trial, and be the determiners of fact.

Natural justice – rules and practises outlining how a trial should run to ensure a person's rights are recognised and upheld, and a just outcome is reached.

Standard of proof – the quality and level of evidence required for the prosecution or plaintiff must reach in order to win their case.

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Introduction – The Adversary System of Trial

The **adversary system of trial** is one of two main trial systems used across the world, the other being the **inquisitorial system**. Australia adopted the adversary system from England, and while the majority of the features of both systems are very similar, every legal system is slightly different.

The nature of the adversary system is based upon the idea where both parties are trying to win their case, the truth will emerge through the presentation of powerful arguments.

There are a few key elements which define the adversary system of trial. They are:

- An independent and impartial judge
- Two independent and autonomous parties
- Strict rules of evidence and procedure
- A jury is the determiner of fact (in an indictable, criminal case) where an accused opts for trial by jury
- Parties are in control of their own case
- The trial is continuous
- Parties have the right to a lawyer

Courts of general jurisdiction in Australia use the adversary method of trial. However, some specialised courts and tribunals have adapted practises more **inquisitorial** in nature, as the judge or arbiter has a large role in the proceedings of the trial.

The focus in this chapter will be on the adversary system of trial, for both civil and criminal cases.

Rule of law

A fundamental element of rule of law is everyone is treated equally under the law. The adversary system helps to uphold this principle through providing a court system administered with strict rules and controls to ensure the system is fair and consistent for all.

Another element of rule of law is it is free from arbitrary government. The rules and procedures of the justice system, and the principle and practical application of judicial independence ensure a government does not use its power arbitrarily. These are in addition to other features, such as the court being open and transparent, conforming to the adage, 'justice should not only be done, it should be seen to be done'.

The features of the adversary system outlined further in this chapter are examples of features designed to uphold rule of law in the trial process through the prevention of arbitrary use of power by the government.

Burden and standard of proof

Burden of Proof

The **burden of proof** is the burden, or responsibility, to prove the truth of the allegations made about the other party. Simply, whoever instigates the legal action, has the burden to prove what they are saying (or alleging) is true.

The government takes the responsibility of prosecuting all criminal cases on behalf of society. Therefore, in a criminal trial, it is the prosecutor's burden to prove the allegations made against the defendant. In the Magistrates court, the burden generally falls to a police prosecutor (a police officer with some legal training). In the District and Supreme Courts, the burden falls to the Director of Public Prosecutions.

A civil case is created by a private disagreement between two private entities or individuals and may not involve the government. Therefore, whoever begins the legal process (also known as the **plaintiff**) has the burden to prove the allegations they have made against the defendant are true.

In both civil and criminal trials, the plaintiff and prosecutor respectively, will call witnesses and present evidence to attempt to prove their cases to the required **standards of proof** (outlined below). It is not up to the defendant in any case to "prove" their innocence; they simply need to introduce doubt to the case, as the burden of proof is not on them.

The parties with the burden of proof always present their case first in a trial, as the case is theirs to prove.

Case Example – R v Che [1995] SASC

The defence are not always required to present a defence case at a trial if it is deemed unnecessary. In the case of *R v Che*, Justice Bollen asked the jury to consider a not guilty verdict at the conclusion of the prosecution's case, as it was considered very weak. Under law, juries can consider a not guilty verdict before the defence case is presented, if the prosecution case was considered so poor, convicting the defendant would be unsafe. In this case, it only took the jury eight minutes of deliberation to come to a not guilty verdict.

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Standard of proof

The **standard of proof** is a straightforward concept. Simply, it describes the level of proof which must be presented in court for the prosecution (criminal trial) or plaintiff (civil trial) to win their case. As explained above, the burden to provide this standard of proof is placed upon the prosecution and plaintiff as they are the parties having instigated the legal action.

The standard of proof in a criminal trial is **beyond all reasonable doubt.** This is an incredibly high standard to meet, and is deliberately difficult for the prosecution to reach. For the prosecution to reach a standard of proof beyond all reasonable doubt, means the collection of evidence presented to the jury (or judge) at the trial leaves no doubt in their minds the defendant has committed the offence. An underlying principle in the adversary system is it is better to acquit and release a guilty person rather than wrongfully imprisoning an innocent one. Therefore, the standard is high to try and protect innocent people from being wrongly convicted, and punished for offending they may not have committed. Another reason for such a high standard of proof in a criminal trial is due to the sanctions applied after a conviction. As convicted offenders can be eligible for losses of both personal and financial freedoms, it is imperative they are only issued to people deserving of them.

The standard of proof in a civil trial is **the balance of probabilities.** This standard of proof is significantly lower than for a criminal trial, as the stakes for losing a civil trial are much lower. The losing party in a civil trial may be required to pay damages, or abide by a court order. The balance of probabilities can be described as something being more likely than not to be true, or to have occurred.

The rules surrounding the inclusion of evidence in a trial to reach the standard of proof will be discussed later in this chapter.

Role of the judge

The role of a judge in the adversary system is to act as an independent referee to ensure all participants in the trial are following the rules. This allows for natural justice to take place, and for rule of law to be upheld.

Judicial independence is an important element of the adversary system, as it stops the judge from showing any bias or preference to one party over another. It also prevents them from holding a position in the executive or legislature and having either of those roles impact their decision making in the courts. This independence enables judges to make decisions without fear or favour and serves as a protection for individuals in society.

By enforcing the rules and procedures of a trial, each party is given an equal and fair opportunity to present their best case to the court. The rules and procedures judges uphold are featured in both legislation and case law.

Role of parties, witnesses and other participants, and juries

Role of the parties

In the adversary system, each of the opposing parties work independently in order to put together their cases. While many aspects of their preparation are similar, there are several differences between the roles they perform. These roles also differ slightly, depending on whether the trial is a civil or criminal trial.

Criminal Trial

Role of the Prosecution

In a criminal trial, the role of the prosecution is to accept the burden of proof and put together a case to prove the guilt of the defendant beyond a reasonable doubt. They must collect their own evidence in order to put together their case. In doing this, they will work with the police force, and other government bodies (such as forensics laboratories) to collect the evidence they need to prove their case in court. It is their job to then present this evidence to the court.

Role of the Defence

The role of the defence in a criminal trial is to create doubt with regards to the evidence being presented by the prosecution. The defendant is protected by the presumption of innocence, and for this reason, is not forced to attempt to prove their “innocence” in court. The defence has the right to know the charges made against them and are given access to all evidence against them before the beginning of the trial, so they can develop a defence case.

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The defendant can choose to represent themselves in court, or hire legal representation to work on their behalf. The defendant also has the right to remain silent, and is not obliged to speak in their own defence, or even offer a defence case if they do not wish to. In some cases, a defence lawyer may prefer to rely solely on cross examination of prosecution witnesses.

Civil Trial

There is minimal government involvement in civil trials, meaning parties are independent of the government when developing their case. The only government involvement in a civil case is to provide the resources (courtroom, judge etc) in order for the case to be heard.

Role of the Plaintiff

In a civil trial, the plaintiff is the party bringing legal action against the defendant for a civil wrong allegedly interfering with their rights or interests (financial etc). The plaintiff may initially seek resolution to the civil wrong through alternative dispute resolution (ADR) methods; however, in many instances, a plaintiff may seek legal advice and support when writing letters or drafting a statement of claim. If ADR methods are not sufficient to resolve the issue, the plaintiff will approach the courts to assist with the resolution of the matter. They may choose to self-represent, or they may hire legal representation. It is their responsibility to build their own case. They are required to share all their evidence with the defence before the beginning of the trial.

Role of the Defence

Similarly to the role of the defence in a criminal trial, the defendant is responding to accusations made against them. They may choose to self-represent, or hire legal representation to represent them during the trial. The defence in a civil trial must also provide the plaintiff with all their information and evidence before the trial commences. Again, as the party responding to the accusations, the defendant has no burden to prove their innocence; it is again enough to cast doubt on the case of the plaintiff in their own defence.

Independent Activity

Role of the Parties and the Judge

In both criminal and civil disputes, parties are left to develop and present their own cases and evidence, without input or comment from the judge overseeing the case.

1. What are the benefits of the parties working independently of the judge?

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2. What are the disadvantages of the parties working independently of the judge?

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3. What is the role of information presented at a trial?

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Role of witnesses

The role of witnesses in a trial is to answer questions put to them by each of the parties. Both parties will approach witnesses to answer questions about the crime in question, in order to present evidence to the court. In the adversary system, all evidence must be given orally (or, *viva voce*). Subsequently, all evidence must be presented by a person in order to meet this criteria. Evidence presented to the court helps to paint a picture of the events which have occurred in and around the commission of the alleged offence.

In the adversary system, witnesses are examined through careful questioning and answers; known as the **interrogatory method**. Witnesses are not allowed to give evidence in narrative form (ie–allowing the witness to recall events and speaking in long form sentences and paragraphs). This is to prevent witnesses giving evidence in court which is inadmissible (this is explained further, later in the chapter) or irrelevant.

A witness will first be examined by the party who has requested their appearance in court to present evidence. This is called an **examination-in-chief.** At the conclusion of these questions, the opposing party is given the opportunity to question the witness, in order to seek more information, clarify evidence presented in the examination-in-chief and test the veracity of such evidence. This process is called a **cross-examination**. Cross-examination by the opposing party is discretionary. Once cross-examination of the witness has concluded, the original party may **re-examine** their witness; however, this questioning is limited to the scope of anything coming up during the cross-examination rather than new material.

Once this process has been completed, the witness will be excused from the court. Witnesses are not allowed to be present during the trial before they have given their evidence but are entitled to remain in court after they have been examined.

Role of other court participants

In order to function effectively, courts need to be staffed by a large number of people. Some other important roles in the court are outlined below.

- **Court stenographer/reporter –** it is their role to transcribe (record) everything said during the course of the trial. Stenographers type in **shorthand** on a steno machine while in court, swapping every 20-30 minutes. Their computer translates their shorthand to text in accordance with their own dictionary settings, and while out of court they check and edit the transcript.
- **Sheriff's Officers –** assist with the running and security of the court. There is typically a sheriff's officer by the door of the court, and at least one other sheriff's officer will sit near the defendant in the dock.
- **Judge's Clerk/Judicial Support Officer –** assists a judge with the administrative tasks required for a trial to proceed. This includes work during a trial, as well as tasks that are conducted outside of a trial, like research.
- **Judge's Associate –** a trained lawyer who assists with the running of the trial. For example, presenting the *allocatus* (reading the charge to an accused), presenting a bond to a guilty person at the conclusion of a sentence hearing and assisting the judge with research during the trial and other judicial tasks assigned. In South Australia, it is common for Supreme Court Justices to have two associates each, while a pool of associates support judges of the District Court.

Role of the Jury

Overview – What is a Jury?

A jury is a group of 12 adults randomly chosen to become the determiners of fact during a trial. A jury is included into the adversary system of trial to sit as 'peers of the accused' when determining the outcome of a trial. They are required to listen to all the evidence presented by each party, and then evaluate the evidence to determine whether or not the standard of proof has been reached.

Trial by jury is a choice offered to the defendant. If they do not wish to have a jury trial, they do not have to have one.

Across Australia, jury trials are typically used for criminal trials for indictable offences. There are some limited uses of juries in the civil trial system in some Australian states. South Australia does not use juries in any civil trials; however, while the Northern Territory does not allow for juries in defamation trials, juries can be used for other civil cases.

Under the *Juries Act 1972 (SA)* and the *Juries Act 1962 (NT)*, a judge may empanel up to 15 people to sit on a jury, if it is determined good reasons exist. However, only 12 jurors may decide the verdict. If more than 12 jurors remain at the end of a trial, a ballot will be taken to remove the excess jurors. An example of a South Australian

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trial with a jury of 15 was the Snowtown murder trial, which was heard between October 2000 and September 2001. Three jurors were excused as the trial progressed (due to illness, and difficulty with the nature of the trial), leaving 12 to decide a verdict.

A jury deliberates in private and does not give reasons for their verdicts.

Helpful online resources

If students wish to explore juries further, the following resource is available to accessed online:

https://outreacheducation.sa.edu.au/the-role-of-juries-ebook/

Did you know?

Right to a jury

Your right to a trial by jury at federal level is protected by section 80 of the Australian Constitution. However, as criminal law is largely a state power, there are not many instances where a federal jury trial would occur for someone to exercise this right.

People's right to jury trials at state level are protected by legislation.

How is a jury put together?

There are two main stages of putting a jury together. The first stage, referred to as **compiling jury lists,** describes how members of the public are selected to be summoned to the courts in order to sit on a jury. The second stage, known as **empanelling**, describes how jurors progress from arriving at the courthouse, to actually deliberating on a trial.

Step 1: Compiling jury lists

Compiling a jury list is an administrative task undertaken by the Sheriff (an officer of the Supreme Court), at the request of the courts. This is typically undertaken at the end of each calendar year.

The process begins with the Sheriff contacting the Electoral Commissioner to generate a random list of approximately 6,000 names from the electoral roll for the House of Assembly. Approximately 500 names are drawn for each of the smaller South Australian districts, and the remainder for the Adelaide jury district. This list produces names of people over the age of 18 who are enrolled to vote.

After this list is generated, there are two stages of vetting (checking the lists) done to remove all people not allowed to, or who cannot serve on a jury. The first stage is the **sheriff's vetting**, where the sheriff will remove all people who are **ineligible** to serve on a jury. To assist in this process, the Electoral Commissioner and the Police Commissioner provide information to the Sheriff about potential jurors. The second round of vetting is by individuals themselves; people who approach the court with reasons why they cannot undertake jury service.

Eligibility

There are categories of people who are unable to serve on a jury in South Australia, and the Northern Territory. These groups of people are determined to be **ineligible** for jury service, and have their names removed from the initial list generated by the Electoral Commissioner.

Firstly, to be **eligible** for jury service, you need to be:

- Enrolled to vote
- Live in one of the jury districts below.

There are three jury districts in South Australia:

- The Adelaide Jury District
- The Northern Jury District
- The South-Eastern Jury District.

There are two jury districts in the Northern Territory:

- The Darwin Jury District
- The Alice Springs Jury District

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Jurors are not expected to travel outside of the jury districts in order to serve on a jury. This means, for example, people living in many areas of country or outback South Australia or Northern Territory, are ineligible for jury service due to their physical address. Jurors can apply for an exemption from service if they live further than 150km away from the place where the jury is to be empanelled.

The *Juries Act 1927 (SA)* describes two categories of ineligibility; people who are **disqualified** from serving on a jury, and those who have **general ineligibility.**

In South Australia, someone is **disqualified** from jury service if they:

- Have been convicted of a crime where a life sentence is the maximum penalty;
- Have received a prison sentence exceeding two years in length;
- Within the previous ten years, have served any time in prison, or been on parole;
- Within the previous five years, have been convicted of an offence and been sentenced to imprisonment, or had a court-ordered licence disqualification of six months;
- Are currently under a good-behaviour bond;
- Someone who has been charged with an offence but is yet to have their trial on those charges.

(*Juries Act 1927 (SA) s12)*

The reasons for people being disqualified demonstrates clearly the government does not want people participating in the administration of justice if they are unlikely to be impartial.

General ineligibility

Under the Juries Act, there are several other reasons someone may be ineligible for jury service. These are:

- If someone is mentally or physically unfit to carry out the duties of a juror;
- If someone has an insufficient grasp of English to carry out the duties of a juror; or,
- If Schedule 3 of the Act outlines them to be ineligible.

(*Juries Act 1927 (SA) s13)*

While these criteria may initially seem discriminatory, they are conditions which ensure a juror can carry out their role within an adversarial trial. Due to the nature of evidence provided at a trial, it is imperative this evidence can be seen, heard and comprehended. Subsequently, people with certain disabilities (blindness, deafness etc), mental impairment or minimal skills in English are not going to have the capacity to understand the evidence presented in court, albeit, there have been circumstances where Auslan (sign language) or the presence of assistance dogs has been provided. This will directly impact the ability of the defendant to have a fair trial.

The **Third Schedule ineligibility** is a list of people, due to their position (or their relationships) cannot sit on a jury trial. The third schedule includes:

- The Governor, Lieutenant Governor and their partners
- Ministers of the Crown and their partners
- Members of parliament
- Members of the judiciary or magistracy and their partners
- Justices of the Peace (with court duties) and their partners
- Legal practitioners who are practising as such
- Members of the police force, and their partners
- Government employees whose roles are related to the administration of the justice system, supervision of prisoners or investigation of offences, and
- People employed in the administration of courts, or the transcription of evidence.

(Juries Act 1927 (SA) Schedule 3)

This list of people is also quite substantial. This type of general ineligibility has two benefits. Firstly, it upholds judicial independence, by not having any perceived interference or involvement from other branches of the legal system in the administration of justice. Secondly, people who work to run our justice system cannot be taken away from their jobs to sit on a jury, as then the system can't function.

Additionally, members of the armed forces are exempted from jury service due to the nature of their job.

Reasons for ineligibility in the Northern Territory are very similar to that of South Australia, but the terminology is a little different. In the *Juries Act 1962 (NT)*, the terminology used in the legislation is "exempted", rather than "ineligible", to describe people barred from undertaking jury service, as well as "persons not qualified". A full list of people who are unable to serve on a jury in the Northern Territory is listed in Schedule 7 of the Act.

After the ineligible and disqualified people are removed from the list, approximately 220 jury summonses are sent out for each month, informing people they have been selected for jury service.

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It is at this point, people can apply to the courts to be **excused** from jury service, or to seek a **deferral** in their service.

There are narrow grounds to be permanently excused from jury service. They require a person to be a:

- Conscientious objector
- Member of a religious order, holding the position of minister, rabbi, priest etc.

These applications for exemptions are made by filling out a statutory declaration form, and submitting them to the court. If the exemption request is denied, it can be challenged in the Supreme Court.

All other people seeking to be excused from jury service should be technically only seeking a deferral to a more convenient month. Some reasons that people apply to the court for deferrals are: pregnancy, pre-booked holidays, examinations, work commitments or illness.

However, in practise, many people who apply for deferrals due to work commitments often find themselves exempted from serving at all. Medical specialists, small business owners and business executives are often excused from jury service with little objection, due to their roles in their workplaces.

Step 2: Empanelling

Once the jurors have arrived in court for their first day, which consists of juror training, they are split into groups of approximately 25 people. These groups of 25 are called **jury sections.** Each jury section will remain together as a group for their month of service. Not all jury sections are required each day. Jurors will receive a text message after 4pm each afternoon letting them know if they are required to be in court the following day. This information is also published in the newspaper.

When a trial is about to commence, one jury section will be summoned to the court on the first day of the trial. From this jury section, the final panel of 12 jurors will be chosen. The jury will sit in the public gallery of the court to hear the **arraignment** of the accused. Once the accused has formally pleaded not guilty (and therefore requiring a trial), the empanelling of the jury will begin. The judge will direct a court official to read out the names of all of the participants in the trial. This includes the names of the legal representatives, and all witnesses. At this stage, if a potential juror knows anyone involved in the trial, they must tell the court so that they can be excused. This is to protect the integrity of the trial.

The jury manager or judge's associate will then select juror names out of a box. When a juror's name is called, they are to walk to the jury box. It is while the juror is walking towards the jury box that the parties have the opportunity to **challenge** the inclusion of a juror in the trial. Once a juror has taken their seat in the jury box, the time for a challenge is over.

Each party has the opportunity to challenge three jurors peremptorily (without giving a reason). Once the parties have used their three peremptory challenges, they can continue to challenge jurors, however, these challenges must be backed up by reasons presented to the judge. The judge will then determine if the challenge is upheld or denied.

Once 12 jurors have been empanelled, the remaining people in the jury section are discharged. They are not required to attend court again until the trial is over, or their whole jury section is called to the beginning of a new trial.

Did you know?

Under the *Juries Act 1927 (SA)*, a judge can direct the court to empanel a jury of only men, or only women, if they feel that the circumstances require it. Either party to a trial can also request this when the jury is about to be empanelled.

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Independent Activity

Is a jury truly made up of peers to an accused?

Consider the different categories of people who are ineligible for jury service, or who can be exempted from jury service. With all these people removed from the jury roll, who is left?

1. Below, write a paragraph outlining whether or not a jury can be considered peers to the accused, with all the members of our society not represented on a jury:

2. Should reforms be made to the eligibility and exclusion criteria? Why, or why not? If you think reforms are necessary, outline a reform below, explaining why you think this change is necessary:

3. Should people be able to be excused from jury service? Justify your answer.

Jury verdict

Not all verdicts will come from a jury of 12 people. In some instances, jurors may be excluded or removed from a jury during the trial but the judge will allow the trial to continue. Reasons for juror exclusion is often juror misbehaviour, such as accessing information about the trial that they are not meant to have. Jurors may also be removed from a trial due to sudden onset of illness, or other exceptional circumstances. However, if too many jurors are excluded a mistrial will be called, and the trial will need to begin again with a new jury.

There are only two verdicts available to a jury in Australia: **guilty,** or **not guilty.** However, should the jury not be able to come to a decision, it is referred to as a **hung jury**.

- **Guilty Verdict**

A guilty verdict is reached when a jury finds the prosecution have proven the defendant guilty of their charges beyond a reasonable doubt. The guilty verdict results in a conviction of the defendant. A guilty verdict can be appealed in a higher court.

- **Not guilty verdict**

The accused is found not guilty by the jury, and the accused is acquitted. Due to the doctrine of double jeopardy, the accused cannot be tried again for the same crime. Additionally, a not guilty verdict by a jury cannot be appealed.

To arrive at each of these verdicts, however, either the majority of the jurors, or all of the jurors must agree on the verdict. It is dependent on the crime as to how many jurors must agree to the verdict for it to be recognised by the court. These requirements are for both guilty and not guilty verdicts.

- **Unanimous verdict**

This is a verdict where all members of the jury vote together and agree on a verdict. For example, 12-0, 11-0, 10-0. It is a legal requirement for murder and treason cases to return a unanimous verdict.

- **Majority verdict**

A majority verdict can be reached after four hours of deliberation. If a sufficient number of jurors agree on the outcome (11-1 or 10-2 with a 12 person jury), then the verdict can be accepted by the court. A majority verdict can be accepted for a “not guilty” verdict for murder and treason.

If a jury cannot come to an agreement on a verdict, this is referred to as a **hung jury**. Jurors must deliberate for a minimum of four hours before they can approach the judge and explain that they have been unable to reach a decision. A judge can then choose to **discharge** the jury from having to reach a decision in a case. This results in a **mistrial**, and the accused is neither convicted or acquitted. Legally, they are in the same position had the trial not occurred. At this stage, the prosecution would need to decide whether they would pursue a second trial with a new jury.

There is one final type of jury verdict which can be delivered. This is called an **alternative** verdict. Once a jury has been deliberating after four hours, they can choose to not convict the accused on the charges put before the court but can instead choose to convict the accused of a lesser offence instead. However, legally, the jury must first consider whether the accused is guilty of the major offence before they can consider the lesser, alternate offence.

An example of this, would be finding an accused not guilty or murder, but instead finding them guilty of manslaughter.

Case example: Geoffrey Adams

One of South Australia’s longest cold cases was solved in 2018. In 1973, Geoffrey Adams told police that his wife Colleen Adams had left him and their two young children, and she was reported missing. However, in 2018, Mr Adams confessed to police that he had accidentally killed his wife during a fight, and had buried her in the backyard of their home.

The police charged Mr Adams with murder, but he offered to plead guilty to manslaughter instead. The prosecutors refused the plea deal, and the murder trial went ahead. However, at the conclusion of the trial, the jury found Mr Adams not guilty of murder, instead choosing to convict him of the alternate charge of manslaughter.

A jury of 11 made the final verdict in the Adams case. One juror was excluded part way through the trial, as they had lunch with a prosecutor on the same team as the prosecutors who were conducting the Adams trial. Justice Peek continued the trial with 11 jurors after ensuring that none of the remaining jurors had any concerns about the trial continuing.

Mr Adams died in prison in December 2020 before he could be sentenced for his wife’s manslaughter.

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Independent Activity

Jury Verdicts: Should juries be allowed to return no result?

As explained above, juries are able to declare themselves 'hung' if they are unable to reach the statutory minimum number of votes to reach a verdict. Considering the idea that the purpose of a trial is to bring finality to a legal dispute, how does a 'hung' verdict meet that need?

1. Research a case that has resulted in a hung jury, and subsequent mistrial. Give a brief overview of the case, and the outcome. If you can find it, describe the reasons for the hung jury result.

   Need some case suggestions? Consider:

   - *R v Nilsson [2020] SASC (murder of mother-in-law)*
   - *R v Hayne [2020] NSW (sexual assault)*
   - *R v Holmes [2020] NSWSC (coward-punch death of friend)*

2. What impact has this result had on: the victim(s) (or family of the victim), the defendant, and on public opinion?

3. Alternatively, what risks are posed to the principle of rule of law and natural justice if we removed the option for a 'hung' jury verdict?

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Jury use in civil trials

South Australia does not use juries for civil trials, as per the *Juries Act 1927 (SA) s5.* However, around Australia, different states have different rules surrounding how a jury may be used in the context of a civil trial.

The Northern Territory allows juries to be used in some civil trials. Jury trials cannot be used for the tort of defamation, but can be used in other contexts. A jury of four people will be empanelled to hear these cases. The process for selecting a civil jury in the Northern Territory is a little different to the empanelment process for a criminal jury, and is explained further in Division 2 of the Act.

When a civil jury is unable to come to a verdict, the Act allows for two different outcomes.

1. If, after a period of six hours of deliberation, the jurors are unable to agree, if three of the jurors have agreed on an outcome, the court will accept the verdict
2. If, after a period of 12 hours of deliberation, the jurors cannot reach a decision, the court will discharge the jury from needing to reach a verdict.

Use of juries in civil trials around Australia:

- **New South Wales** mostly uses juries for defamation cases, and those juries consist of four people. Juries are not commonly used, and are used at the cost of the party.
- In **Victoria,** a civil jury contains six people, and whether or not a jury can be used is determined by the type of remedy being sought, and whether it is being sought under common law or legislation.
- In **Queensland**, a civil trial is made up of four people, under the *Jury Act 1995 (QLD)*.
- **Tasmania** holds civil trials with a jury of seven people, although their use in the civil system is limited due to the expense. Jury trials can be held across a range of different civil wrongs, and verdicts can be returned with a majority verdict of five out of seven jurors.
- **Western Australia** has the legal ability to use a jury trial in a civil case, but they are used rarely. A civil jury has six jurors, and can return a majority verdict of five out of six jurors after three hours of deliberation.
- The territory of **Norfolk Island** also has a legislative allowance for civil juries of six people. Similarly to other Australian jurisdictions, the party requesting the civil jury must pay a prescribed fee to the court.

The ACT is the only other Australian jurisdiction which doesn't allow for juries in civil trials.

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C Collaborative Activity

Should South Australia adopt the use of juries in civil trials?

In a small group, choose one civil case heard somewhere around Australia which involved a jury. Summarise the case below–include the civil claim, the main arguments from each party, the result, and whether there was any criticism of the result.

(Not sure where to start? A couple high profile civil cases with juries are: *Wilson v Bauer Media Pty Ltd [2017] VSC 521* and *King v Amaca Pty Ltd [2011] VSC.*)

Using the information about juries in this chapter, and the information collated above, determine whether or not juries should be used for civil trials in SA, and collaborate to complete a 2-3 paragraph argument below.

Want to learn more about juries?

The use of juries in South Australia is governed by the *Juries Act 1927 (SA)*.

The use of juries in the Northern Territory is governed by the *Juries Act 1962 (NT)*.

Rules of evidence and procedure

Strict rules of evidence and procedure are important defining features of the adversary system. The rules and procedures are considerably different to that of the inquisitorial system; most certainly, stricter in many ways (and discussed further in Chapter 2.4).

An important procedural rule which must be followed in the adversary system is **a trial must be one continuous event.** Parties cannot request breaks or pauses in the trial in order to collect more evidence, for example. Making a trial a single event requires both parties to be prepared with their best cases possible before the beginning of the trial. In addition to ensuring strong cases reaching court, it also means a lawful conclusion can be made at the conclusion of the trial, and the defendant only has to face their accusers in court on one occasion. There are only very few exceptions to this rule. A couple are outlined below.

Case Example: R v Pfennig [2016] SASC

In 2016, Dieter Pfennig was on trial in the South Australian Supreme Court for the murder of Lousie Bell in 1983. Part way through the trial, Pfennig suffered a heart attack in prison, and was taken to hospital and placed in a medically-induced coma. After he recovered, the trial resumed from the point that it had been stopped for his medical episode. He was eventually convicted of murder at the conclusion of his judge-only trial.

Case Example: R v Dansie [2019] SASC

In 2019, Peter Dansie was facing the South Australian Supreme Court on the charge of murdering his wife, Helen. After 13 days of his first trial, the defence called for a mistrial, stating that the judge, Justice David Peek, had undermined Dansie's fundamental right to silence with a remark that had been made during the trial. The prosecutors did not challenge this application, and a mistrial was called. However, the new judge assigned to the case, Justice David Lovell, agreed to accept the transcripts of the evidence from the first trial, rather than starting the trial at the beginning again, effectively allowing the case to pick up where it left off. Not only did it save the witnesses from needing to testify again, including Dansie's son, but it also saved taxpayers approximately $325,000 by not needing to start the trial over from the beginning.

Rules of evidence

The term "evidence" refers to any piece of information presented to the courts to help a judge or jury determine the facts in a case. All evidence must be introduced by a witness, in order for it's provenance and authenticity to be cross-examined by the other party to the trial. Evidence is classified as either admissible, or inadmissible.

Before any witness can present any evidence to court, they must be sworn in by oath or affirmation, to assure the court they will testify honestly. It is a crime to knowingly mislead a court; this offence is called **perjury**, and has criminal penalties attached if someone is to be convicted.

Admissible Evidence

This is evidence that is relevant to the trial, to help the judge or jury determine fact. Categories of admissible evidence include:

- **Direct evidence –** this is original evidence that has been gathered from first-hand experience. This is evidence that has been seen, heard, felt or smelt by an eye-witness, who can testify to this information in court.
- **Indirect evidence –** this is evidence also known as circumstantial evidence, from which facts can be inferred (suggested). For example, fingerprints at a crime scene would prove that the defendant had been to that location, but it does not provide any more specific information such as when the defendant was there, or why they were at that location.
- **Primary (best) evidence –** this is evidence such as objects or documents that are relevant to the case before the court. Examples could include a murder weapon, a hard-copy document outlining illegal money transfers, drug paraphernalia etc.

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- **Secondary evidence –** this is evidence that supports the existence of primary (best) evidence, if the primary evidence has been lost, damaged, deleted etc. For example, an image from a CCTV camera of a murder weapon, a photocopy of an original bank statement, etc.
- **Opinion evidence –** experts are allowed to give opinion evidence in certain contexts. This must be evidence that can be adduced or deduced from what has been seen or heard by witnesses in a case. Opinion evidence is largely given by experts in their field; a coroner explaining the cause of death of a victim of a car accident, a police officer who has worked in the motor accident division for 15 years giving an overview of how an accident had likely occurred, for example.

Inadmissible Evidence

Inadmissible evidence is evidence that is deemed irrelevant to determining fact in a case. Categories of inadmissible evidence include:

- **Hearsay evidence –** this evidence is not direct evidence. Hearsay is evidence passed from one person to another. The person receiving this information second or third-hand cannot present this information in court, as they are unaware of the context in which the evidence was initially presented or heard, for example. A witness presenting hearsay evidence has no way of knowing whether or not the information they are passing along is true, as they were not around in the first instance.
- **Illegally obtained evidence –** this is evidence that has been collected unlawfully, and is subsequently not allowed to be used in trial. This could take the form of a statement taken by police where the defendant has not been informed of their rights, or a confession that was made under pressure. A real-life example of illegally obtained evidence being used in a trial is below.

Case Example: Coco v R [1994]

Mr Santo Antonio Coco was convicted in Queensland of offering to bribe a Commonwealth officer. A significant portion of the evidence used against Mr Coco in court was captured on a listening device that had been installed on Mr Coco's telephone by two federal police officers, dressed as telephone repairmen. Mr Coco initially appealed his conviction to the Supreme Court of QLD, which upheld his conviction.

Mr Coco appealed to the High Court of Australia, arguing that while the judge who had granted the policemen the authority to install the listening device in his telephone had done so legally, the legislation didn't grant the policemen the authority to enter his property and install the device; subsequently, breaching his right to privacy, which was protected by the *Invasion of Privacy Act 1971 (QLD)*. The High Court upheld Mr Coco's appeal, and quashed his conviction, as they ruled that the evidence gathered against him had been illegally obtained.

- **Opinion evidence –** while some opinion evidence is allowed (see above), opinion evidence from general members of the public is inadmissible as it is simply irrelevant. No person can speak to the mind or motivation of another person, as it is impossible to know what another person is thinking.
- **Past criminal record evidence –** this is the criminal record of a defendant at trial. It is irrelevant, as it doesn't relate to the events before the court. Just because a defendant may have committed a crime in the past, doesn't mean that they are guilty in this new context. Including past criminal history as evidence in a trial is likely to be prejudicial against the defendant, while simultaneously not assisting the court in determining the facts of the current case.

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End of Chapter Activities

Consider the 'competing tensions' listed at the beginning of this chapter, and address the questions below.

- Fairness and Efficiency
- Competing rights and responsibilities
- Certainty and flexibility

1. How do the rules of jury list compiling and empanelling address the **competing rights and responsibilities** of the defendant's right to a jury trial, and the rights of the jurors themselves?

2. How does the role of the judge and the parties **uphold certainty, but allow for flexibility** in the trial process?

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3. How do the strict rules of evidence and procedure **uphold fairness and efficiency?**

Essay Questions

Choose one of the following questions to answer below as an essay response.

1. Juries should be abolished from the adversarial system. Argue.
2. Not guilty verdicts by juries should be subject to appeal like all other verdicts. Argue.
3. The rules of evidence are too strict in the adversary system, and require modification to achieve natural justice. Argue.
4. The strict rules of evidence and procedure in the adversary system fails to uphold rule of law. Argue.

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2.2 Resolving Disputes with and without Trial

SACE Considerations for Chapter 2.2

Big Questions

- What is Justice?
- Is justice accessible?
- Is justice reliant on the abilities of lawyers/interpretation of judges?
- Are too many rights afforded to an accused person in the adversarial system of trial?
- Do courts resolve disputes fairly? Fair for whom?
- Is being fair and lawful the same thing?
- Are the rules of evidence too strict to allow just outcomes?
- Should juries be used in the justice system?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Question

- How are criminal and civil disputes resolved both with, and without a trial?

Resolving Disputes Without a Trial

At a Glance

Resolving Disputes Without a Trial

Alternative Dispute Resolution (ADR)

- Self-help
- Abandonment
- Concession
- Consensus
- Mediation
- Conciliation
- Arbitration

Criminal and civil disputes can be resolved without going to trial; put simply, if the disputing parties reach a resolution they are content with, they can decide not to go to trial. On the other hand, if either party are not content then they can choose to go to trial.

Self-help

Self-help is as simple as it sounds. It means resolving a dispute on your own, without help from or consultation with the other party. For example, if there was a dispute over a fence between neighbours. If the fence was damaged or broken in some way, one party might choose to fix it on their own.

Self-help is usually cheap and immediate. However, it is not legally binding and may have the potential – depending on its form – to inflame a situation rather than resolve it.

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Abandonment (or Abandoning a Claim)

Abandoning a claim means to walk away from a dispute without receiving anything, when you might feel you have a valid claim. For example, if an uninsured driver caused damage to your car, you might decide not to pursue a claim.

Abandonment is also cheap and immediate because you will not incur any legal costs. You may effectively lose out by being out of pocket for any repairs. On the other hand, it is not legally binding, so you can choose to pursue a claim at a later date.

Concession (or Conceding a Claim)

Conceding a claim means to acquiesce to the other party's claim. For example, you might agree to pay for the full cost of the repair or replacement of damaged property.

Concession is cheap (depending on the specifics of the dispute), because there are no legal costs. You may be out of pocket, but these costs are known and may end up being significantly less than if the claim was disputed.

Consensus or Mutual Agreement

Two parties may be able to come to consensus or mutual agreement, without the need for third party intervention. For example, two neighbours might agree to split the cost of the removal of a tree sitting on their shared boundary.

Consensus is cheap and immediate. However, it is not legally binding; this can cause problems if one of the parties changes their mind.

Mediation

Using a mediator to help the disputing parties come to an agreement can be very effective. A third party will help the disputing parties present their perspective and listen to the other, with a view to reaching an agreement both parties can tolerate.

Mediation is also cheap and quick, and has the advantage of being likely to be adhered to, as both parties have been involved without the influence of legal representation. However, suggestions made by the mediator are not legally binding. There is also the potential for some parties to feel intimidated and, as a result, concede more than they are actually comfortable with.

Conciliation

Conciliation is a more formal method of dispute resolution where parties to the dispute must attend. A conference is convened by a conciliator who is actively involved in proceedings. While the decision is not legally binding, any agreed decision is usually registered by the court or tribunal to have force of law.

Pre-trial conferences heard before masters of superior courts use this method to attempt to achieve out-of-court settlements. This process is used to attempt resolution of industrial or equal opportunity matters before arbitration or brining the matter to a tribunal.

Arbitration

Arbitration is a more formal way of resolving a dispute without trial but with the help of a third-party. It can be conducted in two ways: institutionalised arbitration and independent arbitration. While arbitration is not a trial, it is also not strictly a method of ADR, as it involves a formal adjudicating body. Parties to a dispute, must agree to arbitration and are bound to comply with the arbitrator's decision.

Institutionalised arbitration is set out in legislation. It is a formal procedure, and the decision of the arbitrator is legally enforceable. Arbitration conferences are conducted by government appointed officers, particularly by registrars and commissioners in the Industrial Relations Commission to resolve industrial disputes.

Independent arbitration is the most formal method of dispute resolution without trial. The parties must agree to go to arbitration as well as to comply with the arbitrator's decision. Once agreement is reached to take a matter to independent arbitration, attendance is compulsory. The arbitrator takes a very active role in the proceedings; they can question the parties, call witnesses and examine evidence. Any decision reached is formalised in writing. Some decisions can be registered at courts to give them specific legal standing.

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Independent arbitration is less formal than court proceedings, relatively inexpensive, and the parties can be involved in deciding who the arbitrator will be and when and where the proceedings will be conducted. The method is employed by businesses in contractual disputes. For example, contracts in the building industry between builders and sub-contractors can include a provision in them to have any dispute resolved by independent arbitration.

Like any other matter, the courts remain the final arbiters of a dispute if a party appeals the decision of the arbitrator. Appeals are usually only possible on process rather than on substance.

Short Answer Questions

Outline three different types of alternative dispute resolution. Include your own example with each.

1. .....
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2. .....
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3. .....
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Resolving Disputes with Trial

Resolving a Criminal Dispute

The criminal justice system refers to all principles, institutions and procedures used to investigate crimes, arrest and interview suspects, conduct court committal, trial and sentencing proceedings and to supervise custodial orders.

Types of Offences:

- **Summary**
- **Minor Indictable**
- **Indictable**

Resolving a summary offence

The procedures to resolve a summary offence in a Magistrates Court are less formal and involve fewer steps. The vast majority of cases are undisputed, and the accused pleads guilty. The table below summarises the general stages in the resolution of a summary offence.

The charge is read to the accused, followed by a plea.

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Guilty Plea:	Not Guilty Plea:
• Prosecution presents a summary of the facts to the court. • The accused admits the facts. • Magistrate hears submissions in the form of a plea in mitigation from the accused. This plea represents an attempt to explain reasons behind and circumstances of the offending which might result in a lesser penalty. Character statements may form part of this plea as well as any voluntary or community work or rehabilitation programmes undertaken since the offending. • Magistrate's sentence handed down *ex tempore* (there and then). In some cases, a magistrate may reserve their judgment and deliver it at a later date. The sentence will include court costs, a victims of crime levy, any relevant behavioural orders and a sanction involving the loss of personal freedom where relevant.. • The decision of the court can be subject to appeal, where it is believed there was an error in law or fact.	In the event of a not guilty plea, matters are referred to trial, the allocated duration of which is determined by the complexity of the matter and the number of witnesses to be examined. • Police prosecutor presents case by examining witness. • Accused cross-examines witnesses and the prosecution re-examines. • Accused presents case by examining witnesses. • Prosecution cross-examines and the accused may re-examine. • Closing address by parties. • Magistrate's verdict and sentence • Possible appeal as per above.

At a Glance

Resolving an indictable offence

- The police investigate the crime, collect evidence and accept the responsibility to prepare and arrest suspects
- Prosecution (the Director of Public Prosecutions) has the burden to prosecute the accused to prove guilt beyond all reasonable doubt.
- The defendant presents their own case for trial.
- The judiciary (the trial Judge) controls the conduct of the trial to determine guilt.
- The jury is the determiner of fact, deciding whether the accused is guilty or not guilty.

The stages:

Pre-trial stage

Role of the executive

Police investigation

- Evidence collected
- Witnesses questioned and statements taken
- Suspect arrested and interrogated

Director of Public Prosecutions (DPP)

- Police submit evidence to DPP
- Prepare and lay the Information *Can be done by police*
- Has burden to establish *prima facie* case

Role of the judiciary

Magistrates Court

- Information laid by police and bail application heard
- Preliminary hearing
- Plea of accused entered
- Written submissions of DPP
- Defendant committed to stand to trial in appropriate court depending upon the charge(s)

Directions Hearings

- Pre-trial hearings to prepare case for trial.

Trial stage

Trial Court—District Court or Supreme Court

- Arraignment
- Empanelling of jury (unless trial by judge alone)
- Prosecution's case
- Defendant's case
- Closing address by both counsel
- Judge sums up issues of law and fact to the jury (unless trial by judge alone)
- Jury's verdict
- Judge enforces jury verdict and announces a date for sentence hearing

Post-trial Stage

- Sentencing hearing (conducted by the trial judge sometime after the trial)
- Appellate hearings (parties can appeal issues of law or fact to the Court of Criminal Appeal, and by special leave to the Full Court of the High Court)

Department for Corrective Services

- The enforcement of the court order is the responsibility of the Department

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Resolving an Indictable Offence

Pre-trial stage

The police conduct the investigation into the crime, including questioning witnesses and taking statements, with a view to arresting and charging a suspect.

The DPP uses the evidence collected in the investigation to prepare the prosecution case.

Once a person is charged with a serious indictable offence, they must be taken before a magistrate so an indictment can be laid.

Once this occurs, the accused is placed into the hands of the court and is allowed to apply for bail. Bail is an undertaking by a charged person that they can be released from the custody of the court on the condition they agree to the terms of the bail agreement–attend all relevant court hearings, conform with certain conditions, and forfeit a sum of money if they do not comply with the conditions.

A bail hearing is based on the presumption of innocence principle and the notion a person's liberty should only be removed if very good reasons exist. A Magistrate must take the following factors into account when deciding a bail application:

- the severity of the offence
- the probability of the person absconding or re-offending
- the need to protect victims, witnesses and the applicant
- past bail record
- strength of the evidence

The judiciary conducts a **preliminary hearing** in the Magistrates Court to determine if a prima facie case exists to commit the accused to trial in a higher court. The prosecution (the police or the Director of Public Prosecutions—DPP) must produce adequate evidence to suggest a conviction could be sustained at a trial in a superior court. This is conducted so the defendant is not placed under needless hardship for a matter where the likelihood of a conviction is poor and to prevent wasting of time and unnecessary expense by the state on weak cases.

The magistrate can find a *prima facie* case does not exist and discharge the defendant or find a *prima facie* case exists and commit the accused to stand trial in a higher court. The accused will be tried in the Supreme Court if the offence is murder or treason or the gravity of the offence warrants it. All other indictable offences are usually tried in the District Court. The magistrate can commit a person to trial in a Magistrates Court if the accused agrees and the offence is not a major indictable offence.

The magistrate would normally consider a new bail application and either order the accused to be remanded in custody or released on bail, taking into account the same conditions as already outlined.

Short Answer Questions

1. Outline the roles of the police and the DPP in the pre-trial stage.

   The police

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   The DPP

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2. Outline the preliminary hearing procedure and explain its purpose.

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3. Outline two other procedures that might take place in the pre-trial stage of a criminal dispute.

(a) .....

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(b) .....

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4. Outline the purpose of two procedures that might take place in the pre-trial stage of a criminal dispute.

(a) .....

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(b) .....

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Trial stage

The Principles of the Adversary System – refer to chapter 2.1

Roles of the parties – refer to chapter 2.1

Rights of the accused – refer to chapter 2.3

The trial procedure

The accused will enter a plea of not guilty (otherwise there would be no need for a trial). A trial is normally open to the public, but at any stage the Judge may close the court and conduct the trial *in camera* if an application is made by either party or if the Judge believes it is in the interests of justice. In a closed court, only the essential participants are allowed to remain in the body of the court while testimony is being given. At any stage, the accused may change their plea from not guilty to guilty. If this occurs, the trial will conclude and the judge will announce a sentencing hearing to be convened at a specified date.

Empanelling the jury – refer to chapter 2.1

The DPP and then the defence put their cases to the jury in accordance with the principles of the adversarial system by calling and examining witnesses. Because the burden of proof rests with the prosecution to prove guilt, the DPP must present the Crown's (State's) case first, so the accused can defend him or herself against the allegations made.

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At any time, the defence counsel may challenge the evidence submitted, or about to be submitted, by the DPP. The defence would make an application to the judge, that the evidence to be submitted is inadmissible according to statutory rules or case law precedent. The judge, as the determiner of law, must decide whether the evidence can be submitted or not. The judge administers the rules of evidence and procedure and acts as the chief adviser to the jury.

There is no obligation on the defence to call witnesses to submit evidence. The defence case could rest entirely on rebutting evidence provided by the DPP's witnesses under cross-examination. When defence witnesses are called, they are examined in a similar way as occurs with the DPP's witnesses.

When the defence case is closed, the prosecutor may bring evidence in reply to any point raised in the defence case that could not have been foreseen by the prosecution. For example, if the accused raised an alibi for the first time at a trial, the DPP may call a witness to rebut it.

At the conclusion of both cases, the parties can sum up their respective cases to the judge or jury by drawing specific attention to the important evidence and the law that must be applied to it. Each party will highlight the strengths of their case and the weaknesses of the opponent's. In this procedure, the defence counsel always gives their closing address last.

When both parties have concluded their closing addresses, the judge addresses the jury about the following:

- the Crown's responsibility regarding the burden and standard of proof
- the inconsistencies and conflicts in the evidence submitted at the trial and explains it is the jury's role to weight that evidence and come to its own version of the facts
- the relevant law and how it can be applied to the facts as determined by the jury
- general rights and duties of the jury regarding the types of verdicts and the need for secrecy

The jury considers the evidence presented and reaches a verdict of guilty or not guilty. An acquitted defendant is released from the custody of the court and the doctrine of double jeopardy applies. A convicted defendant is remanded for sentencing.

Short Answer Questions

1. Briefly explain the roles of the following in a criminal trial:

   (a) DPP

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   (b) defence counsel

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   (c) defendant

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   (d) judge

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(e) witnesses

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(f) jury

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2. Outline three procedures in the trial stage of a criminal trial for an indictable offence.

(a) .. ..

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(b) .. ..

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(c) .. ..

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Post-trial stage

The trial judge conducts a **sentence hearing** to hear submissions from the DPP and defence as well as to consider a victim's impact statement.

The DPP will submit all of the facts they believe the court should consider when determining a sentence. This could include a summary of the defendant's criminal record.

The defence will make submissions aimed at minimising the likely penalty.

The victims of a crime have a right to read a prepared statement (or have this statement read for them) at the sentencing hearing while the prisoner is sitting in the dock. The intention of the victim impact statement is to highlight the effect the crime has had on the victims. This is the opportunity for victims to influence the judge in the nature and extent of the sentence ultimately imposed.

If a custodial sentence is likely, the judge may order pre-sentence reports (e.g. psychiatric) to assist them in imposing a penalty which takes into account the rights and circumstances of the defendant and the need to meet the standards expected of the community regarding punishment and deterrence.

The sanction is not usually determined at the sentence hearing. The judge will adjourn the hearing to consider written submissions and reports. The judge sets the sentence and writes his or her sentencing report in private. At a later date, the trial judge will reconvene the hearing and read the sentencing judgment to the defendant in the court. These are posted on-line on the Courts Administration Authority (in South Australia) website usually within 24-48 hours.

The factors a judge must consider in a are prescribed in section 10 of the *Sentencing Act:*

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Sentencing Act

Section 10

A court in determining sentence for an offence, should have regard for such of the following matters as are relevant and known to the court:

(a) the circumstances of the offence;
(b) other offences that are to be taken into consideration;
(c) if the offence forms a part of a course of conduct consisting of a series of criminal acts of the same or a similar character — that course of conduct;
(d) the personal circumstances of any victim of the offence;
(e) any injury, loss or damage resulting from the offence;
(f) the degree to which the defendant has shown contrition for the offence—

  (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or

  (ii) in any other matter;

(g) if the defendant pleaded guilty to the charge of the offence—the fact;
(h) the degree to which the accused has co-operated in the investigation of the offence;
(i) the need to protect the community from the defendant's criminal acts;
(j) the deterrent effect any sentence under consideration may have on the defendant or other persons;
(k) the need to ensure that the defendant is adequately punished for the offence;
(l) the character, antecedents, age, means and physical or mental condition of the defendant;
(m) the rehabilitation of the defendant;
(n) the probable effect the sentence under consideration would have on dependents of the defendant;
(o) any other matter.

A **custodial sentence** will normally include two components: a head sentence and a non-parole period.

Head sentence is the period the prisoner will spend in gaol should the non-parole release period be denied by the Parole Board. For example, the head sentence for murder is a mandatory life imprisonment.

Non-parole period is the period of time the prisoner must serve in prison before being eligible to apply for parole. The judge is compelled to set a non-parole period with the head sentence. Any sentence of imprisonment will include discounts in accordance with legislative provisions around the timeliness of a plea and time already served. Other legislative provisions In South Australian law, specify a minimum non-parole period as four fifths of the head sentence.

A judge can impose a custodial sentence but **suspend** it on condition that the prisoner enters into a good behaviour bond. This means the sentence does not have to be served in prison, but if the prisoner breaks a condition of the bond the sentence will have to be served later.

Other **non-custodial sanctions** are possible such as fines, community service orders, home detentions and the seizure of property or assets gained by illegal means.

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Independent Activity

Using the relevant legislation and your understanding of the justice system, you need to determine a criminal sentence, and write sentencing remarks justifying your decision. You need to write your sentence based on the scenario below:

Scenario:

Jack Jackson, a 25 year-old Adelaide man, was arrested on 15th May, 2019 after failing a random road-side blood alcohol test. He returned a reading of .098. It was later discovered he was wanted for questioning regarding an assault he had been a part of in the city earlier that evening. Jack was accused of coward-punching a 22 year-old man who pushed past him to get to the bar in a well-known city nightclub. Against all odds, the 22 year-old man survived; however, he has been left with an acquired brain injury.

Jack was charged with a Category 2 DUI, resisting arrest, and recklessly causing serious harm. He was found guilty of all three offences in the Adelaide District Court by jury trial.

In sentencing submissions, Jack's lawyer says there were several mitigating circumstances the judge needed to take into consideration when sentencing. He lives with his mother and his three younger siblings and is the sole income earner for the household as his mother is unable to work. He had been drinking on the night as his girlfriend of four years had suddenly ended their relationship, and he was very upset. He has no prior criminal history, and his boss says he is an exemplary worker and would continue to employ him after the trial. Jack has apologised to the victim and the victim's family and has donated a small sum of money to the rehabilitation hospital where his victim was being treated.

Task Requirements:

- Must be a minimum of 200 words in length (both parts combined)
- You must use the legal sentencing considerations from the Sentencing Act 2017 (SA)
- You must reference the appropriate legislation in your sentencing remarks:
  - DUI – Road Traffic Act 1961 (SA) s47b
  - Resisting Arrest – Summary Offences Act 1953 (SA) – s6
  - Recklessly Causing Harm – Criminal Law Consolidation Act 1935 (SA) – s23

The convicted person or the DPP has the **right to appeal** the guilty verdict and/or the sentence on the grounds of law and fact in an appellate court – the Court of Criminal Appeal. The final appeal lies to the Full Court of the High Court by special leave. This is an example of judicial review.

The appellate court will review the conduct of the trial to decide if the decisions of the judge and/or the verdict of jury were consistent with the principles enshrined in a fair trial. Most importantly, did the accused receive natural justice? There is not a retrial. Witnesses are not called, and evidence is not re-examined in the same manner that the jury would have done.

There are two grounds for appeal:

Issues of law

These issues pertain to the trial judge's application of the law. The DPP could submit the judge erred in not allowing relevant evidence to be admitted. By contrast, the defence could submit certain evidence should have been excluded.

Issues of fact

These issues pertain to the weighting and application of evidence to arrive at the verdict or the severity of the sentence. Defence could submit it was excessive given the circumstances.

There are two possible outcomes of the appellate court:

Find for the appellant

If the defence was appealing a guilty verdict and certain errors in the judge's conduct of the trial were held to have occurred, the Court could quash the verdict and order a retrial. The Court could also increase or decrease the sentence or reverse the precedent as submitted by the appellant. (In the case of *Gassy v The Queen* [2008] HCA 18, the court ordered a re-trial because they held the trial judge had erred in her directions to the jury as the nature of her remarks inferred a degree of bias against the accused).

Find for the respondent

The Court could dismiss the appeal outright and let the trial or sentencing decisions stand.

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It is possible for an appeal to proceed to the appellate jurisdiction of the High Court of Australia. This is only possible when leave (permission) is granted by the High Court, in which case the appeal will be decided by five Justices sitting in the Full Court of the High Court. Its decision is final, and no other appeals are possible.

Short Answer Questions

1. Outline the procedures of a sentencing hearing.

2. Outline factors considered when the judge determines a sentence.

3. Imprisonment is one sanction a judge might impose during sentencing. Identify two other types of sanctions.

   (a)

   (b)

4. Why is the right of appeal a fundamental feature of the adversary system?

5. Which courts can hear appeals in serious indictable offence cases?

6. What are the two categories of grounds upon which to lodge an appeal?

Independent Activity

Search for and find a case decided on appeal in the High Court of Australia. What was the basis for the appeal? What did the court find? Give a summary of the case.

Resolving a Civil Dispute

The civil justice system in Australia embraces a number of fundamental principles designed to protect a citizen's civil, economic and legal rights.

A civil dispute is created when one autonomous legal party (a person or organisation) commits a civil wrong which interferes with the rights or interests of another party. If the wrongdoer will not admit liability, or come to a compromise, then the aggrieved party can seek to resolve the dispute in a civil court. A court will bring a finality to a civil dispute by making a legally enforceable judgment.

At a Glance

Resolving a Civil Dispute

- The civil court resolution process is subject to the fundamental principles of finality, procedural fairness, public accountability and disclosure.
- Civil disputes can be resolved by alternative dispute resolution mechanisms at any time.
- If ADR fails, a plaintiff can initiate formal civil proceedings at a court registry and be willing to present a case before an independent judge in an adversarial trial setting.
- Civil disputes are resolved in quite defined stages that attempt to encourage out-of-court settlements.
- The pre-trial stage commences when a plaintiff lodges a statement of claim at a court registry.
- The pleadings includes the formal exchange of documentary evidence and information between the two parties.
- Civil cases in South Australia are subject to case-flow management where a judge monitors the progress of the case.
- A trial is conducted by an independent judge if an out-of-court settlement cannot be reached. The parties accept the responsibility to present their own cases.
- At the conclusion of the trial, the judge enters the judgment, awards damages and set costs according to statutory and common law rules.
- A plaintiff can have the judgment executed by further court proceedings if the defendant does not pay the damages.
- Both parties have the right to appeal the trial decision in an appellate court.

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The Principles of Civil Law

The resolution principle

Civil law is designed to provide lawful mechanisms to resolve civil disputes between private parties. Its principal objective is to compensate people for private wrongs committed against them. It is *not* designed to punish people for their actions.

The principle of finality—*res judicata*

This principle prescribes that in the public interest, once a court proceeding has concluded and a decision is reached, that is the end of litigation and no further action can be taken on the same matter, apart from an appeal. Herein lies the fundamental role of the civil justice system—to bring about legal conclusions and just outcomes simultaneously so civil laws can play their role in the overall achievement of social cohesion.

The principle of procedural fairness

Alternatively referred to as 'natural justice', this principle means the litigants will have their case decided purely on its merits and in accordance with applicable law. Each party will have a fair and equal opportunity to put his or her case to an independent judge and to be afforded the opportunity to have the decision tested on appeal in a higher court.

The principle of procedural privity

In general terms, this principle dictates only the parties with a direct interest in a case can contest the matter in a court. Unless allowed by statute, the common law precludes third parties from being involved in civil matters of no direct interest to them.

The adversarial principle

This principle places the decision to take a matter for adjudication in court solely into the hands of the parties, rather than the judge or any other agent of the state. The plaintiff is at liberty to commence and cease litigation at will, although there can be legal consequences, such as costs ordered against him or her, if a matter is arbitrarily altered to the detriment of a defendant.

The principle of public accountability

It is deemed appropriate and advisable that matters are decided in open court so the community knows the rights that have been established by the courts. This principle improves the public's confidence in the administration of civil justice by the courts.

The principle of disclosure

The parties are obliged to define their claim and defence in the pleadings. The discovery phase in the preparation for trial is important because it fosters fairness, openness and equality, as well as assisting to hasten the trial procedure to bring about a timely and just conclusion.

Judges must **give reasons** for their decisions (according to common law). This is important because it ensures the judge has considered the evidence tended by the parties and their submissions in law, and it allows the parties to identify possible errors in law or logic needing to be addressed on appeal.

Usually, costs are awarded following the trial. These are determined by the judge. In simple terms, it results in the unsuccessful party paying the legal costs of the successful party. This rule was adopted to encourage out-of-court settlements, as in some cases the costs could exceed any award for damages. It also serves to deter speculative and vexatious litigation which has little chance of success.

Thinking Outside the Box:

Can you think of any instances when judges should not give reasons for their decisions?

Resolving a Civil Dispute

At a Glance

An Overview of the Civil Justice System

The stages:

Pre-trial Stage

- Civil action lodged
- Statement of Claim and summons
- Defence response or Statement of Defence
- Discovery
- Formal pleadings
- Pre-trial conference

Trial Stage

- Plaintiff's case
- Defendant's case
- Closing addresses
- Judge's summary
- Civil trial outcome

Post-trial Stage

- Legal costs
- Execution or enforcement of a judgment
- Appeal—Judicial Review

Pre-trial Stage

An aggrieved party may contact the other party, outlining the nature of the grievance and the remedy they want to finalise the matter. In a formal sense, a civil dispute commences when a civil action is lodged at a civil court registry. The plaintiff serves a Statement of Claim – which must include the nature of the claim and the remedy being sought – and a summons on the defendant.

The defendant can respond by admitting liability and settling, or by serving a Statement of Defence and a Notice of Appearance on the plaintiff.

The parties must disclose all relevant legal documents, which can be registered and served on the opposing party to have specific information revealed (called Discoveries).

When both parties are satisfied they are ready for trial formal documentation is exchanged outlining all the pleadings, which are the statements of claim and defence by the plaintiff and defendant respectively to identify and define the issues in dispute.

The South Australian case management system provides for series of pre-trial meetings (or conferences) by a judicial officer to monitor the progress of the case. The purpose of these conferences is to speed up the pre-trial process by removing all issues not in dispute and having all documentary evidence openly disclosed so the case can be resolved using ADR if possible or proceed as quickly as possible to trial.

Should the parties go to trial, a trial date will be set, and the parties will summons their witnesses to the court. A copy of the pleadings is given to the trial judge and a copy is retained by the parties. The parties can only call evidence relevant to the pleadings.

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Short Answer Questions

1. What are the pleadings and what are their purpose?

2. What role does the trial judge perform in the pre-trial stage?

3. Outline the pre-trial stage of a civil dispute. 10+ lines / 200 words

Trial Stage

A trial is conducted in accordance with the adversarial system. In South Australia, the defendant does not have a right to trial by jury, so the judge is the determiner of fact.

The plaintiff has the burden to prove that the defendant committed the private wrong and is liable to provide a civil remedy; they present their case first. The plaintiff opens their case by summarising the evidence and the law applicable to it. The plaintiff then calls and examines witnesses and the defendant can cross-examine the plaintiff's witnesses. The plaintiff is allowed to re-examine witnesses if necessary.

The defendant's case follows a similar format to the plaintiff's case.

Having presented their cases, the parties summarise their cases to the judge in law and fact in the form of their closing addresses.

In the judge's summary, the judge clarifies the issues with the parties before adjourning the trial to write the judgment. A judge may give reasons *ex tempore* if a matter is urgent or relatively straightforward.

The judge can only find the defendant liable in accordance with the civil standard of proof, the balance of probabilities. The judge can find the case is proven and the defendant is held liable to provide a civil remedy, or the case is not proven and the case against the defendant is dismissed. They can also apportion liability between the parties. For example, in a negligence case the judge could find there was contributory negligence. The defendant could be held 60% liable and the plaintiff 40%, so if damages was set at $100,000, the defendant would only have to pay $60,000.

At the end of the trial, the judge hears submissions regarding the appropriate civil remedy, should the judge decide that the defendant is liable to provide a civil remedy. The judge will take into account a number of factors when deciding the level of damages. These factors are outlined in the *Civil Liability Act 1936* (SA). Special damages are the claims for economic loss that can be quantified in dollar terms. They are designed to reimburse the plaintiff for financial expenses incurred in putting him or her back into the same position had the civil wrong not occurred. They include medical and hospital expenses or repairs to property. General damages are the claims for non-economic loss that cannot be quantified in dollar terms. They are designed to compensate a plaintiff for conditions such as pain and suffering, nervous shock or a loss of quality of life.

Short Answer Questions

1. Briefly explain the roles of the following in a criminal trial:

   (a) Plaintiff

   ..

   ..

   ..

   ..

   (b) Defendant

   ..

   ..

   ..

   ..

   (c) Judge

   ..

   ..

   ..

   ..

2. Who has the burden of proof and what is the standard of proof at a civil trial?

   ..

   ..

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3. Outline the general rules of procedure the judge must administer in civil proceedings.

4. What decisions can the judge make regarding liability?

5. What factors does a judge consider when determining the level of damages?

Post-trial Stage

Legal argument about costs and interest occurs in this stage. As a normal common law rule, the unsuccessful party pays the legal costs of the successful party, although this rule is subject to statutory conditions and the judge's discretion. The Court can refuse an application for costs if the case could have been appropriately decided in a lower court.

A favourable judgment by a court is no guarantee the plaintiff will receive the damages awarded. For a variety of reasons, the defendant may not pay. This could occur if the defendant has no assets, the defendant has gone bankrupt or simply refuses to pay. So, the plaintiff may have to take further court proceedings to have the judgment executed. Possible avenues include a warrant for sale (the seizing and selling of assets) and a garnishee order (a prescribed sum of money is withdrawn from an employee's pay each period by the employer and submitted to the plaintiff).

Both parties have a right to appeal the decision of the trial judge in an appellate court. Civil trials conducted in the Magistrates Court usually go to a single Justice in the Supreme Court. Appeals from the District Court or Supreme Court go to the Full Court of the Supreme Court. In some instances, special leave can be granted to have an appeal heard in the Full Court of the High Court.

The grounds for an appeal can be on an issue of fact, which could include an argument over the weighting of evidence or the level of damages awarded, and/or an issue of law, which could pertain to the application of the rules of evidence or the precedent the court chose to adopt.

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Short Answer Questions

1. Outline how legal costs are usually determined in civil cases.

2. What can the plaintiff do if the defendant does not pay the damages awarded by the court?

3. What rights do the parties have if they are dissatisfied with the decision of the trial court?

4. Outline the roles of the judge in a civil trial.

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Long Answer Questions

1. Explain *three* differences – other than those in the pre-trial stage – between criminal trials and civil trials.

(i)

(ii)

(iii)

I Independent Activity

Using whatever means are at your disposal, find out the claims (in terms of dollars) which determine in which court a civil will be heard.

Magistrates Court Minor Claims: less than $

Magistrates Court General Claims: $ to $

District Court: more than $

Supreme Court: more than $

C Collaborative Activity

In small groups, create a scenario involving a civil dispute. Assume it cannot be resolved without trial. Explain how the case would progress through the stages and how it would inevitably be resolved. Present your scenario to the class as an oral presentation of no more than 5 minutes in length.

Essay Questions

'In Australia, disputes are resolved more fairly and equitably in the civil justice system than they are in the criminal justice system'.

Using examples, evaluate this statement.

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2.3 Underlying Principles of Criminal and Civil Law

SACE Considerations for Chapter 2.3

Big Questions

- What is justice?
- Is justice accessible?
- Do common understandings of fairness have a place in the legal system?
- Is being fair and lawful the same thing?

Competing Tensions

- Fairness and Efficiency
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Question

- What are the key principles of criminal and civil law(s)?

Underlying Principles of the Criminal Law System

Independence of the Judiciary

As mentioned in several sections of this workbook previously, the independence of the judiciary is a key element in both the criminal and civil law systems. It is imperative the courts are seen to be operating separately from the other branches of government, so the public have faith that the system is operating in the way that it is intended. Judges must not have any interest in the outcome of their case, with the exception of ensuring it has been held according to the rules and procedures of the adversary system of trial.

For more on the importance of the independence of the judiciary, students can revisit Chapter 1.5 and Chapter 1.8.

Presumption of innocence

In the adversary system, all defendants have the **presumption of innocence**. This means all defendants are assumed to be innocent of the charges made against them, putting the burden to prove guilt on the prosecution. Trials are subsequently held to attempt to prove to a judge or jury the defendant is in fact guilty of the crime beyond reasonable doubt. People cannot be punished for a crime if they have not been found guilty of it before a court.

Australia's constitution does not have a specific protection of the presumption of innocence, but it can be argued the principle is strongly enshrined in common law. It has also been stated by several High Court justices the presumption of innocence could be considered an element of a fair trial in Australia under common law. Additionally, the government is also a signatory to the seven main human and civil rights treaties, which cover these rights as well.

The presumption of innocence is protected by the *International Convention on Civil and Political Rights* (ICCPR) in Article 14(2), "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty, according to law." However, Article 4 of the ICCPR has a derogation clause. This means the signatory country (in this case, Australia), has the ability to suspend or restrict any of the clauses in the treaty, but only in emergency situations, and only temporarily. It is also a human right, as outlined in the Universal Declaration of Human Rights.

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Rights of the accused

In order to ensure the defendant's presumption of innocence is upheld, and they have access to a fair trial and natural justice, the accused is afforded the following rights:

- The presumption of innocence
- The right to remain silent
- The right to challenge the admissibility of evidence in a trial
- The right to cross-examine the prosecution's witnesses
- The right to a trial by jury
- Adherence of all parties to the strict rules of evidence and procedure in order to hold a fair trial (for example, the right to have access to all the prosecutor's evidence against them before a trial so they can prepare a defence).
- The principle of double jeopardy
- The right to be heard
- The right to legal representation, if they wish to have it.

Some of these rights are found in legislation, but many are simply found in common law.

Right to silence

All defendants have the **right to remain silent** in almost all circumstances. Apart from answering questions from police to establish identity, defendants are not required to give arresting officers or police any other information about any offences for which they are accused. You are only required to provide the police with your name and address if they suspect you have been involved in the commission of a crime, or in the process of committing a crime, or if they believe you are able to assist them in investigating an offence (*Summary Offences Act 1953 SA s74A)*. Police also have the right to seek this information of the driver or passenger of a vehicle (s74AB).

Subsequently, refusing to give your name and address to a police officer is an offence under s74A (3) of the Act.

A defendant cannot be compelled to give evidence in a criminal trial, in case they accidentally incriminate themselves.

Double jeopardy

The principle of **double jeopardy** states a person should not be at risk of being convicted twice for the same offence, and therefore being at risk of being punished twice for the same criminal incident. It is a principle which can be traced all the way back to Greek and Roman legal practises and it has been entrenched in English common law since the 1660s. Protection against double jeopardy, and double punishment currently exists under international law. The *International Covenant of Political and Civil Rights* (ICCPR) states in Article 14 (7) that, "no one shall be liable to be tried or punished again for an offence which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." Currently, Australians are protected against double jeopardy, under s4C of the *Crimes Act 1914 (Cth)*.

Initially, under state double jeopardy laws in Australia, if someone was tried, and then acquitted of an offence, they could not be brought before the courts again for that incident. However, due to several high-profile cases which resulted in unjust outcomes, a Council of Australian Governments (COAG) meeting in 2007 drafted and recommended changes to double jeopardy laws around the country. Individual states have taken different courses of action in regards to these recommendations.

There are several high-profile cases around Australia which highlight the different issues surrounding double jeopardy and its application in Australia.

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Case Example – Pearce v The Queen [1998] HCA 57; 194 CLR 610

This is a frequently cited case from the High Court of Australia in regards to the principle of double jeopardy and sentencing practises. The element of double jeopardy considered in this case is the element of double punishment.

The case originated in NSW, where Mr Pearce was convicted of multiple offences stemming from the same incident, where he broke into a house, and then seriously assaulted the people living inside it. Mr Pearce was convicted of the following offences:

- Maliciously inflicting grievous bodily harm with intent to do the victim grievous bodily harm; and
- Breaking and entering the house of the victim, and while inside, inflicting grievous bodily harm on him.

These were counts 9 and 10 of the charges against Mr Pearce under the *Crimes Act 1900 (NSW)*.

When it came to sentencing, the judge gave him two concurrent sentences for two of the offences, but chose to sentence him cumulatively for the other. Mr Pearce initially challenged his sentence in NSW, and then again in the High Court of Australia, stating that sentencing him for his offending in this way was contrary to the double jeopardy principle.

In the majority opinion written by Justices McHugh, Hayne and Callinan, they discuss the principle of double jeopardy:

"The expression "double jeopardy" is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of autrefois acquit and autrefois convict; sometimes it is used to encompass what it said to be a wider principle that no one should be "punished again for the same matter". Further, "double jeopardy" is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment." (Paragraph 9)

When discussing the application of double jeopardy on Mr Pearce's case, they stated:

"To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means the offences overlap. To punish an offender twice if conduct in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just desserts." (Paragraph 40)

The High Court determined that as two of the charges that Mr Pearce was convicted of overlapped in nature, he was technically being punished twice for the same offence, and therefore, his sentence was in breach of the double jeopardy principle.

Teachers and students can read the judgment in full at: **https://jade.io/article/68081**

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Case Example – R v Carroll [2002] HCA 55; 213 CLR 635

In 1985, Raymond John Carroll was convicted by a jury of the murder of an infant, Deidre Kennedy. Mr Carroll appealed this verdict in the Queensland Court of Appeal, and the court found on the evidence, the jury would not have been able to make their finding beyond a reasonable doubt. The Court overturned the conviction and ordered Mr Carroll be acquitted.

In 1999, Queensland police had gathered new evidence against Mr Carroll. As they could not charge him again with murder, they chose to charge Mr Carroll with perjury, stating he had perjured himself in his original trial by claiming he didn't kill Deidre. Due to the nature of the charges, the trial covered most of the evidence presented in the first trial, in addition to the new evidence. Mr Carroll was convicted of perjury by a jury.

Mr Carroll appealed his conviction again to the Queensland Court of Appeal. The appeal court upheld his appeal, stating that due to the nature of the trial, it was effectively a re-trial of the intial murder trial, and therefore, in contravention of double jeopardy principles. The prosecutors sought special leave to appeal this decision to the High Court of Australia.

The High Court determined that while the leave to appeal should be granted, the appeal itself should be dismissed, with similar reasoning to the Queensland Court of Appeal in regard to the double jeopardy principle.

The court additionally stated,

"It is an abuse of process for the Crown to charge a person with an offence of perjury when proof of the charge necessarily contradicts or tends to undermine an acquittal of the accused in respect to another criminal charge. A perjury charge that has that effect is an abuse of process even if the evidence supporting the charge is different from the evidence that supported the prosecution case in respect of the charge on which the accused was acquitted." (Paragraph 118)

Teachers and students can read the judgment in full at: **https://jade.io/article/68367**

Double jeopardy in South Australia

The law surrounding the limitations and usage of double jeopardy in South Australia can be found in the *Criminal Procedure Act 1921 (SA)* in sections 141-148.

These changes effectively mean double jeopardy no longer applies to serious indictable offences such as murder, manslaughter, aggravated robbery amongst others, if certain legislated conditions can be met. This part of the Act also outlines the conditions under which someone can be retried for a crime they have been previously acquitted. They are,

- If the acquittal was tainted (s146 (1)(a))
- If fresh and compelling evidence is found against the acquitted person in relation to the offence (s147 (1)(a))

Similarly, under the *Acts Interpretation Act 1915 (SA)*, s50 states that an offender, "is not liable to be punished twice for the same offence."

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Independent Activity

Double Jeopardy Reform

Examine the double jeopardy limitations in the *Criminal Procedure Act 1921 (SA) s141-148*, and answer the questions below.

What are the benefits to allowing appeals and retrials from acquittals in these two limited circumstances?

What limitations or problems can you identify by only allowing appeals and retrials after acquittals in these circumstances?

Choose one other Australian state or territory, and look up their double jeopardy laws. Complete the table below:

State/territory selected:

Similarities in double jeopardy laws	Differences in double jeopardy laws

How might double jeopardy laws in your state or territory be improved? Explain.

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Underlying Principles of the Civil Law System

There are several key principles underpinning the civil justice system in Australia, in order to protect the legal, economic and civil rights of citizens.

The resolution principle

The civil law system is designed to facilitate the resolution of a disagreement between two private parties. The civil system is not designed to punish people, simply allow people to seek compensation if they can prove their rights have been infringed by another party.

The principle of finality

Similar in nature to the feature above, the principle of finality is intended to resolve a dispute and end the conflict. The finality principle means that once the matter has been heard by the court, it cannot be heard again, except for an appeal. This principle allows for just outcomes as the issue will reach a resolution, and it cannot be repeatedly revisited over time. This allows parties an opportunity to seek justice, but to not have their legal issues follow them repeatedly.

Procedural fairness

This principle is related to judicial independence, and the rules of evidence and procedure. This principle is the idea a judge will award a case based solely on the merits of the case and strength of evidence and argument. This principle can also be known as natural justice and is also a key element of the criminal law system.

Procedural privity

This principle only allows people with a direct interest in the case to be involved with its passage through the courts. Third parties with no direct hand in the case or outcome are not allowed to be party to the case.

The adversarial principle

This principle states it is the responsibility of the party to bring a matter to the court and put forward their case. The judge or third party do not have any legal responsibility related to the case itself.

Principle of public accountability

Courts are open to the public in order for the public to see that justice is being done. By allowing the public to view the courts and proceedings, the public can put trust in the system as they can see it is working the way that it is supposed to.

The principle of disclosure

Both parties must disclose the full extent of their claim and defence in the pleadings stage. Both parties are obligated in civil proceedings to provide each other with all relevant information in the early stages of the dispute resolution process; having all parties on the same page and with all information allows for the parties to attempt to resolve the disagreement as quickly as possible.

Obligation to give reasons

Common law demands upon judges giving reasons for their decisions. This proves a judge has considered all relevant evidence when determining the outcome of the case, and also allows the parties to determine whether an error of law has been made. This then allows for an appeal.

The incidence of costs

Normally, costs follow after the trial. This typically means the party which loses will pay their own legal costs, as well as the costs for the successful party. This condition exists to encourage people to settle their cases outside of court, to avoid potentially having to pay all the costs involved in the trial. In South Australia, there can also be financial penalties for rejecting a reasonable offer made before a trial. This can also serve as an effective deterrent to cases that are likely to be unsuccessful if pursued through court.

However, this rule is not followed by courts in the Northern Territory. Section 131 of the *Northern Territory Civil and Administrative Tribunal Act 2014* states parties must bear all of their own costs, with a couple minor exceptions.

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Helpful online resources

To find out more about costs in civil trials

In South Australia, information about costs and penalties that are incurred in a civil trial can be found on the Courts SA website:

http://www.courts.sa.gov.au/RepresentYourself/CivilClaims/GeneralClaim/Pages/Legal-Costs.aspx

In the Northern Territory, information about costs and penalties that are incurred in a civil trial can be found here:

https://ntcat.nt.gov.au/after-ntcat/costs

End of Chapter Activities

English Jurist William Blackstone (1723-1780) is famous for his statement,

"It is better that ten guilty persons escape than that one innocent suffer"

Written in his work, *Commentaries on the Laws of England.*

How do you think this belief has been applied to the Australian adversary system? Consider all the elements of the adversary system you have learned so far and consider which elements of the system support this belief. Outline them below.

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Long Answer Questions

Identify the similarities between the underlying principles of criminal and civil law.

Identify the differences between the underlying principles of criminal and civil law.

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Essay Questions

Students are to choose one question from the selection below, and write an essay response. Students are reminded to:

- Consider both sides of the argument
- Consider the quality of the sources used to write their essay response
- Consider multiple perspectives

1. 'The practise of awarding costs to the successful party to a trial deters poorer members of the community with legitimate claims from pursuing legal action and should be reformed.' Using examples, evaluate this statement.
2. 'Double jeopardy laws need to be made consistent across Australia.' Using examples, evaluate this statement
3. 'The rights of an accused give them an unfair advantage during an adversary trial.' Using examples, evaluate this statement.

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2.4 Inquisitorial Systems

SACE Considerations for Chapter 2.4

Big Questions

- What is justice?
- Is justice accessible?
- Is justice reliant on the abilities of lawyers/interpretation of judges?
- Would fairness be better achieved by another justice system?
- Are the rules of evidence too strict to allow just outcomes?
- Is the adversarial system or inquisitorial system of trial more likely to result in just outcomes?

Competing Tensions

- Fairness and Efficiency
- Certainty and flexibility

Inquiry Question

- How effective is the adversary system of trial compared to inquisitorial systems?

Reminder

The key features of the adversary system:

- Burden and standard of proof
- Rule of law
- Role of the judge
- Role of parties, witnesses and other participants, including juries
- Rules of evidence and procedure

At a Glance

Features of Inquisitorial Systems

The key features of inquisitorial systems:

- Burden and standard of proof
- Rule of law
- Role of the judge
- Rights of the accused
- Role of legal representation
- Collection of evidence
- The trial
- Rules of evidence
- Role of parties, witnesses and other participants, including juries
- Rules of evidence and procedure

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At a Glance

Inquisitorial Systems

- Judges take an active and direct role in the resolution of legal disputes
- The judge maintains a dossier of the case, selects the avenues of investigation to pursue, and decides when enough evidence has been collected to bring the accused to trial
- Civil and criminal cases can be resolved in the same proceeding
- Accused persons have similar legal rights, except they cannot control the course of their case at the trial
- Broader rules of evidence to be used to ascertain the truth to reach a just outcome
- The Coroners Court, tribunals and the Minor Claims Court of the Magistrates Court use elements of the inquisitorial system

Inquisitorial systems exist in the non-English civil law nations in Europe, Africa, Asia and South America.

In inquisitorial systems the judge plays an active role in all aspects of the dispute resolution, from the collection of evidence and examination of witnesses to the determination of guilt, and the imposition of a sanction.

Judges in inquisitorial systems perform an adjudicating, investigating and examination role. While a judge does play a more active role in the resolution process, inquisitorial judges are still independent of the legislature and the executive, and impartial to the accused.

Elements of both adversary and inquisitorial systems can, however, be found in both common law and civil law countries such as Australia. For example, the Coroners Court, Minor Claims Court (part of the Magistrates Court) and tribunals tend to be inquisitorial in nature, in that the arbiter takes a more investigative role and there is often no legal representation permitted.

While no two inquisitorial systems are exactly the same, there are common core elements which can be contrasted with Australia's adversary system.

Core Elements of Inquisitorial Systems

General nature of inquisitorial systems

The word 'inquisitorial' comes from the word 'inquire', which means to seek the truth by discussion and investigation. When an offence is reported in inquisitorial systems, the state appoints a judicial officer (similar to a magistrate or judge in the adversary system) to actively investigate the offence. This is different to the adversary system where the judge must remain independent and be impartial to the two sides, who collect their own evidence and present it to the court.

Role of the judge

- The judge controls the investigation of the case and the examination of witnesses at the trial. The judge has two roles: to control the investigation of the case, by gathering evidence (together with the police) and giving advice on points of law (the procureur)
- To supervise the case prior to and at the trial. During the trial, the judge will be in charge of the examination and will bring out the truth by questioning the witnesses and producing other evidence.

For example, in the French inquisitorial system there are two judges. An investigating judge coordinates the police to collect evidence, find and interrogate witnesses and prepare a case for trial. The investigating judge will also make a decision on whether a case exists to commit the accused to trial, where a second judge will conduct proceedings using the dossier prepared by the investigating judge.

Rights of the accused

While the accused does have the right to remain silent, and he or she is considered innocent until proved guilty at a trial, they are expected to answer questions directed at them by the investigating judge and the trial judge. A resistance to answer questions would paint the accused in a poor light in the eyes of the judge.

Role of legal representation

The legal representatives of the accused help the judge to find the truth. While they do not get the opportunity to present their case as they do in the adversary system, the defence can ask for certain evidence be included in the dossier. At the trial, the defence counsel can question witnesses under the direction of the judge. The defence lawyer's main role is to ensure his or her client gets a fair trial by carefully clarifying with the trial judge exactly what inferences can be drawn from the evidence presented. However, legal representation is not essential as it is expected the judge will only seek the truth and an innocent person should have no fear of what evidence is uncovered.

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Collection of evidence

A dossier is kept by the examining judge which contains all of the evidence collected. It includes the written statements of all witnesses and the judge's perceptions of them. The accused will not be committed to trial until a very strong case – which can appear to be a strong presumption of guilt – exists. It is for this reason that observers from the common law countries believe the accused is considered guilty and has to prove his or her innocence at the trial.

The trial

While in the adversary system there is one continuous trial, in inquisitorial systems the trial can be paused until more evidence is collected. The trial is a public event where the judge allows evidence to be publicly examined so the community has confidence that justice is being done. A prosecutor may undertake the role of presenting the evidence to prove guilt, but a judge controls proceedings. The judge is impartial but does participate actively in the trial. The judge can question witnesses and request more evidence be presented to the court.

The trial concludes when a verdict is brought down by the judge. The verdicts of guilty and not guilty are essentially the same as in the adversary system; however, an intermediate verdict of 'charge not proven' exists. This means the accused may be released from the authority of the court but may at a later date be requested to stand trial again.

Rules of evidence

The system allows written statements, although witnesses are interrogated at the trial. The rules of evidence and procedure are not as strict as in the adversary system. The distinction between admissible or inadmissible evidence is less distinct. The main distinguishing factor is what evidence is relevant and what is not. For example, prior convictions, opinion, hearsay, illegally obtained evidence and character witnesses may be presented to the court.

Character evidence and past criminal records

Reports of the character, personality and past record of the accused in a criminal case are included in the dossier, and the investigating judge would generally have a thorough knowledge of the background of the accused. This information is available to the trial judge and if it is relevant it will be considered at the trial.

Witnesses

Witnesses are allowed to give their own version of the facts, without interruption by questions. That is, evidence can be given in the narrative form so that the truth does not have to be extracted by careful questioning. A witness's written statement is acceptable evidence whether he or she is examined orally at the trial or not.

Getting to the truth

The inquisitorial system is designed to get to the truth. The judge investigates the case to find out the truth. It is the responsibility of the judge to accept all evidence, whether it favours the prosecution or the accused.

Right of appeal

Judicial review exists but the grounds of appeal are much more restricted than in the adversary system. The court systems are arranged in a hierarchy so appeals are possible. Appeals are often on issues of fact, such as whether the correct inferences were drawn from the evidence provided by the witnesses at the trial.

Civil claims

It is possible for a trial judge to decide a civil claim at the trial if it arose from the same incident.

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Short Answer Questions

1. Outline the roles of the following in the inquisitorial system:
   - inquisitorial judge
   - the prosecution
   - defendant

2. Why might poorer sections of the community support the inquisitorial system in preference to the adversary system?

3. Why are there likely to be fewer appeals in an inquisitorial system?

C Collaborative Activity

In small groups, select a country (for example, France) that uses the inquisitorial system.

Research the specifics of how their system operates, including:

- The role of the investigating judge
- The role of the judge at trial
- Rules of evidence and procedure

Present your findings to the class as a multimodal presentation.

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Independent Activity

Using dot points, complete the following comparative box

Feature	Adversary System	Inquisitorial System
Burden of proof		
Standard of proof		
Rule of law		
Investigation		
Rights of the accused		
Role of legal representation		
Role of the judge		
The trial		
Rules of evidence		
Rules of procedure		
Roles of the parties		
Roles of witnesses and other procedures		
Role of juries		

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Short Answer Question

What are the main differences between the inquisitorial system and the adversary system?

Evaluation of the Inquisitorial System

C Collaborative Activity

As a class, discuss each of the points below and evaluate each of them as both positives and negatives of inquisitorial systems:

- More active role of the judge
- No jury system – meaning the use of lay judges
- Reduced judicial independence due to increased role of judge
- Relaxed rules of evidence and procedure
- Reduced party control
- Continuity of trial
- Arguably fewer rights for the defendant

Short Answer Question

1. Outline two types of evidence that might be admissible in the inquisitorial system of trial but inadmissible in the adversary system of trial.

2. Explain one difference between the adversary system and the inquisitorial system during the pre-trial stage of a criminal dispute.

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Long Answer Questions

1. Discuss whether or not the role of the judge in the inquisitorial system leads to just outcomes in the resolution of criminal disputes.

2. Identify three features of inquisitorial systems and explain how *each* feature could improve the Australian justice system.

3. Explain *three* weakness of inquisitorial systems.

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4. Discuss whether or not the accused is treated more fairly in the inquisitorial system of trial or the adversary system of trial.

Essay Questions

"Inquisitorial systems are more effective at delivering just outcomes than the adversary system."

Using examples, evaluate this statement.

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2.5 Diverse Groups, Access to Justice, and the Adversary System

SACE Considerations for Chapter 2.5

Big Questions

- What is justice?
- Is justice accessible?
- Do courts resolve disputes fairly? Fair for whom?
- Would fairness be better achieved by another justice system?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities

Inquiry Question

- How does the adversary system of trial protect the rights of groups and individuals in the community, including Aboriginal and Torres Strait Islanders?

Introduction

Ideally, in a system aiming to uphold the rule of law, all people would have equal access to the justice system and be able to trust they receive natural justice. Unfortunately, this is not always the case. Different groups do not always have equal access to justice and find themselves disadvantaged. This chapter focuses on some of these groups, and issues they face in Australia's adversary system.

- Aboriginal and Torres Strait Islanders
- Women and Children
- People with disabilities
- Refugees and Asylum seekers

Access to Justice for Aboriginal and Torres Strait Islander Peoples

Sadly, there are a multitude of issues facing Aboriginal and Torres Strait Islander Peoples in Australia's adversary system of trial. While the Australian legal system has attempted to address some of these issues, there is still significant room for improvement.

Conflict between the Australian Legal System and Indigenous Customary Law

Several High Court cases have confirmed there is no room for alternate legal systems in Australia, such as *Mabo v Queensland (No. 2) [1992]*, *Coe v Commonwealth [1979]*, and *Walker v Commonwealth [1994]*. In each of these cases, the High Court of Australia has determined all Aboriginal people are subject to the laws of their respective state and federal governments, regardless of native title or attempted sovereignty claims over the land in which they live and the customary law applicable in these places. So, where does this leave customary law?

There are several issues with attempting to recognise Aboriginal customary legal systems–the main one being, due to the nature and development of customary law, inconsistencies exist between states and communities, and it is incredibly difficult to codify.

With specific reference to customary law and the adversary system, there are several practical difficulties to consider:

- Does the customary law align with international human rights standards, and which body of law would be considered sovereign?
- When considering customary law in a trial, how does the judge determine which "version" of customary law to recognise and uphold, if the law has changed between generations or communities?

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- To include local and relevant customary law in a trial, would its inclusion be considered a question of fact in a trial, and therefore require witness testimony in court? (von Doussa, 2002).

This is not to say, however, the incorporation of customary law into the Australian legal system is impossible, simply just difficult, due to the very different nature of the two systems. However, changes to the law in 2006 and 2007 by the federal government limited the ability for courts to consider customary law during bail applications and sentencing. These changes can be found in the *Crimes Amendment (Bail and Sentencing) Act 2006 (Cth)* (which amended the *Crimes Act 1914 (Cth))*, and the *Bail Act 1982 (NT)*, which was altered by the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012 (Cth).* These changes are discussed further later in this chapter.

The Northern Territory Law Reform Committee published a report into the incorporation of Aboriginal customary law into the Australian legal system. While dated, it does give some interesting insight into different elements of customary law, and how it might be implemented across the different areas of the legal system, as well as clear recommendations for change.

Helpful online resources

The whole report can be accessed by following this link:

https://justice.nt.gov.au/__data/assets/pdf_file/0011/238619/ntlrc_final_report.pdf

Court System

"The existence of two systems of law side by side, the prevailing one and aboriginal customary law, with their very different attitudes to guilt and responsibility creates serious problems and the question of how far our laws should apply to aboriginals and how far their laws should be allowed to apply to them is controversial." Ngatayi v The Queen [1980], 147 CLR 1 14.

In Australia's court system, there are several key issues to be addressed, such as the language barrier, cultural differences, and the differences in the Australian legal system and Indigenous customary law.

One key area of the adversary system causing great difficulty is the language barrier. The inability of some Aboriginal court participants to speak English has created many difficulties in a system heavily reliant on spoken testimony and interrogatory questioning. A prime example of this issue was evident in the Queensland case, *R v Watt [2007]*. R v Watt was a sexual assault case, where the victim's native language was Wik Mungkan, and she did not speak English. A translator was provided, but due to the lack of translators who could speak this language, the translator was not sufficiently accredited. The victim struggled to communicate, even with the aid of the translator, with questions and answers not necessarily matching, and the judge in the case noted inconsistencies with the evidence; although it could not be ascertained whether those inconsistencies were due to issues with the language barrier. The defendant was acquitted of all charges.

A case with similar issues raised is *Ngatayi v The Queen [1980] HCA 18 147 CLR 1*. This is a significant Australian case many judges refer to as precedent when considering whether a defendant is fit for trial. Mr Ngatayi, a tribal Aboriginal (as described by court documents), was charged with the murder of Mr White, another Aboriginal man who lived in the same mission in Western Australia. He did not speak English, and upon his arraignment, pleaded guilty to murder through a translator. Mr Ngatayi's lawyers, however, asked this plea not be accepted, as Mr Ngatayi didn't understand the concept of a defence for a murder charge; he had been drunk at the time of the offending, and therefore, his lawyers argued, unable to form intent. However, under his knowledge of customary law, Mr Ngatayi refused to enter a not guilty plea in court, as he knew he had killed Mr White, and customary law stated he must take responsibility for his actions. A trial eventuated, after the court refused to accept his guilty plea, and Mr Ngatayi was convicted of murder by a jury, and sentenced to death. His lawyers appealed to the High Court, stating that Mr Ngatayi's inability to understand the law meant he was unable to provide a proper defence. However, the High Court stated since Mr Ngatayi had a 'not guilty' plea entered on his behalf, and went to a jury trial, the system worked as it was meant to, and his appeal was dismissed.

In his report, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System', the Honourable Justice Dean Mildren (of the Northern Territory Supreme Court of 1997) recommends the following changes to conduct at trials, in order to better cater for Aboriginal court participants –

1. The judge should give direction to a jury about the impact of translated testimony in court.
2. Judges should be more active during a trial to disallow questions which are "unfair"–mainly due to the complications arising from the language barrier. Mildren suggests questions which are: leading, 'either or'

questions, questions requiring a quantifiable time, or offensive questions (ie–referring to a deceased Aboriginal person by name, for example) should be disallowed.

3. Aboriginal people should not be required to give direct eye contact, as it is culturally considered to be rude or threatening.

4. The precedent of *Mooney v James [1949] VLR,* should be applied to potentially disallow cross-examination, if the aim is to introduce leading questions to the witness, due to the general concerns about language and the comprehension of the questions during a trial.

In addition to suggested changes to the adversary system, there are several urban 'Aboriginal Courts' around Australia which have been created to try and bridge the gap between Aboriginal culture and practise, and that of white Australians; the first being set up in Port Adelaide, in 1999 (however, this has now closed). This became known as the 'Nunga Court'. The nature of these courts meant each is slightly different in the way it is run, in order to suit the customs of the local Aboriginal communities they served. Additionally, while most Nunga Courts operate at Magistrates Court level, there has been the development of a Circle Court in NSW which hears some indictable offences. Circle sentencing practises were also employed in the District Court of South Australia for some matters.

Some key differences between Nunga Courts and the adversary system are:

- The inclusion of one or several Aboriginal Elders acting in a supervisory role with the presiding officer. They could be deliberately chosen to be the same gender as the defendant, or not. The Elder(s) may also comment on the behaviour of the defendant.
- Often, the Magistrate or Judge will sit at eye level to the defendant, rather than on a raised platform.
- Some courts arrange the room in a circle, with participants seated around the circle to encourage discussion. Others maintain a more traditional courtroom layout.
- In some instances, the court will choose to sit at an alternate location, rather than the local Magistrates Court building for example, circuit courts in regional locations.

While there is not a lot of research on the benefits of local Aboriginal courts, some of the advantages identified are increased community engagement, increased court attendance and better relationships between Aboriginal Peoples and the judiciary.

These changes in process have all been made to attempt to create a system better suited to the needs of Aboriginal Peoples and remove some of the key struggles faced in the adversary system. However, these changes are often local, and not offered universally where Aboriginal and Torres Strait Islander people reside.

Sentencing Practises

After being convicted of an offence under the adversary system of trial, an Aboringal person is sentenced under the same legislation as other offenders. However, it can be argued customary law should be considered when sentencing an Indigenous offender. There are different legal perspectives on this issue across the country.

In the ACT, legislation allows the courts to consider the offender's cultural background, if it is relevant, and in Queensland, if an offender is an Aboriginal or Torres Strait Islander, their cultural background also must be considered when sentencing, and a community leader may make submissions on an offender's behalf. In some instances, Aboriginal communities will hand down their own punishments for wrongdoing in addition to the Australian legal system. The South Australian case of Dudley Davey can be seen below as an example of this practise.

Legislative changes made in the early 2000s have forbidden customary law to be considered when sentencing an Indigenous person at federal level, and inside the Northern Territory. Changes made to the *Crimes Act 1914 (Cth)* stop the courts from considering customary law when determining sentencing in regard to factors that may lessen or aggravate the criminal offence the defendant has been convicted of, which is outlined in section 16A(2A). Additionally, s16A(2)(m) was repealed, which required courts to consider the cultural background of the offender when sentencing. While neither of these sections explicitly use the words "Indigenous" or "Aboriginal", these are the groups of people most affected by the change in the law.

Initially, these changes were made under the Howard Liberal Government in 2006, with the initial justification being the government was attempting to reduce the level of violence in Aboriginal and Torres Strait Islander communities. These changes to the Crimes Act were maintained in the Howard Government's *Northern Territory National Emergency Response Act 2007 (Cth)*, and again in the Gillard Labor Government's *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012 (Cth).* However, there is no substantial research to suggest these legislative changes have had the desired outcome.

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Case Example – Dudley Davey

In 2016, nurse Gayle Woodford attended an early morning call for help in the APY lands town of Fregon, where she was working. Dudley Davey, who had made the call, raped and murdered Mrs Woodford when she responded, and fled by stealing her ambulance.

Mr Davey was quickly apprehended and charged for his offending against Mrs Woodford. He eventually pleaded guilty to his crimes and was sentenced by the South Australian Supreme Court to a life sentence, with a 32-year non-parole period.

APY lands elder, George Murray, issued a statement at the time asking the Anagu people to consider punishment under Aboriginal customary law for Mr Davey, in addition to the punishment that would be imposed by the courts.

A community impact statement, written by the people of the APY lands, was read at Mr Davey's sentencing hearing. Their statement reflected that Mrs Woodford was a much-loved part of the Fregon community, and she would be sorely missed. The elders from this area stated that, "Dudley Davey will never be welcome on the APY lands… What Dudley done is not part of our culture."

Source(s): Dowdell, A 2016, *Murder of outback nurse Gayle Woodford leads to discussion about Aboriginal tribal law and payback.* Accessed on 15/12/2020 from: **https://www.adelaidenow.com.au/news/south-australia/murder-of-outback-nurse-gayle-woodford-leads-to-discussion-about-aboriginal-tribal-law-and-payback/news-story/6a9280b420317de64b879bfd6826489a**

Opie, R 2017, *Gayle Woodford murder: Dudley Davey 'will never be welcomed' back to APY lands.* Accessed on 15/12/2020, from: **https://www.abc.net.au/news/2017-06-05/gayle-woodford-murderer-dudley-davey-never-welcome-apy-lands/8591466**

2

Independent Activity

Case Study

Each of the cases listed below is of an Aboriginal offender who has been sentenced with customary law considered during the sentencing process.

Part A

1. Choose a case from the list below
2. Complete some research into the case, and outline the basic facts of the case, and the sentence handed down by the judge
3. Identify how customary law was included in the sentencing process

Cases for consideration:

- R v Goldsmith [1995] 65 SASR 373
- R v Gondarra [2005] NT Supreme Court
- R v Jadurin [1982] 7 A Crim R 182
- R v Bulmer [1986] 25 A Crim R 155

Independent Activity (continued)

Part B – Answer the following questions below

4. How did the application of customary law change the outcome of the sentence? Explain.

5. Did the application of customary law in this instance make the outcome of this trial fairer for the offender? Explain.

Jury Trials

In addition to being over-represented in the criminal justice and prison systems, Aboriginal people are under-represented on juries. There are several suggested reasons for this. The first is the number of Aboriginal people who are excluded during the compiling stage of a jury trial. They may be excluded due to the distance they live from the courts (and are therefore outside of a recognised jury district), and additionally, some Aboriginal people are excluded due to their criminal history. Secondly, relying on electoral rolls as the only source of jurors also excludes Aboriginal people if they have not enrolled to vote. Finally, peremptory challenges and challenges for cause also allow both parties to the trial to reject Aboriginal jurors from a trial.

Some additional barriers to Aboriginal people being empanelled into a jury can include an insufficient command of English, or a poor perception of the justice system, and a subsequent unwillingness to become involved.

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Report excerpts: *Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds.*

"Given that Indigenous defendants cannot expect a jury of Indigenous peers, can we expect Indigenous Australians to have confidence that they will receive a fair trial? ... Their challenges to the array of all-white juries pivot on the idea that there will be prejudice among these jurors, particularly where racial divides and tensions are relevant to the charges they face. The response by courts in key Australian cases has been to reject such challenges based on the notion that jury selection is racially blind and procedurally fair, irrespective of the constitutive character of the jury. They hold that to challenge an all-white jury constitutes a race-based intervention that interferes with good governance." (pg 27)

"The 'peers' that Indigenous Australians often face in a jury rarely come from the community in which they belong. For the institution of the jury to function as a moral conscience and for it to gain the confidence of Indigenous people, it is imperative that Indigenous people believe that the jury is capable of understanding their moral and ethical worldview and the circumstances in which they live. Otherwise, the jury lacks legitimacy for Indigenous defendants where a white jury is determining guilt or for Indigenous victims where the accused is white." (pg 29)

Source: Anthony, T. & Longman, C., 2017, Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds. *International Journal For Crime, Justice and Social Democracy*, 6(3): 25-46. DOI:10.5204/ijcjsd.v6i3.419.

C Collaborative Activity

Discussion – Competing Tensions

Consider the report excerpts in the box above and the **competing tensions** of **the empowered and the disempowered**, when discussing the questions below.

1. Who holds the power when empanelling a jury, and how does this impact the outcome of a trial?
2. Are the jury 'challenges' enough power for the defendant's legal representation to create a fair and unbiased jury?
3. Does the current power imbalance between the different court participants need to change?
4. Are there risks involved in changing the jury system with rules that only applied to Aboriginal Australians to resolve these issues?

Judicial challenges to all-white juries

There have been several cases across Australia where Aboriginal defendants have challenged all-white juries, stating they do not believe they would have a fair trial free from prejudice. These cases can be examined more closely on the following page.

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C Collaborative Activity

Jury Challenges

Part 1 – Individual: Choose one of the cases below to research. Identify the defendant, and the charges they were facing, and describe the circumstances below. Secondly, identify the reason the jury challenge was refused by the courts.

Cases:

- R v Smith [1981] 3 ALB 81
- Binge v Bennett [1988] 13 NSWLR 578
- R v Buzzacott [2004] ACTSC 89; 154 ACTR 37; 149 A Crim R 320

Outline the circumstances of the case, and the judge's reasoning for upholding an all-white jury:

Part 2 – Pair: Find another student in the class who researched a different case. Compare cases together, and write a short summary of the new case from your classmate, below:

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C Collaborative Activity (continued)

Part 3 – Individual: Consider the judge's decisions in both cases above.

(a) In your opinion, have these judicial decisions resulted in natural justice being achieved?

When delivering their judgment in *Cheatle v The Queen [1993] HCA 44*, the High Court of Australia highlighted that while all people were entitled to a 'representative' jury, what that looked like had yet to be decided by the court or legislation, but they also declined to address that question themselves. It is a concept yet to be defined under Australian law.

(b) Is an all-white jury a representative 'jury of peers' to an Aboriginal person? Explain your response, with reference to both the jury compiling and empanelling processes, the report cited above, and your own opinion.

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Independent Activity

Aboriginal Deaths in Custody

In 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) released a report based on their investigation of 99 deaths of Aboriginal people in custody between 1980-1989. Some key findings of the royal commission were:

- Of the 99 deaths in custody, none were caused by police violence.
- The rate of Aboriginal deaths in custody was roughly equal to that of non-Aboriginal people, but that the incidence of Aboriginal incarceration was much higher.
- There was a high correlation of children removed from their families (as a part of the Stolen Generation) and incarceration later in life.
- Aboriginal disadvantage is a considerable factor in their incarceration.

The RCIADIC report made 339 recommendations for changes to be made in order to improve outcomes for Indigenous people. Sadly, in the years since the report was released, the rate of Aboriginal deaths in custody has not changed.

TASK: Research the impact that the RCIADIC has had on the Australian legal and justice systems, and the resultant outcomes for Aboriginal people. Identify which recommendations have been adopted successfully, and also the recommendations which have been ignored. Summarise your findings, and make recommendations about what changes need to occur in the future. 500+ words.

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Independent Activity (continued)

Helpful online resources

If students wish to look into existing supports that are available for Aborignal and Torres Strait Islander Peoples across SA and the NT, they can consider the organisations below:

Aboriginal Legal Rights Movement (SA)

https://www.alrm.org.au/

North Australia Aboriginal Justice Agency (NT)

http://www.naaja.org.au/

Women and Children

Women and children are considered vulnerable members of society, and subsequently, there are some legal services designed specifically with their needs in mind.

Women and the Adversary System

While times have changed, and women typically have more autonomy over their day-to-day lives (including work, finances, and their role within the home) than they have had before, women are statistically less likely to have access to adequate financial resources than men, and are more likely to be the victims of violence. While women as a group can be considered legally vulnerable, Aboriginal and Torres Strait Islander women, migrant women, women living in rural communities, and women with disabilities are at even higher risk of disadvantage, abuse and violence. Subsequently, there are specialist legal services designed specifically to support women accessing legal help.

Domestic, family and sexual violence is a key issue in Australia disproportionately affecting women. While changes have been made to legislation in recent years in order to better protect victims of domestic violence, there are still problems in the adversary system which impact the ability of women to achieve just outcomes:

- Rules of evidence require all evidence is provided in court through the interrogatory method. This forces women to face their abuser in court where they are compelled to give evidence in order for the case to proceed, where their alleged abuser has the right to silence. This trial procedure can be highly intimidating and traumatic.
- While laws regarding evidence have been passed around Australia that allow for some accommodations to be made in criminal jurisdictions (ie–for victims to be questioned in another room via closed circuit television, or to limit the types of questions defence counsel can ask a victim in a sexual assault case) to try and reduce the impact on victims, these accommodations are not available in the Family Court or other civil jurisdictions.
- In cases of family violence, women are often unable to access legal advice or support as they do not have control of their finances.
- As most women's legal services are government funded or rely on corporate or individuals' donations to operate, they usually cannot meet the demand for their services due to a lack of funds.

A significant key issue in women reporting violence or seeking police or legal protection is public perception, and the fear of not being believed. A 2013 study undertaken by VicHealth reported more than half of Australians surveyed believed women made up incidences of domestic violence in order to affect the outcome of a family law case, and nearly 40% of surveyed adults believed some women reporting rape engaged in consensual sex and regreted the incident, resulting in the rape accusation (*Source: VicHealth, 2013, pg 5)*. Even though research has proven these ideas to be categorically false, these myths persist, impacting women's willingness to engage with the justice system. Additionally, with conviction rates in Australia of approximately only 10% for sexual assault cases, the motivation for women coming forward and making a police report is low. A report commissioned by the Australian Institute for Family Studies in 2017 found that in Victoria, 81.3% of women had failed to report a recent act of sexual violence in which they were a victim.

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Helpful online resources

To find out more about legal services available to women, follow the links below. In addition to providing legal advice, both groups also advocate for changes to the law to better promote just outcomes for women.

South Australian Women's Legal Service

https://www.wlssa.org.au/

Northern Territory Women's Legal Service

https://tewls.org.au/

Children and the Adversary System

Under Australian law, anyone under the age of 18 is legally a child. As a group, children are particularly vulnerable as they are entirely reliant on adults to have their needs met, and for protection. While the *Convention on the Rights of the Child* (CRC) provides an international framework for the rights and access to the justice system that all children should be afforded, and while Australia is a signatory to this agreement, it has not been turned into domestic legislation in Australia, and is therefore not legally enforceable.

Apart from the criminal justice system, children are typically most impacted by family law, and the Family Court, and in most of these instances, do not participate in the system through their own choice. Largely, it is due to their parents or legally mandated notifiers that children find themselves interacting with the legal system.

Children can struggle to access justice in the Australian adversary system, for the following reasons:

- Children cannot access the legal system independently due to their age and lack of access to resources, such as money.
- Due to their ages, there is a likelihood that their complaints or testimony may not be believed.
- Many lawyers do not have any training related to working with children.
- Legal information is not accessible to children due to the technical language used and their inability to understand many of the concepts underpinning the legal system or their rights.
- Children are largely unaware of what legal services are available to them.
- There are very limited services designed to assist children and young people.
- Courts can be an intimidating and confusing environment.

When considering the rules of evidence and procedure in the adversary system, children are at risk of not being able to receive just outcomes. Similarly to other vulnerable and minority groups, the methods of presenting evidence in court does put children at a disadvantage. While Australian jurisdictions with Human Rights Acts (such as the ACT and QLD) have specific protections for children participating in adversarial trials, most other states do not. Child witnesses in court often do not understand the processes or requirements of their role in the trial, are subject to intense cross-examination from strangers, and are at risk of having their evidence not believed due to their age. In addition to children being disadvantaged, there is a significant risk of the trial traumatising the children involved.

Independent Children's Lawyer

In some Family Court cases, an Independent Children's Lawyer (ICL) will be appointed to ensure that the child's best interest is served by any court decision regarding child custody. The ICL can be appointed by the court (under s68L of the *Family Law Act 1975 (Cth)*), on application by the child, or any other person or organisation that is invested in the welfare of the child. While the ICL is legally obligated to consider the perspective of the child (if they are above school age), they must come up with their own independent perspective about what they believe is best for the child.

To fulfill their role, the ICL will collate evidence to put before the court (which could include doctors and psychologists reports), help the child to participate in the court hearing (if appropriate), and negotiate with the child's parents about the child's needs.

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Young Offenders

Criminal law is a state power, and therefore, laws surrounding the age of criminal responsibility, criminal laws, sentencing and detention are different between each Australian state. The age of criminal responsibility varies around Australia, but in most states and territories, it is 10 years. This means children are able to be charged with an offence and legally held responsible for their actions. While 10 years is the minimum age a child can be charged, the police and prosecutors must prove the child has the cognitive ability to understand what they have done, before a criminal trial can proceed. Subsequently, it is quite unusual for a child under the age of 12 years to be prosecuted in the Youth Court. Even though each state and territory have their own laws in regard to young offenders, some shared general principles include detention as a last resort and when dealing with young offenders, rehabilitation should be the primary consideration.

A report published by the Australian Institute for Health and Welfare (AIHW) titled, *Youth Justice in Australia 2018-2019* (2020b) reveals the following information about children in the justice system:

- On an average day in Australia, 5,694 young people were under supervision by the justice system. This equates to about 1 in 490 young people in Australia.
- 80% of these young people were male.
- 79% of these children were between the ages of 14-17.
- Approximately 84% of these young people were supervised in the community, with the remainder in youth detention.
- Approximately 63% of the young people in detention were awaiting trial or sentence.
- While only making up 6% of the population, Aboriginal and Torres Strait Islander young people made up 50% of all those currently under supervision (although these figures are slightly less than 5 years ago).
- On average, Indigenous children are younger when they first appear under supervision when compared to their non-Indigenous counterparts.
- More than one third of all young people under supervision came from the lowest socio-economic areas, compared with only 6% from the highest socioeconomic areas.

It is clear through these statistics some groups of young people are disproportionately represented in the justice system; young men, Indigenous people, and people from lower socioeconomic backgrounds. A separate AIHW report (2020a) lists some reasons why children under youth supervision are particularly vulnerable, as have often experienced:

- Homlessness
- Drug and alcohol abuse
- Parental substance abuse
- Parental incarceration
- Trouble at school
- High rates of abuse and neglect.

Specialist legislation and courts exist to hear offending by children and youths, to minimise the negative impact on the life of the child which would occur if they were to be treated like an adult in the justice system. Some key differences between young and adult offenders are:

- Youth court hearings are closed to the public, and the identity of a child offender is not released in the media or accessible in court documents.
- When sentencing a young person being tried in court as a youth, primary consideration should be made for the youth's rehabilitation.
- Penalties imposed by youth courts are typically limited to no more than three years detention
- Police have alternate consequences issuable to young people not offered to adult offenders (such as family conferences) to try and resolve conflict before it reaches the courts.

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C Collaborative Activity

Reforms to the Youth Justice System

As a group, investigate potential changes which could be made to the adversarial system of trial to make it a fairer system for children and teenagers. You may choose to investigate this issue from a criminal law or family law perspective, or both.

Devise two changes which could be made to the adversarial system and justify the group's choices for each change.

Key Pieces of Legislation

- *Young Offenders Act 1993 (SA)*
- *Youth Justice Act 2005 (NT)*
- *Family Law Act 1975 (Cth)*

Helpful online resources

Young People's Legal Services

Across Australia, there are several services set up to support young people in their experiences with the legal system

In South Australia: The Legal Services Commision has a specialist youth branch that can be accessed through this link:

https://lsc.sa.gov.au/cb_pages/youth_legal_service.php

Australia Wide: Youth Law Australia covers laws from each Australian jurisdiction, and runs programs to educate young people about their rights, as well as offering legal support, and connecting young people to legal services.

https://yla.org.au/

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People with Disabilities

Australia ratified the *UN Convention on the Rights of Persons with Disabilities* in 2008. Article 12 of the convention states that all people with disabilities have equal recognition before the law (and legal systems must provide the necessary support so people can exercise their legal capacity), and Article 13 states all people must have access to justice. In full, Article 13.1 reads:

> "1. States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."

Having a physical and/or intellectual disability affects many different elements of a person's ability to interact with the adversary system. When looking at specific features of the adversary system, there are access issues specifically related to people with disabilities appearing in court as a witness, or their ability to participate in a jury. Additionally, there are many case examples of people with intellectual disabilities being denied natural justice when it comes to ascertaining their competency to stand trial in cases being brought against them. While many of the practises below are designed to be protective in nature, in many cases they are simply exclusionary.

People with disabilities as witnesses in a trial

> "The perception that a person with disability lacks credibility as a witness to or victim of crime often leads to the decision not to prosecute alleged prosecutors. This heightens the vulnerability of people with disability to further harm because the perpetrator is aware that charges are less likely to be brought or prosecuted than if the victim was a person without disability." (Australian Law Reform Commission, 2014, pg 224-225)

During a trial, people with disabilities are often pre-judged by court participants, such as the judge, jury and lawyers. This can be because of preconceived notions from these participants about what it means for someone to have a cognitive or physical disability, or from behaviours exhibited by people with disabilities in a courtroom.

The *Evidence Act 1995 (Cth)* outlines the standard for whether or not someone is considered competent to give evidence in a trial. Section 13 outlines the test of whether someone has enough capacity to understand a question to determine fact or give evidence in a way which is comprehensible to the court, specifically mentioning people with a mental, physical or intellectual disability.

Section 30 and 31 of the Evidence Act outline a couple methods for assistance that witnesses may have in order to present evidence in court. They allow the use of interpreters for people without a sufficient grasp of English, and that witnesses that cannot hear or speak adequately may be questioned in an "appropriate way". However, these resources are still fairly limited in who they allow to receive assistance during a trial.

Independent Activity

Research Task

What are the rules of evidence for the state or territory that you live in? Does your state make allowances under the rules of evidence to allow for people with disabilities to have assistance in delivering witness testimony?

Research the relevant Evidence Act for your home state or territory. Below, outline any sections that would assist a person with disabilities to give testimony in court.

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Issues of determining competency to stand trial

When determining whether or not a defendant will stand trial for a crime for which they have been accused, it must be determined if the person is mentally competent to stand trial. In addition to determining if someone was suffering from a mental illness at the time of an offence, it is also a measure of whether someone with an intellectual disability has the capability of understanding the nature of the charges brought against them, or whether they understand the nature and process of a trial. The Australian legal system considers it to be immoral or unjust to try someone for a crime if they do not understand the connection between their actions, and the criminal process.

The Australian legal system presumes someone is fit to stand trial, and it is up to the parties to prove 'unfitness'. This requirement is found in both common law and in some state legislation. While the process may stop people from being prosecuted who are unfit to stand trial, the risk becomes what happens to these people when they are found to be 'unfit' to stand trial. Some examples of this legal outcome are below.

Case Studies

1) **Marlon Noble – Western Australia**

Mr Marlon Noble was left intellectually impaired as a young child after contracting meningitis as an infant. In 2001, at the age of 19, Mr Noble was accused of sexual offences against two young girls under the age of 16. The prosecution and defence sought psychiatric assessments for Mr Noble, and it was determined that he did not have the capability to enter a plea in his case due to his intellectual disability. The court made him subject to the *Criminal Law (Mentally Impaired Defendants) Act 1996 (WA)* and Mr Noble was unable to make a plea, or have a trial, and was instead sent to Greenough Prison indefinitely.

In 2010, a psychiatrist determined that Mr Noble was fit to stand trial, and his lawyer then moved to bring the case to trial. In response, the prosecutors chose to not proceed with the case due to insufficient evidence, and an unlikely prospect of conviction. Considering that Mr Noble had been in prison far longer than a potential sentence for conviction of these offences would have been, it also did not make a lot of sense to pursue the charges from this perspective as well. Additionally, the mother of the girls in question, in addition to the girls themselves, refuted the allegations made against Mr Noble, and were active participants in calling for his release.

Mr Noble spent 10 years and 3 months in prison without trial, and on release, was subject to strict community supervision, all without trial or conviction. In 2016, the UN Committee on the Rights of Persons with Disabilities found that Australia had breached its obligations under the convention in relation to Mr Noble's case.

Source: Remedy Australia, n.d., *Noble v Australia (CRPD, 2016).* Accessed on 15/12/2020 from: **https://remedy.org.au/cases/40/**

2) **Rosie Anne Fulton – Western Australia/Northern Territory**

Ms Fulton was born in Alice Springs, and unfortunately suffers from Foetal Alcohol Syndrome. As a result of this, she has suffered abuse for a significant portion of her life, and has spent time homeless. She spent some time in WA recuperating after an accident, and it was here where she was arrested for driving without a licence and under the influence of alcohol. Ms Fulton was arrested, and then determined to be unfit to stand trial, and was sent to prison under the same laws as Mr Noble (above). After Ms Fulton's case became known through the media, 120,000 Australians signed a petition on change.org to have her released. It is this petition that is credited with having the WA and NT governments arrange for her to be transferred back to Alice Springs.

Ms Fulton was in custody, without conviction, for 22 months before she was released. The NT government initially organised for Ms Fulton to live in a house staffed with disability support workers, however, it was only five days later that she was arrested again in the NT for abusing the support workers while under the influence of alcohol.

Source: Carrick, D 2014, *ABC Law Report: The case of Rosie Anne Fulton.* Accessed on 15/12/2020 from: **https://www.abc.net.au/radionational/programs/lawreport/story-segment-template/5759618**

If students wish to examine further cases that are similar in nature to those above, they may wish to look at the cases of Mr Carry Doolan and Mr Christopher Leo.

People with disabilities and juries

A core element of the jury system is it is meant to be representative of the peers of the accused, and a wide range of people from the community. However, most people with physical or intellectual disabilities are deemed ineligible from sitting on a jury or are disqualified. For people with physical disabilities, such as blindness or deafness, they are removed from the jury pool due to their inability to hear and see the evidence being presented in court. People with intellectual disabilities are very often removed due to their inability to understand the nature of the evidence being presented to the court. In addition to perspectives being missing from the jury pool, it can also be argued defendants with a disability are not able to be tried by a jury of their peers.

Reforms to the Adversary System

The Australian Law Reform Commission have made many recommendations for change to the law with regard to people living with disabilities, and their equal access to the justice system. From their report, *Equality, Capacity and Disability in Commonwealth Laws (2014)*, they make the following recommendations for change:

Recommendation 7-1 (regarding the 'fitness' of someone to stand trial)

"The *Crimes Act 1914 (Cth)* should be amended to provide that a person cannot stand trial if the person cannot be supported to:

(a) Understand the information relevant to the decisions that they will have to make in the course of the proceedings;
(b) Retain that information to the extent necessary to make decisions in the course of the proceedings;
(c) Use or weigh that information as a part of the process of making decisions; or
(d) Communicate the decisions in some way." (pg 200-201)

Recommendation 7-2 (limiting detention for people found to not be fit for trial)

"State and territory laws governing the consequences of a determination that a person is ineligible to stand for trial should provide for:

(a) Limits on the period of detention that can be imposed; and
(b) Regular periodic review of detention orders." (pg 206)

Recommendation 7-7 (Rules of evidence)

"The *Evidence Act 1995 (Cth)* should be amended to provide that a person is not 'competent to give evidence about a fact' if the person cannot be supported to:

(a) Understand a question about the fact; or
(b) Give an answer that can be understood to a question about the fact." (pg 225)

Recommendation 7-11

"Federal courts should develop bench books to provide judicial officers with guidance about how courts may support persons with disability in giving evidence." (pg 231)

Recommendation 7-12 (Juries)

"The *Federal Court of Australia Act 1976 (Cth)* should provide that a person is qualified to serve on a jury if, in the circumstances of the trial for which that person is summonsed, the person can be supported to:

(a) Understand the information relevant to the decisions that they will have to make in the course of proceedings and jury deliberations;
(b) Retain that information to the extent necessary to make these decisions;
(c) Use or weigh that information as part of the jury's decision-making process; or
(d) Communicate the person's decisions to the other members of the jury and to the court." (pg 237)

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Independent Activity

Recommendations for Change

Choose one of the recommendations above from the Australian Law Reform Commission and investigate if this recommendation has been adopted by the government at either federal or state level.

Recommendation Chosen: .....

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If the recommendation has been adopted, what impact do you think this will have on the adversary system? If this recommendation has not been adopted, what are some of the barriers to this change?

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Helpful online resources

Armstrong, L 1997, *"The Reality of Rights": People with an Intellectual Disability and the Criminal Justice System.*

http://classic.austlii.edu.au/au/journals/AUJlHRights/1997/5.html

Australian Human Rights Commission, 2014, *Access to Justice in the Criminal System for People with Disabilities.*

https://humanrights.gov.au/our-work/disability-rights/projects/access-justice-criminal-justice-system-people-disability?_ga=2.120309391.602366751.1609139716-965371704.1605848174

Australian Human Rights Commission, 2016, *Equal Before the Law? How the Criminal Justice System is failing people with a disability.*

https://humanrights.gov.au/about/news/speeches/equal-law-how-criminal-justice-system-failing-people-disability

Australian Law Reform Commission, 2014, *Access to Justice Issues.*

https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/7-access-to-justice-2/access-to-justice-issues-2/

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Refugees, Asylum Seekers and Migrants

While there are significant legal differences with how migrants, refugees and asylum seekers arrive in Australia, often they face similar difficulties in the adversary system of trial.

Refugees and Asylum Seekers

Australia has legal obligations under international law with regard to the treatment of refugees and asylum seekers. Australia is a signatory to the following international covenants that outline our legal obligations:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)
- Convention on the Rights of the Child (CRC)

Australia is also a party to the Refugees Convention.

When in Australia's jurisdiction, the government has the responsibility to ensure the human, civil and political rights of refugees are upheld. In addition to the conventions Australia has signed, above, domestic legislation addresses these issues is the *Migration Act 1958 (Cth)*.

Under the *Migration Act 1958 (Cth)*, all refugees and asylum seekers who arrive in Australia without a valid visa must be detailed in immigration detention until their application for asylum has been processed. There is currently no legislated limit to how long a person can stay in immigration detention. This has formed the basis of many refugee claims of arbitrary detention, illegal under several international conventions.

Most of the legal complaints made by refugees or asylum seekers are challenges to the Australian government decisions in regard to their visa applications, or human rights complaints relating to their time in detention centres. However, taking these complaints to court is difficult due to their circumstances. Some barriers to their access to the justice system are:

- The cost of legal services
- Language barrier
- Restricted access to legal aid
- Limited funding to legal aid
- Lack of familiarity with Australia's legal system and practises
- Distrust of governments and authorities due to previous experiences in other countries.

According to the Law Council of Australia's *The Justice Project–Asylum Seekers* (2017), refugees and asylum seekers face the following problems in Australia's adversary system:

- Only approximately 20% of refugees and asylum seekers are eligible for the government's Primary Application Service.
- Refugee Legal had more than 2000 refugees on their support list as of 2017.
- Geographic isolation of refugees launching legal action makes it difficult for lawyers to meet with their clients.
- As of 2017, final hearings for migration issues were being scheduled for more than 18 months into the future.
- With many refugees and asylum seekers not being able to attain legal support, they are forced to complete their applications themselves. This can result in mistakes in paperwork, and subsequently, a higher risk of court denial of an application and/or deportation.

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Independent Activity

Case Study

Choose one of the cases below to investigate, and answer each of the questions below.

Cases:

- A v Australia [1993]
- Bakhtiyari v Australia [2003]
- Elmi v Australia [1999]
- Kwok v Australia [2009]

Give a brief overview of the facts of the case, including the decision of the court:

What were the findings of the Human Rights Commission (HRC) in this case?

Did the Australian government or courts agree or comply with the HRC findings?

Did the person/family receive natural justice through this process? Explain your answer.

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Helpful online resources

UN Convention and Protocol Relating to the Status of Refugees

https://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf

Law Council of Australia–Asylum Seekers

https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Infographics/Asylum%20Seekers_FINAL.pdf

Migrants and Non-English Speakers

Similarly to people arriving in Australia as an asylum seeker or refugee, migrants arriving to Australia share issues accessing the adversary system; particularly related to the language barrier.

According to the Law Council of Australia's *The Justice Project–Recent Arrivals (2017)*, migrants are faced with the following issues when accessing the legal system:

- Many recent arrivals have little to no understanding of Australia's legal system (this includes both underlying principles and rights, as well as the structure of the system)
- Many recent arrivals have little faith or trust in legal systems due to their experiences in previous countries
- Some migrants may choose not to pursue legal action as they fear it may impact the government's perception of them when determining their visa status
- There is a lack of interpreters available in the court system to assist migrants who do not speak English
- There is limited funding for legal aid services.

Migrants face potential exploitation from employers and landlords who may choose to break laws around their entitlements, and take advantage of their poor grasp of English, or unfamiliarity with their rights as workers or tenants.

Helpful online resources

Legal support services for migrants and refugees

SA Legal Services Commission:

https://lsc.sa.gov.au/cb_pages/legal_advice_migration.php

Australian Refugee Association:

https://australianrefugee.org/

Multicultural Council of the Northern Territory:

https://www.mcnt.org.au/

Melaleuca Refugee Centre:

http://www.melaleuca.org.au/

Refugee Council of Australia:

https://www.refugeecouncil.org.au/migration-advice/

Refugee and Immigration Legal Service:

https://www.rails.org.au/

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The Justice Project

In 2017, the Law Council of Australia undertook a comprehensive review of the justice system in Australia. The committee that oversaw the compilation of the report was chaired by former High Court Justice, the Honourable Robert French, AC. They have prepared a final report which outlines issues with access to justice for 13 different groups of people across Australia. The scope of the report was to identify the issues with access to the justice system across Australia, and to make recommendations for change across different elements of the system, such as courts and tribunals, legal assistance, laws, policies and practises, and to identify any gaps which may exist in the system.

While a few of their findings have been mentioned in this chapter, students may wish to have a look at sections of the report themselves, to further their understanding about some of these issues.

Groups featured in this report not included in this chapter:

- People experiencing economic disadvantage
- Prisoners and detainees
- LGBTQI+
- Migrants who do not speak English
- People who have experienced family violence
- People who have been trafficked and exploited
- Rural, regional and remote Australians
- Olders Persons
- People who are homeless

The full report (with recommendations) can be accessed at:

https://www.lawcouncil.asn.au/justice-project/final-report

End of Chapter Activities

Discussion Questions

This chapter has discussed many of the failings of the adversary system, when it comes to upholding the rights of all people, and ensuring people have equal access to the justice system. Here is a chance to consider all the benefits of the adversary system, and how it helps all groups of people. Consider the discussion questions below:

1. What features of the adversary system promote equality between all parties?
2. What features of the adversary system protect diverse and minority groups?
3. What features of the adversary system help diverse groups to achieve natural justice?

Long Answer Questions

1. Does the exclusion of customary law in the sentencing of Aboriginal offenders breach the *Racial Discrimination Act 1975 (Cth)*? Explain.

2. How effective was the mechanism of a royal commission when investigating Aboriginal deaths in custody?

3. Identify at least two ways that the rules of evidence in a trial could be changed to assist in women and children achieving just outcomes in the adversary system.

4. Develop an argument for or against allowing people with disabilities appearing on a jury.

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5. What would the consequences be of a national approach to determining "competency" or "fitness" to stand trial?

Essay Questions

Students are to choose one question from the selection below, and write an essay response. Students are reminded to:

- Consider both sides of the argument
- Consider the quality of the sources used to write their essay response
- Consider multiple perspectives

1. 'It is not possible for the Australian adversary system to achieve just outcomes for all people.' Using examples, evaluate this statement.
2. 'Changes to the rules of evidence and procedure would allow justice for all groups of people in the adversary system.' Using examples, evaluate this statement.
3. 'Aboriginal and Torres Strait Islander people are the group most significantly disadvantaged by Australia's adversary system.' Using examples, evaluate this statement.

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Sources

Students may wish to do further reading about each of these topics by looking further at the sources used to write this chapter.

References:

Aboriginal and Torres Strait Islander justice issues

Anthony, T. & Longman, C., 2017, Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds. *International Journal For Crime, Justice and Social Democracy*, 6(3): 25-46. DOI:10.5204/ijcjsd.v6i3.419.

Goldflam, R, 2013, The (Non)Role of Aboriginal Customary Law in Sentencing in the Northern Territory. *Australian Indigenous Law Review,* 17(1), 71-80.

Law Council of Australia, 2018, *The Justice Project–Final Report.* Accessed on 15/12/2020 from: **https://www.lawcouncil.asn.au/justice-project/final-report**

Marchetti, E, & Daly, K, 2004, Indigenous courts and justice practices in Australia. *Trends & issues in crime and criminal justice* no. 277. Canberra: Australian Institute of Criminology. **https://www.aic.gov.au/publications/tandi/tandi277**

Maxwell, J, 2016, 'Two Systems of Law Side by Side': The role of Indigenous Customary Law when sentencing.' *Australian Indigenous Law Review*, 19(2), 97-112.

Mildren, Honourable J D, 1997, Redressing the Imbalance Against Aboriginals in the Criminal Justice System. *Criminal Law Journal*, 21, 7-22.

von Doussa, J., 2003, *Recognising Aboriginal and Torres Strait Islander Customary Law–International and Domestic Implications.* Accessed on 10/11/2020, from: **https://humanrights.gov.au/our-work/indigenous-peoples-issues-international-and-domestic-law-ch-2**

Women and Children

Australian Institute of Health and Welfare, 2020a, *Australia's children*. Accessed on 28/11/2020 from: **https://www.aihw.gov.au/reports/children-youth/australias-children/contents/justice-and-safety/children-under-youth-justice-supervision**

Australian Institute of Health and Welfare, 2020b, *Youth Justice in Australia 2018-2019*. Accessed on 28/11/2020 from: **https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/contents/summary**

Commonwealth of Australia, 2017, *Challenging misconceptions about sexual offending: Creating an evidence based resource for police and legal practitioners.* Accessed on 30/11/2020 from: **https://apo.org.au/sites/default/files/resource-files/2017-09/apo-nid107216_1.pdf**

VicHealth, 2013, *Australians' attitudes towards violence against women.* Accessed on 30/11/2020 from: **https://www.vichealth.vic.gov.au/-/media/ProgramsandProjects/DiscriminationandViolence/PreventingViolence/NCAS-Summary-Final.pdf?la=en&hash=470A0FC07695DA1068400865AAAAD43E57D2F9ED**

People with disabilities

Australian Law Reform Commission, 2014, *Equality, Capacity and Disability in Commonwealth Laws–Final Report.* Accessed on 12/12/2020, from: **https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf**

General Resources

Schetzer, L & Henderson, J, 2003, *Access to Justice and Legal Needs. Stage 1: Public Consultation.* Accessed on 30/11/2020, from: **http://www.lawfoundation.net.au/ljf/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/$file/public_consultations_report.pdf**

Useful Websites:

- Australian Human Rights Commission: **www.humanrights.gov.au**
- Australian Law Reform Commission: **https://www.alrc.gov.au/**
- Law Council of Australia: **https://www.lawcouncil.asn.au/**
- Remedy Australia: **https://remedy.org.au/**

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2.6 Evaluation of Dispute Resolution in Australia

SACE Considerations for Chapter 2.6

Big Questions

- What is justice?
- Is justice accessible?
- Is justice reliant on the abilities of lawyers/interpretation of judges?
- Are too many rights afforded to an accused person in the adversarial system of trial?
- Do common understandings of fairness have a place in the legal system?
- Is being fair and lawful the same thing?
- Would fairness be better achieved by another justice system?
- Are the rules of evidence too strict to allow just outcomes?
- Is the adversarial system or inquisitorial system of trial more likely to result in just outcomes?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Questions

- What is the role of the following in the adversary system, and why are they important?
  - Burden and standard of proof
  - Rule of law
  - Role of the judge
  - Role of parties, witnesses and other participants, including juries
  - Rules of evidence and procedure
- How does the adversary system of trial protect the rights of groups and individuals in the community, including Aboriginal and Torres Strait Islanders?

Quick Reference: Refer to the following chapters

- Burden and standard of proof – 2.1
- Rule of law – 2.1
- Role of the judge – 2.1
- Role of parties, witnesses and other participants, including juries – 2.1
- Rules of evidence and procedure – 2.1
- Rights of the Accused – 2.3
- Rights of groups and individuals in the community, including Aboriginal and Torres Strait Islanders – 1.7, 2.5

Fast fact

Rights protected in the adversary system

- the presumption of innocence
- the burden of proof rests with the prosecution
- the right to remain silent
- the right to present one's own case in defence (party control)
- the right to have court proceedings conducted before an independent judge
- the right to select trial by judge or jury
- the principle of double jeopardy
- the right of appeal

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'Great truths will emerge from powerful conflicting arguments'.

The adversary system aims to balance the rights of the individual against the community expectations of people who break society's laws being punished. There are strengths and weaknesses of this approach; and features of the system can be both a strength and a weakness.

C Collaborative Activity

Class Discussion

How can features of the adversary system be both strengths and weaknesses? Discuss, considering the competing tensions of: fairness and efficiency; empowered and the disempowered; competing rights and responsibilities; certainty and flexibility.

I Independent Activity

Complete the following table, exploring the positives and negatives of each feature when it comes to achieving just outcomes for all members of the community.

Feature	Strength	Weakness
Party control		
Burden of proof		
Equality before the law		
Respect for individual legal rights (the rights of the accused)		
Judicial independence		
Strict rules of evidence		
Strict rules of procedure		
Trial by a jury of one's peers		
Right of appeal		
Double jeopardy		
Rights of victims		

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At a Glance

Strengths and Weaknesses of the Adversary System

Strengths:

- Party control
- Truth and conflicting interests
- Equality before the law
- Respect for individual legal rights
- Judicial independence
- Strict rules of evidence
- Strict rules of procedure
- Trial by one's peers: a jury
- Double jeopardy
- Right of appeal

Weaknesses:

- Party control
- Truth and conflicting interests
- Equality before the law
- Respect for individual legal rights
- Judicial independence
- Strict rules of evidence
- Strict rules of procedure
- Trial by one's peers: a jury
- Double jeopardy
- Right of appeal

C Collaborative Activity

In small groups, discuss one possible reform to the adversary system and present an argument for it to the class. Consider how your proposed reform could resolve at least one competing tension.

Possible reforms to the adversary system worth considering include:

- The role of the judge – Judges could be given broader discretionary powers, including calling and examining witnesses
- Abolition of the right to remain silent – this right was introduced to protect individuals with poor education and low literacy from incriminating themselves. Some have suggested that defendants should be forced to give evidence so that the judge or jury can make their own observations of the defendant's version of events.
- Modification to the rules of evidence – greater emphasis could be placed on relevance, and judges could allow for alternatives in the presentation of evidence by witnesses
- Improving accessibility – to make the court system more accessible to ordinary people, legal aid funding, could be increased acquitted people could be allowed to recover their legal and court costs from the state, setting stricter guidelines and limits on legal costs could be introduced, and penalties could be awarded to parties who intentionally delay proceedings.
- Simultaneous criminal and civil proceedings – judges could be given discretionary power to hear a criminal and civil matter arising from the same incident at the criminal trial proceedings.

Long Answer Questions

'Great truths will emerge from powerful conflicting arguments'. There is no guarantee the truth will emerge, as it may be in a party's best interests to conceal evidence. Discuss whether or not the adversary system achieves justice. Consider the tension between competing rights and responsibilities.

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Discuss whether or not the parties to the dispute are treated equally before the law. Consider the tension between the empowered and the disempowered.

Discuss whether or not general rules of the adversary system are fair and equitable. Consider the tension between fairness and efficiency.

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Discuss whether or not the role of the judge needs reimagining. Consider the tension between certainty and flexibility.

Strict rules of evidence have the effect of excluding relevant evidence which often leads to the acquittal of guilty people on technicalities. Discuss whether or not the rules of evidence in the adversary system need adjustment. Consider the tension between competing rights and responsibilities.

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The continuous trial principle precludes the possibility of adjournments so that the parties can collect more evidence. Discuss whether or not the strict rules of procedure should be changed. Consider the tension between fairness and efficiency.

The appellate process is very expensive. Discuss whether or not it is fair on all parties.

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Evaluative Questions:

Critically analyse the effectiveness of the adversary system in delivering just outcomes for diverse groups in the community. Consider the tension between the empowered and the disempowered.

Critically analyse whether or not the adversary system of trial places too much emphasis on protecting the rights of the accused. Consider the tension between fairness and efficiency and competing rights and responsibilities.

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Critically analyse whether or not the adversary system adequately represents victims. Consider the tension between the empowered and the disempowered.

Essay Questions

'The most urgent issue facing the civil and criminal justice systems in Australia is equality of access to justice for all people.' Using examples, evaluate this statement.

'Rules of evidence and procedure in the adversary system in Australia inhibit the achievement of just outcomes.'

Using examples, evaluate this statement.

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3.1 The Origins of Australia's Constitutional System

SACE Considerations for Chapter 3.1

Big Questions

- Did the Constitution adopt the best features of other countries' constitutional systems?
- Does the Constitution reflect the needs of contemporary society?
- Does the original purpose of the Senate as a 'States' house' adequately serve contemporary Australia?
- How has the division of power between the States and the Commonwealth changed since federation, and what is the significance of this?

Competing Tensions

- Fairness and efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Question

- What are the origins of Australia's Constitutional System?

Helpful online resources

The Australian Constitution

Students can access the full document of the Australian Constitution here:

https://www.aph.gov.au/constitution

Definitions

Constitution – A constitution is (usually) a written document which contains a set of rules outlining how a country is to be structured and run.

Federation – a group of states joining together to form one nation, under a federal government.

Background – Australia's legal history

Before Australia federated in 1901, each of the states were their own separate British colonies. Each colony operated independently, although did engage with the other colonies for trade and business. Each of the British colonies had their own governments, parliaments and military, separate tax systems (even different types of stamps!) and were each self-sufficient.

The movement towards federation was quite slow. There were several reasons for this, but some of the most significant ones were:

1. **Geography** – as the colonies were so far away from each other, and transport and communication were slow, discussions about federation were hindered.
2. **Colonial pride** – each colony was proud of achieving responsible government and were quite happy operating independently of each other.
3. **Inter-colonial rivalry** – the smaller colonies (such as South Australia, Queensland, Western Australia and Tasmania) were afraid the larger colonies in the eastern states would dominate a federal system, were it to be proposed. The colonies were not well-practised at working together; they often imposed trade barriers on each other to improve their own fortunes, and deliberately used different rail gauges to force stops at borders.

However, it became apparent there would also be significant benefit to each of the colonies agreeing to federate and become one nation. Some of the key benefits of federating were:

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1. **National defence** – each colony had their own small military; however, operating independently from the other colonies meant their military lacked coordination, was more expensive, and subsequently were less effective at defending Australia than one nationally coordinated military.
2. **Immigration control** – by the 19th century, there was growing public displeasure with non-English immigration. This largely came from public anti-Chinese sentiment (due to their work on the goldfields) and unhappiness about Pacific islanders working in the Queensland cane fields. It was perceived non-white immigrants would accept lower wages, and this would lead to higher unemployment and subsequent lower living standards for Australians.
3. **Free Trade** – while each of the colonies relied on tariffs (taxes) imposed on trade between the colonies as a source of income, it was argued free trade between the states would be better for the economy and would strengthen many areas of production if states could freely trade goods and services.
4. **National Pride** – most people living in Australia spoke English, and as time passed, with more and more people being Australian-born, found themselves identifying less with England, and more as Australian.

Source: Sir Henry Parkes – Father of Federation

Henry Parkes's federation speech in Tenterfield in October 1889 is credited with being the first direct appeal to the Australian public about becoming an independent nation. After delivering his speech in Tenterfield, Parkes gave the same speech many times over in support of Australia federating over the next couple of years.

Below are some extracts from his version of the speech that was delivered to the Federal Convention in Sydney in 1891:

"We seek no separation. We only seek to draw closer the bonds of true loyalty, and to continue to share in the rights and privileges that belong to every British subject. We seek a proud place, undoubtedly, but it is the proud place of being equals of the best of the British nation and at the same time preserve our Australian identity. We seek in the best way that is possible, by federated power, to master our own destinies and to win our own position in the world, and in entertaining this lofty and enlightened ambition we are not prepared to take any second place amidst the civilised peoples of the world.

…The Australian soldier shall have no superior; the Australian workman shall have no superior. We seek then to build up here an Australia for ourselves, but believing that no form of government could be better than that under which we live, we seek to rend no ties, we seek to shatter no edifice, but only to create what we think is necessary for bringing out all the great faculties of our own individual interests.

…I ask you then, with unreserved feeling, with true hearts, earnestly engaged in this great work to drink this toast: One people. One destiny."

Source: https://parkesfoundation.org.au/resources/sir-henry-parkes-2/in-his-own-words/

Australasian Conventions

Discussion of an Australian federation existed as early as the 1840s, although there were a few false starts to this movement, and several layers of difficulty (as mentioned above), which stalled the federation movement. As the federation movement began in earnest in the 1880s, there were a series of **Australasian conventions** held around Australia during the 1890s. These were meetings held to draft the Australian Constitution. Each state selected several delegates to send along to these meetings, to have their say in forming the Constitution. An initial draft was completed at the end of the 1891 conference, although the progress of this document stalled. A second draft was completed at the Second Convention in 1897-1898 (which was very similar to the first). This second draft was taken to colonies for a vote.

Did you know?

Delegates from New Zealand attended the first Australasian Federation Conferences in 1890 and 1891 and were often referred to as the "seventh" British colony by Australian leaders. However, New Zealand representatives were not particularly enthusiastic about becoming a part of Australia. Some of the reasons New Zealand representatives gave for not joining the Australian federation was distance, alternate economic and political interests and cultural differences. Delegates from New Zealand visited a newly federated Australia in 1901, but they declined again to become a part of the Australian federation.

Clause 6 of the preamble of the Australian Constitution still names New Zealand as a colony that could become a part of Australia.

Helpful online resources

The Australaisan conventions were:

1) Australasian Federation Conference 1890 (Melbourne)
2) National Australasian Conference 1891 (Sydney)
3) Corowa Conference 1893 (NSW)
4) Premiers' Conference 1895 (Hobart)
5) Second Australasian Federal Convention 1897-1898 (Adelaide, Sydney, Melbourne)

The following sites have further information and primary sources on the different conventions:

National Archives of Australia (Edmund Barton's annotated copy of 1891 draft)

https://www.naa.gov.au/learn/learning-resources/learning-resource-themes/government-and-democracy/federation/edmund-bartons-annotated-copy-1891-draft-constitution

National Library of Australia (copy of 1891 Conference texts):

https://nla.gov.au/nla.obj-4420590/view?partId=nla.obj-4449398#page/n5/mode/1up

Parliament of Australia:

https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s

Parliamentary Education Office (PEO):

https://peo.gov.au/understand-our-parliament/history-of-parliament/federation/the-federation-of-australia

Authors of the Constitution

The men who contributed to the development of and wrote the constitution bill were elected (or appointed) by their respective colonies to meet at these conventions to determine the contents and structure of the bill. Several of the names of the contributors below may be familiar to you.

Some key figures in the writing and development of the Australian Constitution:

- Alfred Deakin (VIC)
- Henry Parkes (NSW)
- Edmund Barton (NSW)
- Samuel Griffith (QLD)
- John Quick (VIC)
- Sir Robert Garran (NSW)
- Andrew Inglis Clark (TAS)
- John Forrest (WA)
- Charles Kingston (SA)

Many of these men went on to hold significant roles within Australia's first government(s), and later, were among the first appointees to the High Court of Australia.

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C Collaborative Activity

Missing Perspectives

Due to the structure of society at the time, all the writers of the Constitution were educated white men. There were no women involved (although Catherine Helen Spence unsuccessfully attempted to be elected to attend the Second Constitutional Convention for South Australia, after voting rights changed in 1895), and there were no delegates with Aboriginal or Torres Strait Islander heritage, or with different cultural backgrounds.

When voting to approve the Constitution in state referenda, women could only be counted in the vote in South Australia and Western Australia, and very few Indigenous People were able to participate.

In groups, discuss the following question -

"Would the Australian Constitution be different if it were drafted by men and women of different races, or was open to a universal vote for approval?"

You may wish to consider the following sections of the Constitution in your discussions: Preamble, s25, s51, s127.

Colonial Ratification and British Approval

By the beginning of 1898, the drafters of the Constitution had completed a document they were satisfied with, and each took the draft back to their respective colonies to be approved by referendum. Each state passed the Constitution at a referendum between 1898 and 1899, with the exception of Western Australia, who had concerns about the financial arrangements between the states and the proposed Commonwealth.

With the approval from five states, a delegation left Australia for England to present the Constitution to the British parliament. The British government negotiated some small changes with the delegates before it was put to parliament. The Constitution Bill was introduced to the Parliament in May 1900, sponsored by the British government, and passed without amendment. The Bill was assented to by Queen Victoria in July 1900. Later that month, Western Australia passed the constitution bill in a state referendum, allowing them to be an original state of the nation of Australia.

On the 17th September 1900, Queen Victoria signed the proclamation meaning as at 1 January 1901, the colonies of South Australia, Queensland, New South Wales, Victoria, Tasmania and Western Australia would become the Commonwealth of Australia.

The full name of Australia's Constitution is: *The Commonwealth of Australia Constitution Act 1900 (UK)*

The Australian Constitution is a piece of British legislation, as outlined above, which is why the initials 'UK' are at the end of the Act, rather than the initials 'Cth' which references laws made by the Australian federal parliament.

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Did you know?

Canberra was not always Australia's capital city.

One of the initial sticking points for NSW passing the constitution bill at referendum is they wanted the nation's capital to be within their state. At the time, Melbourne was Australia's acting capital city until a final location could be determined. Through negotiations, s125 was added to the constitution draft, stating the nation's capital would be within the borders of NSW (although not within 100 miles of Sydney) and with that change, NSW passed the bill at a referendum.

After federation, members of the House of Representatives and the Senate spent time looking for a site to create the capital. Eventually, Canberra was selected. In the spirit of compromise, Canberra is approximately halfway between Sydney and Melbourne. The first parliament to sit in the newly constructed Parliament House (now referred to as 'Old Parliament House'), was in Canberra in 1927.

Models for the Australian Constitution

There were many different nations around the world for Australia to take inspiration from when drawing up the draft for Australia's Constitution–the design for its system of Government, and all its underlying principles and ideals. While heavily reliant on the British Westminster system, Australia's system of government is sometimes referred to as the "Washminster System"–reflecting the influence of both the UK and the US in the Australian Constitution.

England

A significant portion of what the delegates designed for Australia's system of government is reflective of the British Westminster system and the adversary system of trial. In federating, a central idea was Australia would remain connected to the British Commonwealth. The initial connections to England were evident; our Constitution was an Act of their parliament, and there were many strong legal connections between our parliaments and courts. Some examples of the similarities, or features adopted from England are:

- Systems of responsible and representative government
- Separation of powers model
- Constitutional monarchy
- Parliamentary sovereignty

While not an exhaustive list, it is clear many of Australia's underlying legal and Constitutional features are modelled on the British Westminster system. Many of the features have been outlined throughout Topic 1 and will be revisited in 3.2.

The United States of America

The United States of America had declared independence from Britain in 1776 and designed a system of government written by the American people, which adopted a few features of the Westminster system, although with many elements of differentiation. The most significant was declaring itself a republic after their revolution from British governance.

While Australia was not interested in declaring complete independence from England as America had, the drafters of the Constitution did take some inspiration from the American system. Andrew Inglis Clark, one of the authors of the Australian Constitution, was familiar with the American Constitution as he had visited America on several occasions and had become friends with an American judge, Oliver Wendell Holmes. Holmes was the Chief Justice of the Massachusetts Supreme Court while the founding fathers were drafting the Australian Constitution (and later became a Supreme Court Justice), and he was in regular correspondence with Clark. This relationship, and familiarity with American Supreme Court decisions resulted in several key similarities elements being included. It was Clark's inclusion to provide original jurisdiction being granted to the High Court of Australia, in order to avoid issues seen in the United States in *Marbury v Madison*. Clark also proposed a bill of rights, similar in nature to the American system, but while this was rejected overall, several specific suggestions were adopted, for example, s80 (the right to a trial by jury). There is more on this in Chapter 3.5.

Some other similarities between the United States and Australia:

- Federalism
- The name of the parliamentary houses (the House of Representatives and the Senate)
- The physical structure of the Constitution.

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The influence of other nations on our Constitution can also be identified; for example, Australia took inspiration from Canada with regard to the Senate, and Switzerland for our use of referenda.

Helpful online resources

Interested in some further reading about the international influences on the Australian Constitution?

Speech: The Honourable Robert French, AC–United States Influence on the Australian Legal System (2017): https://perthusasia.edu.au/getattachment/Blog/Event-Hon-Robert-French-AC-and-U-S-Influence-on/Final-Speech-USAsia-Centre-United-States-Influence-on-the-Australian-Legal-System-10-4-2017.pdf.aspx?lang=en-AU

Speech: The Honourable Justice Michael Kirby–A I Clark and the High Court of Australia (n.d): https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_clarkandhighcourt.htm

Journal: Cowan, Z, 1955, A Comparison of the Constitutions of Australia and the United States. Buffalo Law Review, 4(2), 155-180. https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=3958&context=buffalolawreview

Journal: Moffat, R C. L., 1965, Philosophical Foundations of the Australian Constitutional Tradition. *Sydney Law Review,* (4), 59-88. http://classic.austlii.edu.au/au/journals/SydLawRw/1965/4.pdf

Journal: Rich, W, 1993, Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia. *Federal Law Review*, 21(2), 202-227. http://classic.austlii.edu.au/au/journals/FedLawRw/1993/2.pdf

3

End of Chapter Activities

Discussion – Competing Tensions

Choose one set of the competing tensions from the beginning of the chapter. How do these competing tensions relate to the process of drafting the Constitution as outlined in this chapter? Explain below.

Competing Tensions:

Research Task – International Influence on the Constitution

Big Question – Did the Constitution adopt the best features of other countries' constitutional systems?

Students are to choose either England or the United States of America to compare to Australia, to answer the 'Big Question' above. Students can choose to pick a specific feature to compare (for example: explicit rights, separation of powers model etc), or could perhaps identify features that exist in the other nation they believe should have been adopted by the Australian founding fathers. 250-400 word response.

Students can use the further reading suggestions above as a starting place, if they wish.

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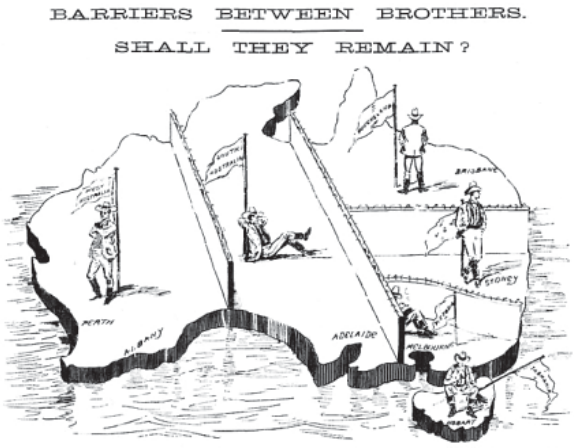
Political Cartoon Source Analysis – Federation

Source 1: *Cartoon of Victoria urging the Federation to get rid of the 'Chinese Pest'. Melbourne Punch, 10 May, 1888, National Library of Australia.*

Accessed: https://getting-it-together.moadoph.gov.au/victoria/road-to-federation/resource-1.html

Source 2: *The Argus, 1 June 1898, National Library of Australia.*



Accessed**:** https://getting-it-together.moadoph.gov.au/national-story/road-to-federation/resource-1.html

Source 3: *South Australia and Victoria want to help sail the Federation ship, but Reid wants complete control or nothing. 'The Bold Boarders', Critic, 21 January, 1899.*

THE BOLD BOARDERS.

Accessed: https://federation.collections.slsa.sa.gov.au/slides/1/3critic_bold_boarders.htm

Short Answer Questions

1. Identify some of the reasons given by the political cartoons for the movement towards federation.

2. Identify some of the legal and political struggles faced in the movement towards federation.

3. Are these cartoons useful sources for determining Australian attitudes towards federation in the late 1880s? To what degree are they limited? Using evidence, explain your answer.

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Essay Questions

Students are to choose one question from the selection below and write an essay response. Students are reminded to:

- Consider both sides of the argument
- Consider the quality of the sources used to write their essay response
- Consider multiple perspectives

1. The Australian founding fathers failed to create a Constitution for all Australian citizens. Using examples, evaluate this statement.

2. The Australian Constitution is too heavily influenced by overseas nations, and subsequently has failed the Australian people. Using examples, evaluate this statement.

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3.2 The Underlying Principles and Key Features of Australia's Constitutional System

SACE Considerations for Chapter 3.2

Big Questions

- Does the Australian High Court have too much power?
- Does the Australian constitutional system adequately protect the rights of individuals and groups?
- Did the Constitution adopt the best features of other countries' constitutional systems?
- Does the Constitution reflect the needs of contemporary society?
- How does the Constitution provide for both certainty and flexibility?
- Does the original purpose of the Senate as a 'States' house' adequately serve contemporary Australia?
- How has the division of power between the States and the Commonwealth changed since federation, and what is the significance of this?
- Has the High Court of Australia been an effective guardian of the Constitution?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Questions

- What are the underlying principles and key features of Australia's constitutional system?
    - Unwritten conventions
    - Separation of powers
    - Division of powers
    - Preservation of state powers
    - Representative government
    - Responsible government
    - Constitutional monarchy
    - The Referendum process
    - The High Court of Australia

The Australian Constitution is the product of rigorous and protracted debate designed to produce a piece of legislation which creates principles, structures and processes designed to achieve stable governance and democracy. History to date, has shown this to be the case. Despite this, there are critics of Australia's constitutional system.

Fundamental to Australia's constitutional system has been the acknowledgment and adherence to the rule of law. Elements of this include the supremacy of constitutional law with all government organisations (including parliaments, governments, government agencies and courts) only able to exercise power in accordance with constitutional law. All institutions (government and private) and individuals are bound by constitutional law. (This concept will be examined in more detail in Chapter 3.5).

The principal features of the Australian Constitution are as follows:

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Unwritten Conventions

Unwritten conventions – rules about the operation of the government not enumerated in the Constitution which are essential to the effective operation of our system while also providing flexibility.

At a Glance

Examples of conventions in the Westminster System:

- Responsible government – the Government is determined from the political party or parties commanding the majority of seats in the lower house.
- The Governor-General commissions the leader of the majority leader as the Prime Minister, who must sit in the lower house (the House of Representatives) and acts as the Governor-General's chief adviser.
- The Governor-General only accepts the advice of the majority party, provided such advice is consistent with constitutional law and the Government can guarantee the passage of the Supply bills through the Senate.
- The Speaker of the House has access to the Governor-General to advise him/her of the composition of the House of Representatives; principally which party commands the majority.
- The High Court of Australia does not give legal advice to the Government (or the Parliament).
- The Governor-General gives assent to bills passed through both houses of parliament in exactly the same form.

Advantages of Unwritten Conventions

Unwritten conventions accommodate flexibility within the constitutional system. For example, a minority government can be formed with support from minor parties and independents if no one party or coalition of parties gains a majority of seats in the lower house in their own right. Furthermore, the convention system has sound historical support. The unwritten rules have survived hundreds of years of British and Australian compliance. As the saying goes, 'if it ain't broke, don't fix it'.

Disadvantages of Unwritten Conventions

Unwritten conventions bring uncertainty and a lack of predictability to the structure and operation of government. As conventions are not legally binding, a breach of a convention is not subject to legal challenge. If conventions were written, the rules of government would be clearly enunciated to the general community, so there would be greater transparency. The British system has an unwritten constitution, solely reliant upon conventions developed over time. This offers limited protection to the people as the Parliament can depart from convention at any stage.

C Collaborative Activity

Think/Pair/Share

Consider the dismissal of the Whitlam government in 1975. In pairs, research it and discuss the importance and impact of unwritten conventions in this historic event. Does it highlight anything in need of change or reform? Share your findings and thoughts with the class.

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Long Answer Question

Considering the competing tensions of certainty and flexibility, discuss whether or not unwritten conventions should be written into the Australian constitution.

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Separation of powers

The concept of the separation of powers is not officially enumerated in the Constitution. However, the nature and parameters of the three institutions of government – the legislative, the executive and the judiciary – are established in chapters I, II and III of the Constitution (form of the Parliament in Chapter I, the Executive Government in Chapter II, and the Judicature in Chapter III), as well as the powers they can exercise. These powers are subject to review by the High Court.

The separation of powers shares lawmaking power across different institutions, making it more likely the rights of diverse groups in society will be upheld while also creating a system of checks and balances, thereby upholding acceptable standards and reducing corruption. The supervisory role of each branch helps ensure laws are valid and of good quality, while judicial independence protects the rights of people against the power of the state.

The Parliament is conferred legislative power – the power to make laws through legislation in chapter 1 of the Constitution. The bicameral nature of the Commonwealth Parliament and the legislative powers it may exercise are prescribed here. The legislative powers of the Commonwealth are 'enumerated powers' because they arise from the legislative authority of the parliament, as expressly listed in the Constitution. The chapter also prescribes the composition of the two Houses of Parliament and the rules of Eligibility regarding the election of citizens to those chambers.

The Executive is conferred executive power – the power to administer laws and carry out the business of government in chapter 2 of the Constitution. Executive power is vested in the Governor-General as the Queen's representative, but is exercised, by the conventions of responsible government, on advice of the Ministers of Government. There is no list of executive powers in the Constitution; the government assumes executive powers by the text of the Constitution, the common law and federal statutes which have amended or changed common law executive powers. The most apparent powers exercised by the government refer to passages which grant the Governor-General specific executive power. For example, while section 68 vests commander- in-chief powers over the defence forces in the Governor General, these powers are only exercised on the advice of his or her responsible ministers.

The Judicature is conferred judicial power – the power to resolve legal disputes in chapter 3 of the Constitution. Pursuant to a constitutional obligation in Section 71, the Commonwealth Parliament established the High Court of Australia and vested it with judicial power. The parliament also created the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court to exercise judicial powers in specific jurisdictions to bring about just outcomes to legal disputes.

Despite this structure, there is not a clear separation between the legislative and the executive. While only the Parliament can pass Acts, these Acts often give the Executive Government the power to make regulations, rules and by-laws (delegated legislation). The distinction between the two is made less clear by the fact the Prime Minister and Ministers must be members of Parliament; this reflects the principle of responsible government. Contrastingly, the Judicature is strictly separate.

In summary, the Legislature (Parliament) makes laws, the Executive (Public Service and Government departments) administer laws and the Judiciary (Courts) resolve disputes.

Division of powers

The Constitution divides legislative power between the Commonwealth and the states. While the doctrine of the division of powers is not expressly enumerated in the Australian Constitution, it is implied by various sections in the document. This is done through specific powers (which include concurrent and exclusive powers), prohibited powers, and residual powers. This doctrine brings certainty and predictability to the lawmaking powers each federal partner can exercise and can be enforced transparently by an independent High Court. While not specifically stated in the Australian Constitution, the Founders intended the Commonwealth could only exercise legislative powers enumerated in the Constitution – a presumption endorsed by the High Court of Australia in its judgments. The Commonwealth's legislative powers are therefore restricted to those powers enumerated (written) in the Constitution. Section 51 lists 39 specific powers.

Specific powers

The Constitution specifies the areas in which the Commonwealth can legislate (anything written in the document). Many of these areas are identified in section 51. For example, marriage and divorce (s51 subsections xx and xxi) are specific powers of the Commonwealth.

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At a Glance

Some of the Specific Powers of the Commonwealth include:

Section 51(i)

Trade and commerce with other countries, and among the states

Section 51(ii)

Taxation, but so far as not to discriminate between states and parts of states

Section 51(v)

Postal, telegraphic, telephone, and other like services

Section 51(xxi)

Marriage

Section 51 (xxxii)

Divorce and matrimonial causes; and in relation thereto, parental rights, the custody and guardianship of infants, respectively

Section 51(xxix)

External affairs

Section 51(xxxvii)

Referral of powers.

Exclusive powers of the Commonwealth

These are the specific powers which only the Commonwealth can exercise.

Section 51(vi) and **Section 114**

The provision of an armed defence force

Section 51(xii) and **Section 115**

Currency, coinage, and legal tender

Section 90

The provision of uniform imposition of custom duties (tariffs) and excises

Concurrent powers

Many specific powers, such as marriage and divorce, are also concurrent powers, meaning states are also allowed to legislate in this area. If there is any inconsistency between state and federal laws, state laws, if challenged in the High Court, will be ruled *ultra vires*, to the extent of the inconsistency in accordance with the inconsistency rule (section 109). Where both the States and the Commonwealth have the power to make laws on the same topic, they are not only specific but also concurrent powers.

The inconsistency rule (section 109):

'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

Exclusive powers

Some powers, such as defence and immigration, are exclusive powers of the Commonwealth, meaning the states are not allowed to pass law in these areas. These are specified in the Constitution, meaning they are both specific and exclusive. Section 114 (Taxation of property of the Commonwealth or the State) and section 115 (the States shall not coin money) are examples of exclusive powers.

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Prohibited powers

Other powers, such as religion, are prohibited, meaning the Commonwealth is not allowed to legislate in this area.

At a Glance

Commonwealth prohibited powers

Section 99

The Commonwealth cannot discriminate between the states in matters dealing with trade and taxation.

Section 116

The Commonwealth cannot make laws regarding religion.

General prohibited powers

Section 92

The Commonwealth and the states cannot arbitrarily impose barriers against free trade between the states.

State prohibited powers

The states cannot make laws in areas which are the exclusive powers of the Commonwealth, such as defence (**Section 119**)

Residual powers

Any legislative power not enumerated in the Constitution, such as health and education, resides with the states. This means the states are free to make their own laws in these areas without fear of being inconsistent with the Commonwealth or other states. Other examples include civil and criminal law, environment, women, children and public health, education and housing. The principal reason behind this rests with the desire to appease smaller states, who threatened to derail federation as they believed they were given too few powers by the framers of the original versions of the Constitution.

Short Answer Questions

1. Provide an example of a specific, concurrent, exclusive, residual and prohibited power.

2. Do the division of powers represent a fair and equitable distribution of legislative powers? Justify your response.

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3. List three powers you believe should rest with either the States or the Commonwealth. (Your choices do not have to come from those enumerated in the Constitution). Explain your decision.

4. Outline a strength of adhering to Montesquie's theory of ensuring there is a separation of powers.

5. Provide an example for each of the following:

   (a) A checking mechanism of the Legislature over the Executive.

   (b) A checking mechanism of the Executive over the Legislature.

   (c) A checking mechanism of the Executive over the Judiciary.

   (d) A checking mechanism of the Judiciary over the Executive.

   (e) A checking mechanism of the Judiciary over the Legislature.

   (f) A checking mechanism of the Legislature over the Judiciary.

6. How does an independent judiciary act as a protection for members of the community?

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Transfer of powers

There are a number of ways in which power can effectively be transferred from the states to the Commonwealth, and vice versa. These include High Court decisions, cooperative federalism, referral of power (voluntary handover), tied funding, referenda, unchallenged legislation, and bullying.

High Court decisions

The original jurisdiction of the High Court of Australia requires it to resolve any disputes regarding the Constitution. There have been a number of disputes which have effectively resulted in a transfer of powers from the states to the Commonwealth. Examples include *Brislan's Case 1935*, the *First Uniform Tax Case 1942* and the *Tasmanian Dam Case 1983.*

More recently, HCA interpretation of the Corporations Power (s51 (xx)) has seen a further shift in the balance of power toward the Commonwealth. In *NSW v Commonwealth (Work Choices Case*) 2006 229 CLR 1, the court held Work Choices legislation was a valid exercise of the Corporations Power because it supported any law which directly created, altered or impaired rights, powers, duties, liabilities or privileges of a corporation. This was despite the fact for much of the twentieth century, states and territories had been responsible for their own workplace relations laws with respect to terms and conditions for employees and is significant because of the number of businesses in Australia now acting as corporations, be they sole traders or otherwise.

There are also some examples of cases where the ruling of the HCA has resulted in limiting the scope of Commonwealth powers. In the School Chaplaincy case (*Williams v the Commonwealth HCA 23 (2012*)) the power of the Commonwealth executive to enter into contracts and spend public monies under s61 was challenged in the HCA. The monies were allocated in accordance with a proposed National Schools Chaplaincy initiative in relation to a funding agreement entered into with the Scripture Union of Queensland. Subsequent legislation was also ruled ultra vires in Williams No. 2 ensuring the status quo remained with respect to the division of powers. This case also impacted on existing and future funding arrangements.

Helpful online resources

For a detailed commentary on this decision see

https://.theconversation.com/the-high-court-school-chaplains-case-and-what-it-means-for-Commonwealth-funding-7795?

posted by Gabrielle Appleby June 20, 2010

External Affairs power

The Commonwealth has exercised the external affairs power to enact legislation in an area in which it does not have a specific head of power. The High Court has held in a number of cases, the 1983 Tasmanian Dam case for example, that the Commonwealth can exercise the external affairs power provided the legislation puts into effect a valid obligation expressed in an international treaty the Commonwealth has signed. In this case, the Tasmanian premier proposed to shore up his state's power supplies by flooding the Gordon Below Franklin River region in the Southwest to create a hydro-electricity plant. The Commonwealth Labor government headed by R. Hawke opposed the scheme. Mr Gray, the Tasmanian premier declared the Commonwealth did not have the power to stop him and no such power existed in the Constitution. The Commonwealth refuted this, arguing before the High Court in the dispute which followed, the region in question was an area of world-wide significance, attracting visitors from all over the world and as such had been placed on a World Heritage List. They further argued as an item of world heritage, the region had significance beyond Australia and could hence be described as an 'external affair' within the parameters and meaning of s51 xxix and as such was something the Commonwealth could make laws about. In accepting this argument by a majority of 4-3, the Full Bench of the High Court effectively gave the Commonwealth power to make laws with respect to the environment. The expanded meaning of s51 xxix broadened Commonwealth powers at the expense of state residual powers.

Cooperative federalism

All members of the Commonwealth – the states and the federal government may negotiate and pass similar legislation in order to achieve a consistent outcome.

As a matter of principle, the federal partners have agreed a number of social and legal issues need to be addressed in a uniform manner in areas where the Commonwealth does not have a specific power. The Commonwealth and the States have entered into a spirit of co-operation to address these issues.

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To reflect and accommodate the new spirit of co-operation the federal partners, in May 1992, established an organisation, called the Council of Australian Governments (COAG). Its members include the heads of government of the Commonwealth, states, territories and the President of the Australian Local Government Association (ALGA). COAG meets to debate and co-ordinate government activities. The federal partners will endeavour to make intergovernmental agreements (called federal co-operative agreements) about adopting measures needing a uniform and consistent approach in which the Commonwealth lacks a specific power to legislate unilaterally. For example, in response to massacre at Port Arthur in Tasmania in 1995, a federal cooperative agreement was created (called the National Weapons Agreement) to ban the purchase, sale and ownership of automatic and semi-automatic weapons. As the Commonwealth did not have a specific power about guns, the States passed identical gun legislation, exercising their residual powers, to prohibit the purchase, sale and ownership of the prescribed weapons. The Commonwealth financed a buy-back scheme to acquire and destroy all weapons already in circulation, as well as passing legislation to prohibit the importation of those types of weapons. Where this situation arises, Queensland, because of its status as a uni-cameral (one-house) state in the federation, drafts template legislation to put to the Legislative Assembly. The lack of an upper house (abolished in 1922) means passage of the bill is generally guaranteed. Once successful, other states move to pass similar legislation.

Referral of Powers

The states can choose to voluntarily refer (or transfer) power to the Commonwealth. This is provided in section 51(xxxvii), the 'referral of powers'. It was used in 1987 when four States referred power over ex nuptial children (children born outside of a valid marriage) to the Commonwealth, so disputes regarding all children could be resolved in the then Family Court. This meant the Commonwealth (through the Family Court of the Federal Circuit Court) could deal with all disputes regarding children upon the breakdown of relationships, irrespective of the marital status of their parents. This method has only experienced limited success as the states are reluctant to surrender their powers, particularly as the High Court has held a referred power cannot be redeemed.

Grants power (or tied funding)

The Commonwealth has control over the vast majority of finances and taxes, primarily because they are the collectors of income tax and GST, which is then allocated to the states. Section 96 of the Constitution allows the Commonwealth to give financial grants to the states subject to certain conditions. The lure of financial grants effectively compels the states to enact legislation (per their residual powers) in a manner consistent with Commonwealth policy. They can also "tie" any allocation of funding to the states to requirements, such as the passing of specific legislation. For example, if the federal government wants states to legislate for a reform in education, they can make funding dependent upon that law being passed. Similarly, if a state seeks funding for a new school, the Commonwealth can, through the threat of withdrawing or failing to allocate funding, dictate where the school should be built. This means even if the Commonwealth does not have any specified power and it is a residual power of the states, the Commonwealth can effectively dictate what the law will be.

Referendum

The Constitution can be changed via a referendum, which might result in a shift in power. For example, in 1967 there was a successful referendum which resulted in the Commonwealth being granted the specific power to legislate with regard to the people of any race, including Indigenous Peoples. Prior to this, the Commonwealth had been prohibited from legislating with regard to Indigenous Peoples. The referendum process with be discussed later in this chapter.

Unchallenged legislation

If legislation which, if challenged, would be found *ultra vires*, goes unchallenged, then it will become law. This happened in 1949 with the Snowy Mountain River scheme, which resulted in the establishment of the Snowy Mountain Hydro-electric Plant. Technically, it was unconstitutional for the Commonwealth to pass the *Snowy Mountains Hydro-electric Act* as it related to a waterway, which remains a state power, but it was never challenged in court.

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Independent Activity

Research examples of different ways in which the division of powers has been affected.

Consider:

- High Court Cases
- Cooperative Federalism
- Grants Power (or Tied Funding)
- Referral of Powers
- Referenda
- Unchallenged Legislation

Long Answer Questions

1. Outline three ways in which powers can be transferred from the states to the Commonwealth.

(a) .....

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.....

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(b) .....

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(c) .....

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2. Referring to the competing tensions of fairness and efficiency, discuss the ease with which power can be transferred from the states to the Commonwealth.

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Preservation of State Powers

At a Glance

State Powers

At federation, the states' powers were preserved in the following ways:

- The states retained all of their laws (sections 106-108). These are often referred to as Residual Powers.
- The states retained the power to legislate in all areas unless prohibited by the constitution.
- The states retained all "residual" legislative power.
- The states retained their own constitutions, parliaments and governments.
- The Senate was established as a "states' house" of review.
- A double majority is required for constitutional change (section 128).
- The High Court of Australia was created with the primary role as the guardian of the constitution, to review Commonwealth law and resolve State v State disputes.
- There are constraints on Commonwealth law-making power.
- The Commonwealth must provide for the military defence of the states.
- The states retain access to water (section 100).

Effective Preservation of State Powers

The Founding Fathers were very careful to protect the sovereignty of the states by having safeguards in the Australian Constitution. There has been effective preservation of the states' powers, particularly due to explicit constitutional protections, residual powers, the retention of state systems, bicameral parliament, the referendum process, and constitutional challenges (judicial review).

Constitutional Protections

A number of sections have been enumerated to specifically protect state sovereignty. Section 106 states that the Constitution of each state shall continue to the extent it is not in conflict with the Commonwealth Constitution. Section 107 ensure that every power of the states shall continue unless exclusively given to the Commonwealth. Section 108 means every law remains valid in the state provided they are not in conflict with federal law. Section 99 prohibits the Commonwealth from making laws which discriminate unfairly against individual states in matters concerning trade, commerce and revenue, and section 119 places a constitutional obligation on the Commonwealth to defend the states against invasion and, at their request, to protect them from domestic unrest.

Residual powers

The Commonwealth can only exercise legislative powers specifically enumerated in the Constitution (more specifically in section 51); all other powers reside with the States. The High Court has endorsed this principle in many of its decisions since 1903.

Bicameral Parliament

The structure of the Commonwealth Parliament has prevented the Federal Government from arbitrarily encroaching on state powers. This has occurred largely because of the proportional electoral system for the Senate which makes it very hard for the Federal Government to attain a majority in both Houses to implement its policies by enacting new legislation. Independents and minor party Senators have generally commanded the balance of power in the Senate in recent decades. They have exercised their voting power to limit the Commonwealth's intrusions into the sovereignty of the States.

Section 1 of the Constitution prescribes the Commonwealth Parliament is bicameral with a House of Representatives and a Senate, while section 7 provides that each state has equal representation in the Senate irrespective of its population size. This means the Senate is structured to perform the role of a House of legislative review. Section 58 prescribes the Governor-General can only assent a Bill to become an Act after its successful passage through both Houses in the same form. Collectively, these sections prevent the larger states from dominating the parliamentary process to pursue laws which serve to protect and recognise their interests at the expense of the smaller states. The Senate can also prevent the Federal Executive Government from pursuing a legislative program which in any way arbitrarily interferes with state powers.

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Constitutional alteration by referendum

The dual criteria required for a referendum to succeed (section128) has largely prevented the Commonwealth from using this vehicle to encroach arbitrarily on state powers. This is evidenced by only eight successful changes by referendum of 44 attempts since federation in 1901, of which only 4 have affected the powers of the States. The details of the referendum process will be explained later in this chapter.

Constitutional challenges

The States do have the power to challenge the validity of Federal legislation in an independent High Court arguing such laws are *ultra vires* using section 76. The High Court will decide if the Commonwealth has exercised power *ultra vires* the Constitution. The independence of the High Court means federal laws are objectively reviewed to prevent the Commonwealth from unlawfully intruding into the residual powers of the states. The High Court decides the matter purely in accordance with law. It has not always proven an effective method of protecting state powers, as many cases have been decided in the Commonwealth's favour, but it still remains a vehicle to uphold the Constitution and ensure the protection of the rights and powers of the states.

Long Answer Question

Explain how the Australian Constitution preserves state powers.

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Ineffective Preservation of States' Powers

Some of the states' legislative powers have not been effectively preserved. This has been due, largely, to an increase in the scope of Commonwealth legislation and the exercise of the Commonwealth's external affairs power.

The Commonwealth has passed much legislation since 1901 in areas where there was no previous Commonwealth legislation, but where they have the power to do so. For example, in 2005 the Commonwealth exercised the Corporations' power to create a national industrial relations system by successfully passing the Work Choices legislation through the Commonwealth Parliament, thereby creating a national industrial relations scheme regarding employers and employees involved with companies. In 2006 the States challenged the Commonwealth's exercise of the corporations' power in this manner, but the High Court held the Commonwealth had validly exercised the power to create the (federal) industrial relations system.

The Commonwealth has successfully used the external affairs power to 'encroach' on state powers by enacting legislation giving effect to obligations in an international treaty where it previously had no valid head of power. The High Court has endorsed this exercise of power in many of its judgments. For example, in the Tasmanian Dam case of 1983, the High Court found Commonwealth legislation to ban the damming of the Franklin River was a valid exercise of its external affairs power, as it had previously signed an international treaty making the region a world heritage site. Other examples include *Koowarta* (1982) and *Mabo No. 1* (1988).

Representative government

Representative government is a system of governance in which elected members of the community are elected to parliament be the sovereign decision-makers and law makers in Australia. A parliamentary democracy is a model of representative government. The concept applies to the powers and roles performed by elected members of the community in the legislative arm. Chapter I of the Constitution establishes the Parliament, and this has provided Australia with stable bicameral elected parliaments since the first federal elections in 1901.

At a Glance

Representative Government

Section 1

Prescribes the Commonwealth Parliament is bicameral with a House of Representatives and a Senate.

Section 7

Provides each state has equal representation in the Senate irrespective of its population size.

Section 58

Prescribes the Governor-General can only assent a Bill to become an Act after its successful passage through both Houses in the same form.

There have been criticisms of the model. Most of these criticisms relate to the nature of the constitutional system within which the Commonwealth Parliament must operate, such as the eligibility of candidates standing for a parliamentary seat and their tenure, the legislative powers the Commonwealth Parliament can exercise, and the relative legislative powers of the two houses of parliament. The challenge for critics as is often the case, is to come up with a better model.

Responsible government

Responsible government is a system of governance in which the Executive is determined to decide the policies of government and to enforce parliament's laws. The concept applies to the powers and roles performed by members of the executive arm. Chapter II of the Constitution establishes the Executive. In the Westminster system conventions of responsible government feature prominently.

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At a Glance

Representative Government

- The Executive is determined to decide the policies of government and to enforce parliament's laws.
- Adopted from the British Westminster system.
- Incorporates the parliamentary democratic model.
- The political party (or coalition of parties) attaining the majority of seats in the *lower house* (House of Representatives) in an election forms the Government (Convention).
- The leader of the majority party is commissioned as the prime minister and is the chief adviser to the head of state, the Governor General. The GG will accept the PMs advice provided three conditions are met:
  - The PM's party retains the majority in the HR
  - The Government can guarantee the passage of supply through Parliament, and
  - The PM's advice is consistent with constitutional law (Convention).
- Members of Parliament (MPs) are nominated by the PM to become ministers in the Federal Cabinet (Convention).
- The term 'responsible' is important as it indicates the PM and his/her Ministers are directly responsible to the Parliament as this is where the Government was formed. By virtue of this they are indirectly accountable to the populous who elected them.

In Australia's system of responsible government, the roles of head of state (British Monarch represented by his/her resident Commonwealth Governor-General and State Governors) and head of government (the Prime Minister) are clearly separated and performed by different people, who attain public office in different ways. Interestingly, there is no mention of the office of Prime Minister, or even representative or responsible government in the Australian Constitution. These are terms created by academics. Ultimately, our system of government is subject to review by the HCA, hence a significant hurdle lies with the HCA endorsing any changes in their decisions. Thus the principles enshrined in representative and responsible government are dependent on interpretation by HCA justices.

While there have been criticisms of this model, it can be argued the strengths of the system far outweigh weaknesses. This is supported by the fact this model of responsible government within the parliamentary democratic model has provided Australia with stable and effective government since 1901.

There are clear strengths of this model, for example the creation of executive government and leadership, in the form of the Prime Minister and Cabinet and the defined and strong relationship between legislature and executive. There is an effective system of accountability and scrutiny through processes such as Question Time and the fact the Prime Minister is held directly accountable to the Parliament (principally the House of Representatives) for all executive decisions made by the Government. Perhaps the greatest strength of Australia's constitutional system is the ability to change it through referendum and the steps required to make this happen. This is deliberately difficult to achieve.

There are also obvious weaknesses of this model. There is a lack of complete separation between the legislature and executive–the fact conventions are not always followed and shortcomings in scrutiny (problems with Question Time) and the lack of accountability of Ministers. Australian Prime Ministers also exercise too much power in deciding when elections will be held and there is potential for regular change in leadership.

Extended Response Question

With reference to the competing tensions of certainty and flexibility, critically analyse the effectiveness of the principle of responsible government in Australia. (500+ words)

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Constitutional monarchy and the Governor-General

In our system of responsible government, the roles of head of state and head of government are clearly separated and performed by different people who attain public office in different ways. Executive power rests with the Head of State, the hereditary monarch and their representative (the Governor-General), and the institutions of government. By convention however, the powers of the Monarch are quite narrow.

The division of powers is enumerated in a written constitution with the High Court in its original jurisdiction, interpreting the Constitution. However, by convention the Monarch acts on the advice of the Prime Minster and Ministers, who are bound by the Constitution in terms of the limits of their power.

This Constitutional Monarchy model has provided Australia with a stable system of governance since federation in 1901. The British Monarch and Governors-General perform their roles objectively by not favouring either side of the political spectrum. The British Monarch and their Governors-General only perform very prescribed constitutional roles, such as assenting Bills on advice of the Parliament, historically supported by the Australian community.

The Constitution confirms the British Monarch as the constitutional 'head of state' even though the British King or Queen does not actually reside in Australia. For this practical reason, the Constitution made provision for the Crown to be represented in Australia by a titular head of state knowns as the Governor-General. The Governor-General is appointed by the Queen (or King) on the recommendation of the Australian Prime Minister and usually holds public office for a fixed term of five years.

Fast fact

The Powers of the Governor-General

**NB: The following list is not exhaustive but provides some indication of the role and influence of the Governor-General. In most of these roles, the Governor-General acts on the advice of his or her Prime Minister at Federal Executive Council.*

- Reserve Powers

The capacity of the Governor-General to dismiss a Prime Minister is important as it provides a circuit breaker in the event of government not being able to pass supply bills, the Prime Minister losing confidence of the House or in the event of serious criminal misconduct by the Prime Minister

- Legislative powers
  - Head of the Commonwealth Parliament (section 2)
  - Prorogues and dissolves Parliament (section 4)
  - Issues writs for general elections for the House of Representatives (section 32)
  - Assents bills passed in both Houses of Parliament (section 58)
  - Submits Constitutional Alteration Bills (referenda) (section 128)
- Executive powers
  - Accepts the advice of his/her responsible ministers at Federal Executive Council (section 62)
  - Appoints officers to administer government departments and statutory bodies (section 67) on the advice of his/her responsible minister e.g. PM.
  - Commander in chief of the armed forces (section 68)
- Judicial appointment and dismissal powers
  - Appoints judges to all federal courts (section 72[i])
  - Dismisses federal judges on address of both Houses of Parliament on the grounds of proved misbehaviour or incapacity (section 72[ii])
- Ceremonial powers
  - Accepting the credentials of foreign diplomats to Australia
  - Hosting leaders of government from overseas nations

However, the British head of state attains their position by birthright, not on merit, which contradicts Australia's principles of democratic and equal opportunity. Furthermore, the British monarch (as Australia's head of state) represents British interests abroad, not Australia's interests, while the Governor-General performs no active constitutional role, at great cost to the community.

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Fast fact

Reserve Powers of the Governor-General

While the reserve powers detailed in section 64 are unclear, past practice would indicate the Governor-General may act independently to:

- Select a leader to form a government after an election in the event of a 'hung' parliament (that is, where no individual party or coalition holds a clear majority)
- Dismiss a Prime Minister who cannot guarantee the passage of the supply Bills through parliament
- Refuse to accept the advice of a Prime Minister who has lost the confidence of the House of Representatives

Short Answer Questions

1. Explain how Australia is a constitutional monarchy.

2. Outline the role of the Governor General. (2 marks)

Long Answer Questions

1. Discuss the relative importance of the Governor-Generals role in Australia's system of Government.

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2. In approximately 500 words, critically analyse the effectiveness of constitutional monarchy as a system of Government in Australia.

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Referendum procedures

The Constitution provides a lawful and effective method to alter or amend the Constitution by democratic vote – a referendum – provided the reasons for change are clearly explained to the Australian community and specific criteria are met.

Any change to the Constitution requires a successful referendum. For a referendum to be successful, it requires a double majority: a proposed change must receive majority support (50% + 1) from the total number of registered voters, and majority support in a majority of states (meaning in at least 4 states there must be at least 50% + 1 who vote in favour of the change).

Criteria for Success:

- Democratic criterion

A majority of votes cast, that is, at least 50% plus one, must support change

- Federal criterion

A majority of states must also support the change. This means four of the six states must approve the referendum question for it to succeed

- Special criterion

A special criterion must also be satisfied if any particular state is likely to lose entitlements in the Constitution. This state must also record a majority vote

At a Glance

The Referendum process

The referendum process can be summarised as follows:

- Initiate/propose the holding of a referendum
- Public consultation to facilitate positive public debate
- Arguments for and against the proposed change prepared
- Precise wording of the question decided
- Passage of a Constitutional Alteration Bill through the Cwlth Parliament.
- Conducting a successful referendum meeting the dual criteria (democratic and Federal criterion)
- Assent of the successful Constitutional Bill into an Act
- Formal change of the Australian Constitution via proclamation and gazettal

Despite being the intention to accommodate constitutional change by referendum, it has proven to be difficult to achieve change by referendum. Only 8 of 44 referendum questions have succeeded since federation in 1901, and only three have successfully increased the powers of the Commonwealth, relative to the States. This is because it is difficult to attain bi-partisan support and the dual criteria of a majority democratic vote in a majority of states. Bi-partisan support is often made more problematic due to major political parties expressing partisan views in relation to most referendum proposals. This resistance to change may also be a result of the conservatism of the Australian community (that is, reluctance to change) and a fear of granting greater power to government bodies. It is often proposed the dual criteria is too strict to guarantee change and more referendum proposals could have succeeded had there only been one criterion required for change.

Fast fact

Why most Australian referenda fail

- Lack of bipartisan support

History indicates when the major political parties do not agree on the change, the proposal fails

- Intrusion into state powers

When the powers of a state (or states) are threatened they, inevitably campaign against change

- Rigidity of the dual criteria system

It has proved difficult for many referendum proposals to meet the dual criteria

- Conservatism of the Australian electorate

The poor success rate (8 of 44 attempts) suggests the Australian community is reluctant to endorse change

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Short Answer Questions

1. Explain, in dot point form, the referendum process.

2. Outline three stages of the process by which amendments can be made to the Australian Constitution.

   (a)

   (b)

   (c)

3. Why do most Australian referenda fail?

4. With reference to the competing tensions of fairness and efficiency, discuss whether or not the criteria for changing the Australian Constitution are too difficult to achieve.

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C Collaborative Activity

Search for Sources

One prominent illustration of a referendum is the 1967 referendum in which wording in section 51(xxvi) was deleted to allow the Commonwealth to make laws about Aboriginal people. This reform allowed the Commonwealth to use its vast resources to implement policies for the betterment of Australia's Indigenous population. The referendum also meant that Indigenous Australians could be counted in the census, which translated to increased funding as this was determined on a per capita basis.

Task: in small groups, use your devices, library, and any other avenues available to you, to search for and find sources relating to the 1967 referendum.

Try to find at least one example of each of the following:

- An extract from legislation
- A voting ballot
- A newspaper article
- A political cartoon
- A photograph
- A statistical graph

For each source, consider what this reveals about the 1967 referendum itself and about the process. Share your sources and your considerations with the class.

High Court of Australia

The High Court of Australia, established in Chapter III of the Constitution, is the most superior court in Australia. It has both original and appellate jurisdiction and its principal role is to give effect to the doctrine of judicial review.

Original Jurisdiction: to resolve constitutional disputes, giving meaning to the Australian Constitution

As the final interpreter of the Constitution, the High Court resolves all disputes between members of the Commonwealth, including between states or between the Commonwealth and the States. This is defined in sections 75 and 76 of the Australian Constitution. It includes any matter involving the interpretation of the Constitution or where the Commonwealth is a party to a dispute.

High Court decisions involving interpretation of the Australian Constitution cannot be overruled by any parliament in Australia. In this respect, the High Court has sovereign power. These decisions can only be overruled by another Full Bench of the High Court departing from its own precedent or a successful referendum which changes the wording in the Constitution and therefore the effect of the High Court's decision.

Essentially, the High Court sits in this jurisdiction as a 'Guardian of the Constitution' to ensure power is validly exercised by legislatures and executives throughout Australia.

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Conflicts might occur between the Commonwealth and the States regarding:

- the financial dominance of the Commonwealth over the States, for example the distribution of the revenue raised by the Goods and Services Tax (GST)
- the Commonwealth exercising power in relation to concurrent power – legislating where it has not in the past meaning the inconsistency rule (s109) sees commonwealth law prevail (for example, the Commonwealth *Marriage Act 1961*)
- states challenging the validity of commonwealth laws believing them to be *ultra vires* the Constitution, for example as a result of the Commonwealth signing a treaty and then legislating
- different parties in Government, for example LNP in Commonwealth, ALP in Vic, resulting in a lack of cooperation

Significant Case: Cheatle v The Queen 1993

In this case, the Full Bench held the guarantee of trial by jury for a federal indictable offence under section 80 precluded majority jury guilty verdicts. This means defendants can only be convicted of federal offences by a unanimous jury verdict.

Appellate Jurisdiction: as the final court of appeal in Australia in all branches of law

The High Court is the highest court of appeal. Parties can seek leave to appeal to the High Court if they have exhausted all avenues of appeal in the federal court hierarchy or any state court hierarchy. The High Court is therefore the determiner of law in the nation. Most of the High Court's workload relates to hearing appeals against decisions of federal and state courts pursuant to section 73 of the Australian Constitution.

There is no automatic right to have an appeal heard by the High Court. The appellant must convince the High Court special reasons exist. These are called special leave applications and the resulting court action is referred to as a hearing, not a trial. The High Court has broad discretionary power, and usually considers whether:

- the case involves a question of law of public importance, or has caused differences of opinion to arise in court decisions
- whether the case should be heard in the interests of justice

Often the hearing gives consideration to a narrow aspect of the matter before it, especially in hearing civil or criminal appeals.

High Court decisions become binding precedents on all other courts in Australia, thereby bringing consistency and uniformity to the application of case law. Australian parliaments are at liberty to override the High Court's decisions in this jurisdiction (appeals) by enactment. The High Court can also depart from its own decisions.

Significant Case: Hoyts Pty Limited v Burns 2003

The Full Court held Hoyts was not negligent for failing to erect signs warning patrons the theatre seats automatically contract into the upright position. Mrs Burns, the appellant, was injured when she tried to sit down on a contracted seat. The High Court overturned the decision of the Full Court of Appeal of New South Wales. The High Court held a court must be convinced warning signs would have resulted in a completely different standard of behaviour by the plaintiff, Mrs Burns.

The High Court is comprised of seven justices, appointed to the Bench by the Governor-General on the advice of the Federal Attorney-General at Federal Executive Council. In reality, the Federal Government discusses an appointment at a confidential Cabinet meeting to decide appointments. The Attorney-General is obliged by statute to consult the states regarding the appointment. Justices are appointed for the term of their professional career if they so choose (permanency of tenure) but must resign at 70 years of age. This is a constitutional requirement, created at the 1977 referendum. Justices can only be removed by the Governor-General for two reasons: proved misbehaviour or incapacity. As at 2021, no Justice has ever been dismissed.

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Fast fact

High Court jurisdictional sittings

The High Court sits in three 'Courts':

- High Court of Australia

A *single justice* hears relatively straight-forward matters in federal law. This could include, for example, a justice presiding in the Court of Disputed returns to hear a dispute about an irregularity alleged to have occurred at a federal election.

- Full Court of the High Court

The Full Court presides with three or five justices. It usually sits with three justices to hear special leave applications regarding appeals to the Full Court. When actually hearing an appeal, the Full Court sits with five justices. It can sit with all seven justices in special cases. This Court sits in the appellate jurisdiction to hear civil and criminal appeals from the appellate divisions of all superior federal and state courts.

- Full Bench of the High Court

The Full Bench sits with the seven justices in the original jurisdiction to interpret the Constitution to resolve constitutional disputes. Their actual seating position at the bench is determined according to their seniority within the court. The Chief Justice sits in the middle and remaining members sit either side with the least experienced at the ends.

High Court interpretation of the Constitution

Constitutional change by referendum has proven very difficult in Australia, and the High Court has kept the Constitution alive and flexible through its interpretations. The High Court is now a very important part of the constitutional process. Its interpretations have impacted the nature and meaning of the Constitution in three fundamental areas:

Division of powers

The Australian Constitution gives authority to the High Court to judicially review the exercise of legislative powers by the Commonwealth and the States. The decisions of the High Court in these power sharing disputes have changed the balance of legislative power between the federal partners, more often than not, at the expense of the States.

Separation of powers

Although there is a close and direct relationship between legislative and executive powers, the High Court has held in its judgments federal judicial power must be exercised as a completely independent power of government.

It is also important to acknowledge in a number of constitutional cases, the High Court has held some implied human rights are protected by the Constitution. This is discussed, along with the cases themselves, elsewhere in this workbook.

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I Independent Activity

Researching Cases

Research the following cases, expanding upon the brief summary provided, outlining their significance regarding the interpretation of the Constitution.

- R *v Kirby, ex parte Boilermakers' Society of Australia*
- *Uniform Tax Case 1942*
- *Tasmania Dam Case 1983*
- *Work Choices Case 2006*

R v Kirby, ex parte Boilermakers' Society of Australia

The High Court held that certain sections of the *Conciliation and Arbitration Act 1904* were invalid because they vested judicial power in an arbitral tribunal, the Court of Conciliation and Arbitration. The High Court made it clear that an executive body could not be vested with judicial powers, so the principle of judicial independence was held to be implied in Chapter 3 of the Australian Constitution by judicial decree.

Uniform Tax Case 1942

HCA held that the Cwlth validly enacted legislation that effectively prevented the States from levying income taxes, thereby making the Cwlth the superior financial federal partner in the federation. The case permitted the Cwlth to exercise its financial dominance to effectively 'arrest' legislative powers from the States.

Tasmania Dam Case 1983

HCA held that the Cwlth validly enacted legislation to give effect to the conditions of an UN Convention it had signed, despite not having a prescribed head of power in that area. The case meant that the Cwlth could exercise the External Affairs power to enact laws in areas presumed to be the residual powers of the States.

Work Choices Case 2006

HCA held that the Cwlth validly enacted legislation to regulate industrial matters related to companies. The decision effectively meant that the Cwlth could exercise the corporations' power in section 51 (20) in almost any area it wished, including encroaching on those powers presumed to be the residual powers of the States.

I Independent Activity

Referring to at least one of the competing tensions, critically analyse the role of the High Court of Australia in the shifting balance of power between the Commonwealth and the States. (10 marks)

C Collaborative Activity

Think/Pair/Share

Research and consider one significant High Court case. In pairs, create a document to share with the class. Include the following:

- Facts of the case
- Important legal principles considered
- Result of the case
- Why is this case significant? Consider its influence

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Essay Questions

Choose one of the following statements:

1. *'Australia's constitutional system is responsive to change.'*
2. *'The Australian Constitution provides for both certainty and flexibility.'*
3. '*The Australian High Court has too much power*.'

Evaluate your chosen statement with reference to examples and one or more of the following competing tensions:

- Competing rights and responsibilities
- Fairness and efficiency
- The empowered and the disempowered.
- Certainty and flexibility

(800+ words)

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3.3 The Constitution and Australia's Relationship with other Countries

SACE Considerations for Chapter 3.3

Big Questions

- Does the Australian High Court have too much power?
- To what extent should Australia be required to comply with its international human rights obligations?
- Has the High Court of Australia been an effective guardian of the Constitution?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Questions

- How does the Constitution affect Australia's relationship with other countries?
- How have decisions made by the High Court of Australia impacted on the Australian legal system and society?
- How does Australia comply with its international human rights obligations?
- How do treaties become law?
- What is the role and impact of international courts?

Sovereignty and International Law

Australians are extremely cautious when it comes to surrendering their sovereignty. While Australian governments adhere to the general principles of international law, they have made it very clear they will not tolerate international law interfering arbitrarily with Australia's sovereignty. International law has no bearing on Australia unless Australia agrees to it.

The Role of the Constitution in Australia's Relationship with other Countries

According to Section 51(xxix) of the Constitution, the Commonwealth Parliament has specific powers with respect to 'external affairs'. Furthermore, section 75(i) states the High Court has original jurisdiction to hear matters 'arising under a treaty'.

However, the Australian Constitution is silent on the matters regarding the method by which Australia can enter into treaties, the legal implications of treaties on Australian law, and who is responsible for the enforcement of international obligations in Australia.

Under section 61, the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. It extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth. Using executive power and specific powers regarding external affairs and treaties, the Federal Government has assumed general executive power to sign and ratify international treaties. In many judgments, the High Court has held signing international treaties is an exclusive executive function protected under constitutional law. Decisions made by the High Court of Australia have impacted the Australian legal system and society. This will be discussed later in this chapter.

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Treaties

International treaties are agreements entered into by two or more nation states which are binding in international law. They can also be referred to as protocols or covenants.

They come in two fundamental forms: bilateral treaties and multilateral conventions.

Bilateral treaties are agreements entered into by two nations over specific issues. The two nations decide the details between themselves, largely free from the influence of the United Nations. Australia has entered into many of these treaties in a range of areas, including defence, extradition proceedings, social security payments, culture and trade. For example, Australia signed the 'Air Services Agreement with the People's Republic of China' in 2004 granting Australian airlines aviation rights into China. Australia has signed a similar treaty with every other nation our international airlines fly to.

Multilateral conventions are agreements entered into between three of more nations. The most common examples are treaties Australia signs with member states of the United Nations.

These treaties are usually signed in areas affecting all nations of the world as a whole, such as human rights, the environment, world trade and the non-proliferation of weapons.

Definitions

Treaty (or bilateral treaty): an agreement Australia voluntarily enters into with one other nation

Convention (or multilateral treaty): an international agreement Australia enters into with many nations as a member of an international forum, notably the United Nations

At a Glance

Why does the Australian Government sign treaties?

The Australian Government signs international treaties for a number of reasons:

- To comply with international standards. For example, compliance of universally accepted diplomatic rules and environment standards
- To enhance Australian economic interests. For example, trade agreements
- To accommodate universal standards for citizens' safety. For example, air traffic control
- To foster the recognition and protection of universal human rights
- To foster Australia's national security. For example, defence agreements with other nations

Independent Activity

Find Examples

Research and find specific examples of treaties the Australian Government has signed for each of the following:

- Environment standards
- Trade agreements
- Air traffic control
- Human rights
- Defence agreements

To have the legal obligations of international agreements incorporated into domestic Australian law, the Federal Government has three choices: legislative action, co-operative federal agreements, or executive action.

Legislative action

The government may draft a bill for parliament to enact. This may include using a specific head of power or the external affairs power in section 51(xxix).

Co-operative federal agreements

The government may elect to enter into an agreement with the states to have uniform legislation passed.

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Executive action

The government may use a regulatory power which already exists in an enabling Act.

While it is clear the executive can enter into international treaties, it is restricted in its powers to implement international law into Australian domestic law. The High Court has held the executive has exclusive power to sign and ratify treaties; however, only the parliament can incorporate the obligations of international law into Australian domestic law.

A good example of this is the *Racial Discrimination Act 1975*. While the Federal Government signed and ratified the United Nations' Convention on the Elimination of all Forms of Racial Discrimination, it had no force in Australian law until the Commonwealth Parliament passed the *Racial Discrimination Act* in 1975.

Fast fact

Impact of Treaties on Australia

Treaties have no direct effect on Australian laws, unless given effect by an Act of Parliament

**NB Refer to the Teoh case for an exception to this*

At a Glance

How treaties become law

The treaty-making process: this is a general overview of how an international treaty is incorporated into Australian domestic law.

- The Executive Government or Cabinet discuss and decide to enter into an international treaty
- The Minister and department officers negotiate with the other parties to the treaty
- The Government signs a treaty with at least one other nation
- The Minister for Foreign Affairs tables an intention to take treaty action
- JSCOT conducts an inquiry into the treaty and its effects and submits a report to parliament and government
- The government has ratifying (or confirming) legislation to incorporate the treaty into legislation drafted by the Office of Parliamentary Counsel for submission to parliament
- The Bill is introduced to Parliament, Parliament debates the Bill (taking into account JSCOT's recommendations and the Minister's explanatory memorandum), the Bill is voted on and must pass both Houses in the same form
- The Governor-General gives royal assent, the Act is proclaimed, and its commencement date is published in the *Government Gazette*
- The Act (not the treaty) could be subject to a High Court challenge

Fast fact

The Joint Standing Committee on Treaties (JSCOT)

JSCOT is empowered to inquire into and report upon:

- Matters arising from treaties and related National Interest Analysis and proposed treaty actions presented or deemed to be presented to parliament
- Any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
    - either House of the parliament
    - a Minister and
    - the Minister for Foreign Affairs and on such conditions as the Minister may prescribe

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Independent Activity

Mapping the Process

Choose a treaty to which Australia is a signatory and map its progression through the process – from the initial discussion through to becoming law.

Long Answer Questions

Describe, in your own words and in full sentences, the process by which international treaties are incorporated into Australian law.

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Referring to the competing tension of the empowered and the disempowered, discuss whether or not the executive has too much power in the treaty-making process.

The Impact of High Court Decisions

A number of High Court cases have impacted the division of powers.

These include but are not limited to: *Koowarta v Bjelke-Peterson 1982* [Koowarta case], *Commonwealth v Tasmania 1983* [Tasmanian Dams case], *Mabo v Queensland (No 1) 1988 [Mabo no. 1],* and *Minister for Immigration and Ethnic Affairs v Teoh 1995 [*Teoh case].

High Court Cases

Koowarta v Bjelke-Petersen 1982 [Koowarta case]

In 1975, the Commonwealth Parliament enacted the *Racial Discrimination Act* to incorporate into Australian law the obligations of the International Convention on the Elimination of All Forms of Racial Discrimination.

Queensland state government policy opposed proposals for Indigenous People acquiring large tracts of land. Subsequently, the Queensland Minister for Lands refused to grant land title to the Winychanan people. John Koowarta, a member of the Winychanan people, instigated proceedings in the High Court against the Queensland Premier to have the Queensland Government's executive action declared invalid.

The High Court held the *Racial Discrimination Act* was valid, because it gave effect to the conditions of a treaty the Australian Government had signed, which it was entitled to sign under its external affairs power. This meant the Queensland Act which prohibited the transfer of land title to the Winychanan people was in conflict with the *Racial Discrimination Act* and was therefore invalid under the inconsistency rule in section 109 of the Australian Constitution. The case meant the Commonwealth could exercise the external affairs power to enact laws in areas presumed to be the residual powers of the States.

Commonwealth v Tasmania 1983 [Tasmanian Dams Case]

A wilderness area in south-west Tasmania had been registered on the World Heritage List by Australia, pursuant to a UNESCO treaty to protect the environment, and the Commonwealth had an international obligation to protect it. Tasmania had passed legislation, under its residual powers, to dam the Gordon below Franklin River, affecting part of the wilderness area in question. The Commonwealth opposed the legislation, arguing it had the power to take such action.

The High Court held (in a majority 4-3 decision) the Commonwealth validly enacted legislation to give effect to the conditions of an UN Convention it had signed, despite not having a prescribed head of power in relation to the environment. As the High Court held t both the federal and state Acts were valid, it invoked the inconsistency rule in section 109 to declare the Tasmanian legislation invalid.

The case confirmed the Commonwealth could exercise the external affairs power to enact laws in areas presumed to be the residual powers of the States, effectively giving them defacto control over the environment. The Commonwealth has subsequently passed a number of Acts in the areas of racial discrimination, human rights and industrial relations pursuant to the external affairs power, thereby eroding the power base of the states.

Mabo v Queensland (No 1) 1988 [Mabo no. 1]

In May 1982, Eddie Mabo and four other members of the Meriam community commenced a legal action claiming native title to the Murray Islands—a group of three islands off the north-east tip of Cape York in Torres Strait.

In 1985, the Queensland Government attempted to pre-empt the case by having the State Parliament pass the *Queensland Coast Islands Declaratory Act 1985*. The Act declared that, upon the islands being annexed, they were 'vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever'. This Act prevented Eddie Mabo from pursuing his land claim in the High Court.

In May 1985, Eddie Mabo instigated proceedings in the original jurisdiction of the High Court to have the Queensland Act declared invalid because it was in conflict with the Commonwealth's *Racial Discrimination Act 1975*.

The High Court held the Queensland Act and the Federal Act were both valid exercises of their respective Parliaments' powers. However, the two Acts were inconsistent with each other and according to the inconsistency rule in section 109 of the Constitution, the Queensland Act was declared invalid. This decision enabled Mabo to continue to pursue his land claim in the High Court, which led to Mabo no. 2.

While the High Court's decision could not force the Minister to revoke the deportation order, it did implore the minister to reconsider his executive action in light of Australia's intention to enter into legal obligations under the treaty. The Minister revoked the deportation order.

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Minister for Immigration and Ethnic Affairs v Teoh 1995 [Teoh case]

Mr Teoh, an alien (meaning he was not an Australian citizen), had been convicted of a serious criminal offence in Australia. The Minister for Immigration and Ethnic Affairs ordered his deportation to his native country. Teoh fought the deportation order through the Administrative Appeals Tribunal and various courts, arguing it was harsh and unjust because his children, who were Australian citizens, would be denied the parental care, love and guidance of their father.

Australia had signed the *Convention on the Rights of the Child*. However, it had not passed any legislation incorporating the obligations in the convention into Australian law. Despite this, the High Court held individuals are entitled to a 'legitimate expectation' the Commonwealth decision-makers will consider international treaties ratified by Australia but not yet implemented in legislation.

Long Answer Question

Explain how, in each of the cases above, the High Court of Australia considered an international treaty the Australian Government has signed. Consider the significance and impact of this in each case.

Australia's International Human Rights Obligations

Human rights conventions

Australia is a signatory several significant human rights conventions. For example:

- International Covenant on Civil and Political Rights (ICCPR)
- Convention on the Elimination of all Forms of Racial Discrimination (CERD)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC)

However, it has not met its obligations in many of them.

A good example of this is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). While it did pass *The Crimes (Torture) Act 1988* regarding torture occurring outside of Australia, Australia has enacted no domestic legislation on the treaty. In 2015, a United Nations report found Australia was systematically violating the international Convention Against Torture by detaining children in immigration detention and holding asylum seekers in dangerous and violent conditions on Manus Island.

A number of human rights treaty committee reports have been critical of Australia's compliance with the treaties it has signed as well as its tardiness in meeting its reporting obligations. Australia's main defence is it has an excellent human rights record and its traditions in common law and parliamentary democracy adequately address the human rights issues prescribed in the treaties.

At a Glance

Arguments for human rights conventions

- Conventions provide a consistent and universal application of human rights between member states
- Developed countries have a moral obligation to provide leadership to other nations
- They improve human rights and provide a guide for the protection of human rights
- With increased travel around the world, people need to have confidence in the universal protection of rights
- Mechanisms which monitor compliance and to report and address violations of human rights.
- International Covenant on Economic, Social and Cultural Rights

C Collaborative Activity

Think/Pair/Share: Meeting Obligations

Individually, and then in pairs: choose one of the human rights conventions listed above. Research and evaluate Australia's compliance. Share your findings with the class.

Non-human rights multilateral conventions

Australia is a signatory to many (non-human rights) conventions which perform important international functions. For example, the Australian Government adopted the Constitution of the World Health Organization, a specialised agency of the United Nations (UN). The World Health Organisation (WHO) works worldwide to promote health, keep the world safe, and serve the vulnerable. Another example is the Paris Agreement, when standards were set at the Paris Conference in 2015 on climate change which set carbon growth at 1.5% pa.

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Independent Activity

Independent Task: The Role of the WHO

Go to: https://www.who.int/

Write a brief summary of the role of the World Health Organization.

Long Answer Questions

Outline how one international treaty has contributed to the provision of human rights in Australia.

Considering the competing tension of rights and responsibilities, discuss the extent to which international treaties have influenced the Australian legal system.

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Considering the competing tension of fairness and efficiency, critically analyse the treaty-making process.

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International Courts

The two significant international courts are the International Criminal Court (ICC) and the International Court of Justice (ICJ).

International Criminal Court (ICC)

The role of the ICC is to prosecute and sanction offenders who commit one or more of the listed offences in the ICC international agreement considered unacceptable to basic international standards. For example, genocide, crimes against humanity and war crimes.

The ICC was created by the UN, through a convention called the Rome Statute, but it is an independent international organisation. Australia signed and ratified the Rome Statute as one of the original 60 nations. Criminal cases which can be heard in the ICC will be tried in Australian courts by the Commonwealth, thereby confirming Australia's sovereignty.

Australia's Points of Clarification to the Rome Statute

- A case is not admissible before the ICC if is being investigated or prosecuted by a State
- Australia's criminal jurisdiction takes priority in relation to crimes within the jurisdiction of the ICC
- No person will be surrendered to the Court by Australia until it has had a full opportunity to investigate or prosecute any alleged crimes
- No person can be arrested on a warrant issued by the ICC or surrendered to the Court by Australia without the consent of the Attorney-General
- Genocide, crimes against humanity and war crimes will be interpreted and applied 'in a way that accords with the way they are implemented in Australian domestic law'

The Rome Statute effectively provides a list of the offences of genocide, crimes against humanity and war crimes using other conventions, such as the 1949 Geneva Convention, as a model.

To incorporate the obligations of the Rome Statute into Australian law, the Commonwealth parliament passed the *International Criminal Court Act 2002* (ICC Act). The Parliament also passed the *International Criminal Court Act 2002 (Consequential Amendments) Act 2002* and amended the *Criminal Code Acts 1995* to accommodate Australia's claim to primacy under the Rome Statute.

The *Consequential Amendments Act 2002* is the Commonwealth's vehicle for creating offences which are the equivalent of the crimes the ICC has jurisdiction to hear, such as genocide, crimes against humanity and war crimes. By doing this, Australia can exercise the principle of complementarity by giving itself primacy to hear any international crimes that the ICC has the jurisdiction to decide.

JSCOT endorsed the Commonwealth's right to exercise the principle of complementarity and to include the crimes exercisable by the ICC into Australian law.

The ICC can only hear cases concerning crimes which occurred after 1 July 2002, and by mid- 2004, had not commenced hearing cases.

Elements of Crimes

Genocide

The *Consequential Amendments Act 2002* adopts the *Elements of Crimes* by identifying five offences of genocide:

- killing
- causing serious bodily or mental harm, including torture, rape, sexual intercourse, or inhuman or degrading treatment
- inflicting conditions of life calculated to bring about physical destruction, including depriving people of essential resources such as food or medical services, or systematic expulsion from homes
- imposing measures intended to prevent births
- forcibly transferring children to a different national, ethnical, racial or religious group

Crimes against humanity

The *Consequential Amendments Act 2002* mirrors the crimes against humanity in Article 7 of the Rome Statute. A crime against humanity may not be committed in isolation or by an individual. Evidence of a link between the perpetrator and a state or organisational policy must be established. It is also necessary to demonstrate:

- the acts have been committed as part of a widespread and systematic attack against a civilian population, in that the perpetrator intended to further the attack
- the crimes are a result of the policy of a state or organisation to commit the attack

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- the perpetrator knew the act was, or intended the act to be, part of a larger attack on a civilian population, though not necessarily a military attack

Acts considered crimes against humanity include murder, extermination, enslavement, sexual slavery, enforced prostitution and apartheid.

War crimes

These crimes are grave breaches of the Geneva Convention of 1949. Offences in this category could include wilful killing, torture to obtain information, biological experiments, taking hostages and causing great physical or mental suffering.

The Federal Government's intention is for as many criminal cases as possible (which could be heard in the ICC) to be tried in Australian courts by the Commonwealth exercising the principle of complementarity.

As a general rule, the decisions of foreign courts, including the ICC, are only of persuasive authority on Australian courts. The ICC's decisions will be binding on Australian courts if the Attorney-General allows an Australian citizen to be prosecuted.

International Court of Justice (ICJ)

The ICJ is essentially a civil court with jurisdiction to hear cases which disturb basic peace and harmony in the world community. For example, it determines matters related to disputed national borders.

The ICJ is the principal judicial organ of the UN and it has two roles (both civil in nature):

- to settle disputes in accordance with international law brought to it by member states
- to give advisory opinions on legal questions referred to it by authorised international organisations and agencies

The ICJ does not hear cases regarding individual complaints and can only reach a decision if both parties agree. Once a decision is made, it is binding on the member states, though the ICJ has virtually no powers to enforce its decision if a member nation chooses to ignore it.

The ICJ has delivered judgments on matters relating to disputes over land and maritime borders, territorial sovereignty, diplomatic relations, hostage-taking, the rights of asylum seekers and general economic rights.

The decisions of the ICJ are not binding on Australian courts, although they may consider the issues raised as persuasive authority. In many cases, the legal decisions made have no direct relevance to Australian law.

Long Answer Questions

International courts have been described as 'toothless tigers'. To what extent do you think this is true? Justify your answer.

C Collaborative Activity

Socratic Discussion

Discuss the international legal influences on the Australian legal system

Consider – and share examples – of some or all of the following:

- Political pressures – community and international sentiment regarding an international matter
- United Nations – expectation from member nations to be a signatory UN Conventions
- United Nations – places expectations on the federal Government
- International standards eg air traffic control, navigation at sea
- Diplomatic relations
- National security
- International trade
- Environmental protection
- International health regulation
- International human rights Another Think, Pair, Share activity?

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Extended Response Question:

Considering the competing tension between rights and responsibilities, critically analyse the relationship between the Australian legal system and international law.

C Collaborative Activity

Response to Sources: Creating Your Own Digital Response to Sources on Treaties

In small groups, using the Response to Sources in chapter 1.7 on page 113 as a model, your task is to create your own digital response to sources.

Choose a specific focus relating to treaties (for example, a specific treaty to which Australia is a signatory), then choose your own sources, write your own questions, and respond to the questions.

Sources should be varied and should cover all sides of the argument. They could include news articles, opinion pieces, legislation, Hansard, graphs, YouTube clips, photographs, political cartoons. You must provide links to each source and, if possible, appendices. The questions should follow the format in the model and they should include:

- A range of questions relating to specific content, and processes, relevant to the topic of sources of law; these should be guided by the examples and include the outline and explanation of specific content relevant to sources of law.
- Questions which promote and provoke discussion and critical analysis of competing tensions within your chosen area of sources of law.

Essay Questions

Choose one of the following statements:

1. *'Australia be required to comply with its international human rights obligations.'*
2. *'The Australian High Court has too much power.'*
3. *'The High Court of Australia been an effective guardian of the Constitution.'*

Evaluate your chosen statement with reference to examples and one or more of the following competing tensions:

- Competing rights and responsibilities
- Fairness and efficiency
- The empowered and the disempowered.
- Certainty and flexibility

(800+ words)

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3.4 Diverse Groups and Individuals in the Australian Community and the Constitution

SACE Considerations for Chapter 3.4

Big Questions

- Does the Australian High Court have too much power?
- Does the Australian constitutional system adequately protect the rights of individuals and groups?
- To what extent should Australia be required to comply with its international human rights obligations?
- Does the Constitution reflect the needs of contemporary society?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Questions

- How does the Constitution protect groups and individuals in the Australian community, including Aboriginal and Torres Strait Islanders?
- How have decisions made by the High Court of Australia impacted on the Australian legal system and society?

Teachers and students may consider reading or teaching this chapter in connection with Chapter 1.7 as there are similarities and cross-overs in content.

Introduction

There was very minimal recognition or consideration of diverse groups when the constitution was being drafted. Note also, at the time of federation the Australian population lacked diversity, with over 90% of Irish-Catholic stock and little preparedness to recognise Indigenous Australians at all. The Founding Fathers were more focused on addressing the division of powers between the states and proposed federal government, rather than protecting or legislating rights of individuals or groups. At this time, it was simply assumed the states would largely retain the powers to create and protect rights as needed as residual powers upon federation.

However, it became apparent the rights of many groups would not be adequately protected under this arrangement. This chapter will explore some diverse groups, and how the Constitution has affected the rights available to them in Australia.

The Constitution and Indigenous Australians

As the Australian Constitution is not a rights document, there is very little mention of Indigenous People as a specific group. At the time of federation, there were only two mentions of Indigenous Australians in the Constitution; section 51(xxvi) and section 127. (Please note the excerpts below are written as they originally appeared in the 1901 document.)

Section 51, the section outlining the specific powers of the Commonwealth, begins with the statement:

'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: …..'

Section 51(xxvi) reads:

'The people of any race, other than the aboriginal race in any State', for whom it is deemed necessary to make special laws.'

This section made Indigenous affairs a prohibited power of the Commonwealth, and subsequently, a residual power of the states. While not intended to be blatantly discriminatory, it did allow states to deny Indigenous people access to their civil and political rights.

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Section 127 stated:

> 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.'

A common misconception or misinterpretation of this section is that Indigenous Peoples were not counted in the national census. This is false.

Section 127 was designed to be read in conjunction with s24 and s25, which discusses the election of members to the House of Representatives, based upon the population of each state. Section 127 effectively stopped states from counting their Indigenous populations when determining how many voters existed, so states with large Indigenous populations would not have the benefit of having additional members in the House. Section 127 was also used by the parliament when considering financial grants for each state which were calculated per capita. Recorded discussions between Edmund Barton and James Walker at the Constitutional Conventions in Adelaide confirm this to be a deliberate intention. Hence the subsequent change effectively means states can access greater grants of money from the Commonwealth in accordance with increased population figures.

There was some initial concern that s127 may stop Indigenous Peoples from voting in federal elections when this section was proposed. Dr John Cockburn (an early South Australian Premier) was a progressive politician, and also was a key figure in the women's suffrage movement. He expressed concern at the Adelaide Constitutional Convention the Constitution would deny Indigenous People the right to vote, noting there were many enrolled Indigenous voters in SA. Sir Alfred Deakin, however, reassured him this was not the intention of this section.

Fast fact

Indigenous Voting Rights

It is a popular misconception amongst Australians that the 1967 referendum gave Indigenous Peoples the right to vote. This is untrue.

While different states had different laws with regards to Indigenous people voting at state elections, Indigenous people were not able to vote in federal elections until just before the referendum was held. The *Commonwealth Electoral Act 1962 (Cth)* was assented in May, 1962, and it gave all Aboriginal and Torres Strait Islanders the right to vote in a federal election. Enrolment was optional; however, once an Aboriginal person had enrolled, voting was compulsory.

Compulsory voting for all Indigenous Australians was not mandated until the passing of the *Commonwealth Electoral Amendment Act 1983 (Cth)*, which requires all Indigenous adults to be enrolled to vote. As the Commonwealth could only legislate with respect to federal elections, each state had to pass similar legislation for eligibility to vote in state elections.

1967 Referendum

Helpful online resources

Watch this YouTube video, produced by the National Museum of Australia, explaining Australian legal history surrounding Constitutional sections 51(xxvi) and 72 up until the 1967 referendum.

https://www.youtube.com/watch?v=6mB8fXkGzoo

The 1967 referendum put two questions to the Australian people – the first concerned changing the number of members of the House of Representatives and was defeated. The second question to the Australian people was as follows:

> 'Do you approve the proposed law for the alteration of the Constitution entitled 'An Act to alter the Constitution, so as to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in reckoning the population'?'

Built upon a decade of campaigning by Aboriginal rights activists, and the absence of a "no" campaign in the lead up to the referendum, the 1967 referendum recorded the highest ever "yes" vote for a referendum in Australian legal history. Just over 90% of Australian voters agreed to change the wording of the Constitution, as they believed it would benefit the lives of Indigenous Australians.

This made lawmaking about Indigenous Peoples a specific power of the Commonwealth (and therefore a concurrent power with the states), and removed the restrictions of s127, as outlined above.

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Helpful online resources

Students can see the actual results of the referendum vote here:

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum

The immediate consequence of the referendum was allowing the Commonwealth Government the ability to make laws on behalf of the Indigenous population. Many of these are outlined in Chapter 1.7, and can be found on pages 103 and 105. With the federal government now able to legislate in this area, it allowed for many state-based discriminatory laws and practises to be overturned and overruled.

Largely, though, this referendum can be viewed as a symbolic step forward for Indigenous rights and recognition in Australia–demonstrating the majority of the Australian public wanted change, and stood alongside their Indigenous neighbours.

Helpful online resources

The ABC maintains an excellent mini-site dedicated to the 1967 referendum. It can be accessed here:

https://www.abc.net.au/rightwrongs/

Short Answer Questions

1. What impact did the removal of section 127 have on the legal system in Australia?

2. How has the power of the Federal Government changed with the removal of part of section 51(xxvi)?

3. Did this successful referendum affect social cohesion? Explain.

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4. How did this referendum affect the application of the rule of law in Australia?

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Impact of Federal Legislation

Some key legislation impacting the rights and wellbeing of Indigenous Peoples are outlined in Chapter 1.7 (page 105). Below are some other key pieces of legislation made by the Federal Government which have impacted on the rights of Aboriginal and Torres Strait Islanders in both positive, and negative ways.

Racial Discrimination Act 1975 (Cth)

This Act was created in response to the Federal Government entering into the UN treaty called the *International Covention on the Elimination of All Forms of Racial Discrimination (CERD)*. As outlined on page 105, the aim of the Act is to make discrimination of people based on their race (or cultural or ethic background) unlawful. The Act has formed the cornerstone of several key High Court cases (such as Mabo (1) and Koowarta, outlined over the page), and has provided a legal protection against governments discriminating against Indigenous Peoples in various (but not all) circumstances.

Hindmarsh Island Bridge Act 1997 (Cth)

This legislation is central to the *Kartinyeri v Commonwealth (1998)* case below.

The Act was written and passed by the Commonwealth Government to assist with the construction of a bridge in Goolwa, South Australia. This was a controversial development, as there were unsubstantiated claims of significance to local Aboriginal Peoples at the proposed site for the bridge. After many delays, court challenges and a South Australian Royal Commission, the Act was passed to allow the construction.

The Act is controversial as it explicitly removes the construction of the bridge from protection under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*, removing the ability for people to challenge the bridge's construction on those grounds. Students can see the end result of this case below.

Northern Territory Emergency Response Act 2007 (Cth)

In response to a tabled parliamentary report regarding the abuse of Aboriginal children in the Northern Territory, the Howard Liberal Coalition Government passed the *Northern Territory Emergency Response Act.* The law was heavily criticised at the time of its passage through parliament but received bipartisan support from the members in both houses.

While the intention of the law was to improve child protection in the Northern Territory and improve the living circumstances of Indigenous Peoples, there was strong community criticism for the way the law was implemented, as well as various arguments surrounding the infringement on the civil rights of Indigenous Peoples living in the Northern Territory.

Amongst other measures, the law:

- Restricted consumption of alcohol and kava,
- Placed pornography filters on public computers,
- Removed customary law and cultural practises from bail applications and sentencing, and
- Quarantined portions of welfare payments to families accused of neglecting their children.

A key area of particular concern was the suspension of the *Racial Discrimination Act* when the Act was assented; the suspension lasted until an amendment was made by Indigenous Affairs Minister Jenny Macklin in 2010.

This Act was eventually repealed by Julia Gillard's Labor Government in 2012, and replaced with the *Stronger Futures in the Northern Territory Act 2012 (Cth)*.

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Helpful online resources

Students can view the Emergency Response Act here:
https://www.legislation.gov.au/Details/C2011C00053

Students can view the Strong Futures Act here:
https://www.legislation.gov.au/Details/C2012A00100

Students can view the Act here:
https://www.legislation.gov.au/Details/C2004A05158

Independent Activity

Research

Choose one of the Acts listed above (or one of the Acts listed on page 105), undertake some additional research into the context of its development and impact on Indigenous Peoples, and complete a SWOT analysis of the selected legislation below.

Strengths	Weaknesses
Opportunities	Threats

Overall, what is your impression of this Act? Has it benefited Aboriginal and Torres Strait Islander Peoples? Outline your reasoning from your notes above.

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Significant High Court Cases

There have been many significant High Court cases involving Indigenous Australians, and their access to rights. These are summarised below.

Several of these cases have already been summarised in Chapter 1.7, and those summaries can be accessed by returning to the page numbers outlined below. They are mentioned again here as they are important Constitutional cases.

Koowarta v Bjelke-Petersen (1982) 153 CLR 168

Please see page 106 for a summary of this case.

A key element in the result of this case was the High Court upheld the Federal Government's ability to make laws under the 'external affairs' power. This became a precedent followed shortly after in the Tasmanian Dams case.

It is also worth noting, following the High Court finding in favour of Mr Koowarta and referral of the initial dispute of land acquisition back to the Supreme Court of Queensland, despite the sale being approved by the Court, Mr Koowarta and the Wik people still did not gain access to the land. Shortly before the sale to the Wik nation was to proceed, Premier Joh Bjelke-Petersen declared the Archer River property to be 'national park', ensuring that no-one could ever claim ownership of it.

In 2010, Queensland Premier Anna Bligh, announced that a 750 square kilometre section of the park would be given to the Wik-Mungkana People in a free-hold lease.

Mabo v Queensland (1) (1988) 166 CLR 186

Please see page 106 for a summary of this case.

Mabo v Queensland (2) (1992) 175 CLR 1

Please see page 106 for a summary of this case.

In addition to the introduction of native title into Australia's legal system, the Mabo (2) decision also introduced a 'tripartite' test into case law to determine Aboriginality. This test was referenced in the decision of Justice Brennan.

The test involves the following:

1) The person is biologically descended from the Indigenous People of Australia;

2) The person identified as Aboriginal; and

3) The person is recognised as an Indigenous person by Elders of their community or by other community members with authority.

This test has been cited many times since Mabo (2), including in *Love v Commonwealth* (below).

A recent example of a case referencing the tripartite test, highlighting its shortcomings, can be found in *Webster v Minister for Immigration [2020] FCA 702*.

The Wik People v The State of Queensland and Ors

The Thayorre People v The State of Queensland and Ors (1996) 187 CLR 1

Please see page 107 for a summary of this case.

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Kartinyeri v Commonwealth (1998) 195 CLR 337 (The Hindmarsh Island Bridge Case)

Background

In Goolwa, South Australia, the Chapman family wanted to build a bridge between the mainland, and Hindmarsh Island (specifically, to a marina they were building), just off the coast to replace an existing ferry service. Amongst the opposition to the project in 1994, a group of Ngarrindjeri women came forward and claimed the land for the proposed bridge was sacred, for reasons they would not share.

As this case came shortly after Mabo (2) and Wik, it was immediately controversial. The Aboriginal Affairs Minister at the time, Robert Tickner, initially agreed to ban the construction of the bridge for 25 years upon receipt of information from an anthropologist working with the Ngarrindjeri women. However, this ban was overturned when challenged by the Chapman's in the Federal Court. Shortly after, the *Hindmarsh Island Bridge Act 1997 (Cth)* was passed to allow construction of the bridge to occur.

The case of Kartinyeri v Commonwealth occurred when Ms Dorren Kartinyeri, on behalf of the Ngarrindjeri women, challenged the *Hindmarsh Island Bridge Act* in the High Court, arguing the Act itself was invalid and could not be supported under s51(xxvi), as it was creating discriminatory legislation against one race of people. However, the High Court found while the Federal Government had the ability to make laws for specific races of people, nowhere did it specify those laws had to be for the benefit of that particular race, and the Government had the right to make laws to the detriment of a race.

Many Indigenous people felt betrayed by this decision, having voted for this change in the Constitution at the 1967 referendum in good faith.

In 2010, the South Australian Government made a formal apology to the Ngarrindjeri people.

Love v Commonwealth; Thoms v Commonwealth [2020] HCA 3

Mr Daniel Love and Mr Brendan Thoms were two men awaiting deportation, as recent prison terms meant they had failed the character test in the *Migration Act 1958 (Cth)*, under a 2014 amendment. Both men were challenging their deportation, however, they both identified as Aboriginal, and they argued due to their cultural and racial background and heritage, they could not be deported from Australia as they were 'beyond' the reach of the 'aliens' power. Neither man held Australian citizenship, despite their Aboriginal heritage and having lived in Australia for most of their lives, as they were both born overseas.

Mr Love was born in Papua New Guinea, but is recognised as a member of the Kamilaroi People. Mr Thoms is a native title holder as a member of the Gunggari People, but was born in New Zealand.

The final decision was split, 4:3. Each of the seven Justices issued their own judgment in this case, as they all gave different reasons for their decision.

The majority (Bell, Nettle, Gordon and Edelmen) agreed under the tripartite test developed in Mabo (2) (above), Aboriginal Australians were not able to be classified as 'aliens' under s51(xix) of the Constitution, and therefore, the Federal Government does not have the ability to make laws about them. However, the majority of the court could not agree as to whether Mr Love was an Aboriginal under the law (there was concern he didn't meet the third element of the test), and they referred this issue back to the Federal Court of Australia to determine.

There are several key legal consequences of this case. At the forefront is a third category of person under the law has essentially been created; in addition to Australian citizens and non-citizens, a third category of 'non-citizen non-alien' now exists. This has caused controversy amongst several members of parliament, who are looking at legislative options to change the law.

Another consequence of this decision recognises Aboriginal identity supersedes their status under citizenship law, as the Justices who made the majority decision recognise Aboriginality is based upon spiritual, cultural and historical connection with the land which was not erased by white settlement.

This case, however, is not a recognition of Aboriginal sovereignty.

For students wishing to do further reading on this case, they may find the following article on the Australian Public Law Blog a good place to start:

https://auspublaw.org/2020/03/the-rightful-place-of-first-nations-love-thoms/

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Future Constitutional Change and the Uluru Statement of the Heart

The 1999 referendum is best known for seeking to change Australia's system of a Constitutional monarchy to a republic. What is lesser known, is there was a second question about adding a preamble to the Constitution. The proposal read as follows:

Preamble

With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.

We the Australian people commit ourselves to this Constitution:

proud that our national unity has been forged by Australians from many ancestries;

never forgetting the sacrifices of all who defended our country and our liberty in time of war;

upholding freedom, tolerance, individual dignity and the rule of law;

honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;

recognising the nation-building contribution of generations of immigrants;

mindful of our responsibility to protect our unique natural environment;

supportive of achievement as well as equality of opportunity for all;

and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

Source: https://www.legislation.gov.au/Details/C2004B00537

This question was also defeated at the referendum with no states voting in favour, and an overall 'no' vote Australia-wide of approximately 60%.

In addition to the question not receiving much campaigning in favour from the government, and the full text of the proposed preamble put to the people before the vote, it was not surprising about the lack of support for change. Indigenous Australians were also divided about their support for the wording of the section of the preamble relating to them. Overall, they felt this level of constitutional recognition would have minimal impact and would be nothing more than symbolic.

Between 1999 and the present, there have been several key steps forward made by the Federal Government on the way to Constitutional recognition. Some of these include:

- 2015 Kirribilli Statement
- Creation of the Referendum Council in December, 2015 (from Abbott & Turnbull)
- 2017 First Nations National Convention at Uluru
- Uluru Statement of the Heart (2017)
- 2018 Joint Select Committee formed (https://www.aph.gov.au/constitutionalrecognition)

It is pleasing to note Aboriginal and Torres Strait Islander peoples have been heavily involved, if not leading, each of these stages.

Uluru Statement of the Heart

(The Uluru Statement can be found on page 111 in full)

Perhaps the most significant of all of these stages of moving towards constitutional recognition is the Uluru Statement of the Heart, determined at the Uluru Convention in 2017. This convention was historic, as it was the culmination of a range of 13 'dialogues' held around Australia; each dialogue made up of 100 participants, deliberately invited to participate. Each of these dialogues elected representatives to attend the First Nations National Convention at Uluru to determine the final statement.

The Uluru Statement calls for three key changes to the Australian Constitution–Voice, Treaty, Truth.

Voice refers to the call for a First Nations Voice enshrined in the Constitution.

Treaty and **Truth** refer to an agreement making process between governments and First Nations people, and truth-telling.

Students are encouraged to visit: https://ulurustatement.org/ to learn more about this statement, and its intended outcomes for Constitutional change in Australia.

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C Collaborative Activity

Video and Discussion

Watch the following BTN (ABC's Behind the News) video explaining proposed constitutional changes regarding Indigenous rights, and a 'voice to parliament'. https://www.youtube.com/watch?v=uLS7yZR3-e0

- What do you think of these proposed changes?
- Do you think they will be an effective mechanism to allow for protection of Indigenous rights, and allow them to have self-determination?
- What hurdles do you think the Uluru Statement may face in being made into law?

For students wishing to look further into issues surrounding Indigenous Constitutional recognition, may wish to look into these advocacy groups and websites for further information from Indigenous perspectives.

- Creative Spirits: https://www.creativespirits.info/aboriginalculture/politics/constitutional-recognition-of-aboriginal-people
- Reconciliation Australia (formerly the 'Recognise Campaign'): http://www.recognise.org.au/index.html
- Uluru Statement Website: https://ulurustatement.org/

C Collaborative Activity

Constitutional Recognition

While there is support for constitutional recognition from some parts of Australia, there are also some Aboriginal and Torres Strait Islanders who feel strongly opposed to it.

In groups, conduct some research to find some arguments both for and against Constitutional recognition.

You may choose to present your findings like a government pamphlet for a referendum, or as a website, so that you can inform voters of the key reasons both for and against support for Constitutional recognition.

There is some room for your notes, below:

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Independent Activity

Research

This chapter focuses on how Indigenous Peoples have been affected by our Constitution. Choose another diverse group of people and undertake an investigation into how constitutional interpretation by the High Court, or laws made under the specific powers of the Commonwealth, have impacted the wellbeing of diverse groups.

Students may consider groups such as:

- Women
- LGBTQI+
- Immigrants
- People with disabilities,

or another group of their choice.

Essay Questions

Students are to choose one question from the selection below, and write an essay response. Students are reminded to:

- Consider both sides of the argument
- Consider the quality of the sources used to write their essay response
- Consider multiple perspectives

1. 'The High Court is the champion of Indigenous rights in Australia.' Using examples, evaluate this statement.
2. 'Indigenous recognition in the Constitution is imperative to improve the rights of Indigenous Australians.' Using examples, evaluate this statement.
3. 'Constitutional recognition of diverse groups is inefficient and unnecessary. All meaningful changes in the law will come from legislation.' Using examples, evaluate this statement.

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Further Reading

Students may be interested in pursuing reading from sources used to write this chapter.

Arcioni, E 2012, Excluding Indigenous Australians From 'The People'; A Reconsideration of Sections 25 and 127 of the Constitution. *Federal Law Review*, 40, pp 1-29.

McGuire, T 2020, *Aboriginal Australians cannot be deported as 'aliens', High Court holds.* Human Rights Law Centre. Accessed on 20.2.2021, from: https://www.hrlc.org.au/human-rights-case-summaries/2020/2/21/aboriginal-australians-cannot-be-deported-as-aliens-high-court-holds

Taylor, G 2008, A History of Section 127 of the Commonwealth Constitution. *Monash University Law Review,* 42(1), pp 206-237.

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3.5 Bill of Rights

SACE Considerations for Chapter 3.5

Big Questions

- Does the Australian High Court have too much power?
- Does the Australian constitutional system adequately protect the rights of individuals and groups?
- To what extent should Australia be required to comply with its international human rights obligations?
- Does the Constitution reflect the needs of contemporary society?
- Should Australia have a constitutional bill of rights?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Question

- How have decisions made by the High Court of Australia impacted on the Australian legal system and society?

Introduction

A bill of rights is a legal document which explicitly outlines the human, civil and political rights of the people. Australia does not have a bill of rights in its constitution, or in federal legislation. The Australian Constitution does have some explicit rights protections, but these are few and far between. Page 100 of this workbook (Chapter 1.7) has a list of the five explicit rights available to Australians from the Constitution. Additionally, other rights offered to Australians are sometimes put in legislation, or are features of common law adopted from England, or High Court decisions. Those resulting from High Court decisions are often referred to as implied rights, for example, freedom of speech. These rights will be discussed further in this chapter.

The Australian Constitution upholds or protects the following rights through the sections outlined below:

- s41–the right to vote in a federal election, if you are eligible to vote in a state election
- s51(xxxi)–the government may only acquire your property on 'just terms'
- s80–the right to a trial by jury for a federal, indictable offence
- s116–the right to engage in a religion of your choice
- s117–protection from discrimination based upon the state you live in

(A more comprehensive overview can be found on page 100)

Australia is unlike many of our democratic neighbours in not having a bill of rights attached to our Constitution or implemented into legislation and is often cited as the only Western democracy without one.

Origins of human rights documents

The earliest recording of a human rights document is the Magna Carta, first written in 1215. While this document was not universally applied or available to all people at the time it was written, it is an important foundational document in legal history.

Helpful online resources

Students can watch the following video, produced by the Australian Human Rights Commission which explains the impact of the Magna Carta on our human rights documents today.

https://humanrights.gov.au/magnacarta/

Did you know?

The Magna Carta was first written in 1215, as an agreement between King John and a group of barons; the rights in it were not intended to apply to all people in its initial form. The document itself was re-drafted and re-issued several times in the next decade, after various conflicts arose surrounding its application. We are aware of different versions of the document being published in 1216, 1217, and 1225, each with their own changes and revisions.

The Magna Carta made its first appearance in English statute law in 1297, with broader, community application, after King Edward I reissued the document again.

Only three clauses of the Magna Carta remain a part of British statute law today; they refer to the freedom of the English church, a right to due legal process, and the 'ancient liberties' of the city of London. The remainder of the clauses have been repealed, as the rights and other legal issues covered by those clauses have been addressed by other pieces of legislation or common law.

Helpful online resources

More recent legal documents which form the foundations of human rights around the world, and Australia, are written by the United Nations. The nine core treaties covering human rights can be found here:

https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx

International Bills of Rights

Most Western democracies, and other British dominions, have a bill of rights included into their Constitutions or domestic legislation. A brief outline of how some neighbouring nations have included their rights documents are outlined below.

English Bill of Rights – 1689

The English Bill of Rights was signed into law after King James II was overthrown by a public deeply distrustful of the monarchy. King James was eventually replaced by his daughter Mary II, and her husband, William III, who ruled together. In conjunction with the parliament, they passed the English Bill of Rights, which effectively set the legal groundwork for England's system of a Constitutional monarchy as it gave the English parliament more power than it had ever had before. The bill of rights limited the amount of power retained by the monarchy and stated they could not rule without the consent of the parliament.

This document also outlined specific rights of individuals, such as freedom to elect members of parliament, freedom from penalty without trial, and freedom to bear arms in self-defence.

The English Bill of Rights is considered to be a significant influence on the American bill of rights.

Students can view the English Bill of Rights here: https://avalon.law.yale.edu/17th_century/england.asp

England has since passed an updated version of their bill of rights, based upon the 1689 version–the *Human Rights Act 1998 (UK),* which students can view here: https://www.legislation.gov.uk/ukpga/1998/42/contents

American Bill of Rights – 1791

The American Bill of Rights is composed of the first 10 amendments to their Constitution. It outlines the civil and political rights of the American people, and also limits the government's power (to a degree) in order to preserve these individual rights, or the sovereignty of the states.

The bill of rights was drafted almost immediately after the first American election, after some states expressed concern at federation about the powers of the government, and lack of explicit rights for the people under their new constitution. Members of Congress believed they did not have the right to change the new Constitution, so they added their bill of rights as a series of amendments.

Students can view the American Bill of Rights here: https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say

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New Zealand Bill of Rights – 1990

New Zealand's Bill of Rights differs to both the US and England as their bill of rights is a piece of legislation passed through their parliament, rather than attached to a Constitution (although, it's worth noting New Zealand does not have a single Constitutional document).

In 1985, the parliament was presented with a 'white paper' titled, 'A Bill of Rights for New Zealand'. This paper made several recommendations about adopting a bill of rights including the recommendation the bill become 'entrenched' law–meaning it couldn't be changed or overturned with less than 75% support of the parliament, or a majority at referendum, and the judiciary could invalidate any legislation or case law contradictory to the new bill. Some of these recommendations were too controversial for the people of New Zealand, and their bill of rights was eventually drafted and passed as a normal piece of legislation.

The New Zealand Bill of Rights covers the following categories of rights for people in New Zealand–life and security of the person, democratic and civil rights, non-discrimination and minoirty rights, search, arrest and detention, criminal procedure and the right to justice.

Students can view the New Zealand Bill of Rights here: https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html

Why does Australia not have a Bill of Rights?

During the Constitutional Convention stage of the development and writing of the Australian Constitution (please see Chapter 3.1), the Founding Fathers discussed embedding a bill of rights into the document. However, the proposal was eventually defeated, as the writers believed a written document was largely unnecessary, due to protections under the common law system being adopted from England already being recognised by the colonial governments and courts, and the principle of responsible government. While some rights were explicitly outlined in direct response to concerns from the states about federation, this was the extent to which rights were addressed.

The most frequent argument made for why Australia doesn't currently have a bill of rights is our legal system adequately addresses human, civil and political rights. This is through a combination of our statute law, as well as High Court interpretation of the constitution.

Legislation

The most significant rights legislation in Australia is anti-discrimination legislation, largely passed in response to international treaties, such as the *Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth)* and the *Disability Discrimination Act 1992 (Cth).* While they are important documents which have formed the foundation of important cases, it can be argued legislation alone does not go far enough in protecting the rights of Australians, especially as these pieces of legislation typically require specific complaints to be made, rather than offering a comprehensive protection against systematic abuse.

Another key issue with the anti-discrimination legislation at federal level is the power with which it has been written. The Commonwealth parliament has relied on their external affairs power in s51(xxix) in order to implement these laws; technically allowing them to make laws outside of their specific powers. The power of the federal government to make this legislation is bound by the following premise: 'if there is not sufficient conformity, or proportionality, between the law and the obligation, the law will be invalid' (Williams, 1999). Subsequently, the federal government will only retain the power to make laws in this way if the legislation is a genuine attempt to fulfill the terms of the treaty.

While limited in some ways, federal legislation has protected the human rights of many Australians, particularly under the 'inconsistency rule' in section 109. This section makes any state law potentially invalid (ultra vires), where it is in conflict with federal law, to the extent of the inconsistency. Where states have attempted to uphold discriminatory legislation, the High Court has found in favour of federal anti-discrimination legislation under section 109. In particular, Queensland and Western Australia had legislation overturned under the *Racial Discrimination Act* when attempting to extinguish native title rights of Indigenous Peoples.

Case Law

The High Court has interpreted the constitution to establish many 'implied' human, civil and political rights. Some examples of important cases are below:

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Case: Australian Capital Television Pty Ltd v Commonwealth [1992] HCA 45, 177 CLR 106 (The Adban Case)

In 1991, the Federal Labor Government passed the *Political Broadcasting and Political Disclosures Act* stopping media organisations from playing political advertising or messaging during an election campaign (the news, current affairs programs and talkback radio were exempted). The Act also obliged media organisations to provide "free time" (divided amongst all parties and independents), for political parties to advertise themselves. The intention of the Act was to stop political corruption, and to avoid a situation where only wealthy individuals or parties could afford to participate in politics.

However, this Act was challenged in the High Court, by eight plaintiffs (all media corporations with broadcasting licences) and the NSW Government. They argued:

- These laws were in breach of the implied right to freedom of political speech in the Constitution, and
- Forcing broadcasters to provide "free time" was an unjust acquisition of property.

The NSW Government also argued these laws unfairly infringed on the rights of the States, which are also protected by the Constitution.

The High Court, in a majority decision of 5-2, agreed the Constitution did contain an implied right to freedom of political communication, as the Constitution makes provision for a representative government, and the provision of freedom of political communication is necessary for it to work.

Implied Right: The right to freedom of political communication.

Case: Dietrich v The Queen [1992] HCA 57, 177 CLR 292

In 1986, Mr Olaf Dietrich arrived back in Melbourne after a trip to Thailand. He was arrested the following day and charged with drug trafficking after drugs were found in his residence. During his initial trial, Dietrich did not have legal representation, and was subsequently convicted. His appeal to the Supreme Court was denied, and so he sought special leave to appeal to the HCA. The main argument presented was Dietrich was denied a fair trial due to his lack of legal representation.

The court decided, while there was no common law requirement to have publicly funded representation, some cases make it necessary for there to be legal representation to ensure a fair trial.

Implied right: The right to legal representation to allow for a fair trial.

Case: Roach v Electoral Commissioner [2007] HCA 43, 233 CLR 162

Vicki Lee Roach was a Victorian woman of Aboriginal descent who was serving a six-year prison sentence for her involvement in a robbery. She challenged the validity of the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (*Cth)* Act, which prevented her from voting in the 2007 federal election due to her conviction and subsequent imprisonment. She argued being denied the right to vote was inconsistent with the system of representative government outlined in the Constitution. She also argued Indigenous Peoples were unfairly targeted by this amendment as they were overrepresented in the prison population.

In his decision, Chief Justice Murray Gleeson stated,

> I see no reason to deny that, in this respect, and to this extent, the words of s7 and s24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote. (7)

However, while the right to vote was upheld as an implied right under the constitution in this case, the court also found the parliament had the right to remove the right to vote due to serious misconduct. Subsequently, Ms Roach won her case, but was unable to vote in the 2007 election.

Implied Right: The right to vote.

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Attempts at introducing a bill of rights, or rights protections, into Australia

There have been several attempts across Australian legal history to include more explicit rights into the Constitution or legislation, with mixed levels of success.

The bills outlined below are representative of some of the attempts at legislating bills of rights, or specific human rights into the Constitution. This section does not focus on pieces of legislation addressing narrow areas of rights (such as the Racial Discrimination Act or the Sex Discrimination Act) considered by the parliament.

Pre-Constitution

While drafting the Constitution, the idea of including a bill of rights was proposed by several of the writers. The American decision to include a bill of rights in their Constitution, provided a source of inspiration for the Australian Constitution and was forefront in the minds of the Founding Fathers. Andrew Inglis Clark, a key drafter of the Constitution, was a strong supporter of including a bill of rights into the document. However, his proposals were not accepted into the final draft of the document. (Students can read more about this process in Chapter 3.1.)

The proposal for the inclusion of a bill of rights was eventually defeated. Some academics claim it is because some of the Founding Fathers were concerned a bill of rights would conflict with some of the discriminatory sections of the Constitution (such as section 51(xxvi), the power for the Commonwealth to make laws specific to certain races) which they wished to retain, so they chose not to pursue this further.

1944 Referendum

At the 1942 Constitutional Convention, changes to the constitution were proposed to include some more 'heads' of power into the Constitution to allow the federal government to make laws with regard to:

- Freedom of speech and expression
- Religious freedom
- Freedom from want, and
- Freedom from fear.

While this would not have been a bill of rights, it would have expanded the federal government's power to make laws in this area. It would have additionally then protected Australian's from discriminatory state laws under the inconsistency rule.

However, this proposal was modified before the referendum held in 1944. The referendum question sought to include 14 new heads of power for the government to rebuild the nation after WWII, and the powers would run for a period of five years. This question did also feature guarantees of freedom of speech and would have strengthened freedom of religion at state level.

The referendum failed both criteria, recording a total 'yes' vote of approximately 45%, and only recording a majority vote in two states.

Helpful online resources

Students can view the original bill here:

https://www.aph.gov.au/binaries/library/intguide/law/docs/1944referendumbills.pdf

The Human Rights Bill 1973 (Cth)

In 1973, Senator Lionel Murphy, Attorney-General in the then Whitlam Labor Government introduced the *Human Rights Bill*, attempting to turn the International Covenant on Civil and Political Rights (ICCPR) into Australian domestic law. In his second reading speech in support of the bill, Senator Murphy said,

"Although we believe these rights to be basic to our democratic society, they now receive remarkably little legal protection in Australia. What protection is given by the Australian Constitution is minimal and does not touch the most significant of these rights. The common law is powerless to protect them against written laws and regulations made by Parliament, by Executive Government under delegated legislative authority, and by local government and other local authorities."

In addition to covering the rights outlined in the ICCPR, the bill also allowed for these rights to be applied against not only the government, but in civil action as well. The bill also introduced the concept of an Australian Human Rights Commissioner.

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Helpful online resources

Students can read Senator Murphy's full Second Reading Speech in support of the bill, here:

https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=HANSARD80;id=hansard80/hansards80/1973-11-21/0050;orderBy=_fragment_number,doc_date-rev;query=Dataset:hansards,hansards80%20Decade:%221970s%22%20Year:%221973%22;rec=10;resCount=Default

This bill faced heavy opposition and did not pass. After the parliament was dissolved in the 1974 double-dissolution election, the bill lapsed. Shortly after, Lionel Murphy was appointed to the High Court by Gough Whitlam in 1975 to fill a vacancy. His subsequent immediate resignation from the Senate to take the judicial appointment, meant he missed the chance to reintroduce his bill to the new parliament. From his position in the High Court, Justice Murphy was able to focus on the access of Australians to their explicit and implicit rights.

1988 Referendum

While the 1988 referendum was not about introducing a comprehensive bill of rights into the Australian constitution, it did attempt to introduce more specific rights. This marked an attempt by the government to include more specific rights in the Constitution, without experiencing similar obstacles to those faced in the 1970s with the *Human Rights Bill* and other like legislation.

The *Constitutional Alteration (Rights and Freedoms) Bill 1988* aimed to:

- Extend the right of trial by jury
- Extend freedom of religion, and
- Ensure fair terms for persons whose property is acquired by any government.

Helpful online resources

Students can view the bill in full, here:

http://classic.austlii.edu.au/au/legis/cth/bill/caafb1988471/

The referendum posed four questions, and this was the fourth on the ballot. The question asked with regards to these proposed rights changes was,

"A proposed law: To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government. Do you approve this proposed alteration?"

The 'yes' vote in this referendum is the lowest recorded. No State recorded a majority, and only 30.79% of Australians voted in favour of the change.

2019 – Private Members Bill

In 2019, MP Andrew Wilkie introduced the *Australian Bill of Rights 2019 (Cth)* into the House of Representatives as a Private Members Bill. It reached the second reading stage in 2019 but was removed from the parliamentary agenda in March 2020.

The bill was to attempt to include multiple human rights treaties Australia had signed into law, including the ICCPR, International Convention on the Rights of the Child (CRC), and the Convention Against Torture (CAT), amongst others. The bill would additionally force all states to uphold these rights (as any inconsistent state laws would become obsolete under s109) and would award the Australian Human Rights Commission with new powers in relation to the Act.

Helpful online resources

The bill, explanatory memorandum and all second reading speeches can be accessed here:

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6404

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C Collaborative Activity

Discussion

Discuss the following questions with the people around you:

- Why do you think there has been so much difficulty in passing more explicit rights protections in Australia?
- What do you think would need to change (socially, politically, culturally) for legislative or constitutional changes to be made to our system?

Human Rights at State Level

While Australia may not have succeeded at implementing a bill of rights at the federal level, some states have taken it upon themselves to make legislative change in this area.

Currently, only two states and one territory have Acts outlining explicit human rights. The ACT has passed the *Human Rights Act 2004 (ACT),* Victoria has passed the *Charter of Human Rights and Responsibilities Act 2006 (Vic),* and Queensland has the *Human Rights Act 2018 (QLD)*. While some human rights are outlined, both of these acts are more reflective of the ICCPR in their nature, rather than the Universal Declaration of Human Rights. While other states have undertaken inquiries into adopting bills of rights, or put forward bills into their respective parliaments, none of these have been successful.

The Victorian Bill of Rights

In 2006, the state of Victoria developed a charter act to protect human rights in the state of Victoria, called the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic). It came into force on the 1st January, 2008. The aim of the Victorian Act explicitly protects twenty rights which "promote and protect the values of freedom, respect, equality and dignity" (Victorian Government, 2021). The 20 human rights listed in the Act are based upon some of the human and civil rights included in the International Covenant on Civil and Political Rights (ICCPR). The Act is designed to protect human rights in three ways:

"1. Public authorities in state and local government must act in ways that are compatible with human rights

2. Human rights must be taken into account when developing new laws

3. People and public institutions, including the courts, must interpret and apply all laws in a way that is compatible with human rights, as far as possible."

(Young, 2015, pp 3)

A sunset clause was added to the legislation to ensure regular review, and that the Act was achieving its aims. The initial Act required review after four years, and subsequently after eight years. The first review was held in 2011.

Helpful online resources

The full Victorian Charter Act can be accessed at the following link:

https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/014

In 2015, the second review of the legislation was chaired by Michael Brett Young, former CEO of the Law Institute of Victoria. This review was tabled in the Victorian parliament. Mr Young's review made 52 recommendations to the Victorian parliament, focused on making the Act more accessible to the public and more effective in delivering its intended outcomes and practical in application.

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Helpful online resources

The full review, and a summary of the review can be found here:

https://www.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights-and-responsibilities-act-2006

The response of the Victorian government can be found here:

https://www.justice.vic.gov.au/government-response-to-the-2015-review-of-the-charter-of-human-rights-and-responsibilities-act

C Collaborative Activity

Victorian Charter of Rights

Part 1: In groups, discuss the following statement:

"All states should adopt similar charters to Victoria, to ensure consistent access to human rights protection across Australia."

In your discussion, you may wish to consider:

- The competing tensions of **rights and responsibilities, certainty and flexibility** and **the empowered and disempowered**.
- The pros and cons of writing a specific list of rights
- The pros and cons of writing charters at state, rather than federal, level

Part 2: Implementation

In your groups, discuss how the Victorian charter could be implemented nationwide, and create a proposal about how this could be most effectively accomplished. Students will need to consider:

- Whether this law should be adopted at state or federal level, and the pros and cons of each approach
- The technical process of passing the law that would be required (ie–state or federal powers required to pass the law, the Constitution, and the different legal processes required by different legal avenues of making legislation that applies across the whole nation)
- What would be of most benefit to Australians.

Write your proposal below:

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Arguments For and Against a Bill of Rights in Australia

If a bill of rights were to be introduced into Australian law, there are two main ways this could be included in the legal system. A bill of rights could be written as a piece of legislation, and passed by the Federal Parliament, or it could be added to the Constitution via referendum. A legislative bill of rights is not the preferred option, as it could be easily changed by governments, and not guarantee the permanency of those rights written into the bill.

The arguments below are looking at the arguments for and against a Constitutional bill of rights.

Arguments For

Democratic

If a bill of rights were to be added into the Australian Constitution, it would need to be implemented via a referendum. This would make a bill of rights a democratic document as it would need to pass the 'double majority' referendum requirement. Hence, a majority of states and a majority of Australian voters would need to be in support of the bill for it to pass into law.

Rule of Law

The rule of law would be upheld in a couple different ways if Australia was to include a bill of rights into its constitution. Firstly, the rule of law requires all people are treated equally under the law. The inclusion of a bill of rights into the constitution, would legally require the Australian legal system to treat all people in the same way. Secondly, the recognition and upholding of fundamental human rights is a core element of the rule of law.

Protection from the discretion of governments

Implementing a bill of rights into the Australian Constitution will stop regular attempts at alteration by politicians and keep control of any change in the hands of the Australian public. A piece of legislation is vulnerable to constant change with new governments, and their changing perspectives, whereas a bill of rights embedded into the constitution would require a referendum for any changes. In this way, a bill of rights would put the rights of people above politics. It is worth noting however, a counter argument to this could be mounted in reference to the difficulty to achieve change through successful referenda because of the difficulty in achieving the required double majority.

Equal access across Australia

A constitutional bill of rights will ensure all Australians have access to their human rights regardless of where they live, and which government they live under. This will ensure Australians will not be offered different rights dependent on their geographic location.

Consistent with international standards

Not only will including a bill of rights bring Australia into line with other Western democratic nations, but it will also help ensure our human rights enshrined in law are consistent with international standards (and the treaties Australia has signed) and improve our international reputation in this area.

Promote tolerance and acceptance amongst the community

Including a bill of rights in the Constitution which applies to all people living in Australia should serve the purpose of promoting tolerance and acceptance amongst all races and cultural groups living in Australia.

Limited scope of the judiciary

Currently, Australians rely on the High Court to interpret the Constitution in a way which protects their rights. However, courts and judges are limited to the cases and questions which come before them. By introducing a bill of rights, Australians would not have to wait for a High Court case to make a decision about a human rights issue relating to them in order to have rights protected.

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Arguments Against

Subject to interpretation

Including a bill of rights into our Constitution, removes the ability of sovereign lawmakers (parliament) to make the law, by handing it to the judiciary through the process of judicial review. It can be argued non-democratically elected judges should not have the power to make law in this area through the development of common law.

Hard to change

Once a bill of rights is enshrined in our Constitution, it is hard to change. Should a right be interpreted in a way the parliament or public are unhappy with, it would be very difficult, slow and expensive to change, as it would require a referendum. This circumstance could also arise if the values of society change, and the Australian public wish to change the bill. It is easy to argue a bill of rights would likely be outdated shortly after it was added to the Constitution.

Referenda are hard to pass

Australia has a low success rate for referenda. In our legal history, we have only passed 8 out of 44 proposed changes. Therefore, it is reasonable to suggest it would be difficult to pass a bill of rights into the Australian Constitution, as clearing the "double majority" requirement is deliberately difficult and has not occurred on many occasions. Proposals for additional rights in the Constitution in 1944 and 1988 failed and there has not been a successful referendum in more than 30 years.

Human rights are already adequately covered by the legal system

Human rights are already adequately protected by the Australian legal system, through the introduction of legislation and case law. In 1966, Prime Minister Robert Menzies stated the rights of Australians were as well protected as anywhere else in the world, due to our system of responsible government, and common law and legislative protections. Including a bill of rights into a Constitution is in conflict with the idea of parliamentary sovereignty, as this takes away the ability of the parliament to make laws for the people.

Could result in a significant increase in court actions

Including a bill of rights into the Constitution could potentially be quite expensive as people seek redress for alleged infringements of their rights under the Constitution. This could potentially cause significant delays in the courts with an influx of new cases.

It could limit our access to rights

If Australia was to write a bill of rights, the nation would be bound to the limited rights in the document. This could potentially lead to rights not explicitly stated being potentially overlooked or not recognised by the court. While bills of rights overseas typically focus on a person's rights with regards to criminal process, they are not always representative of other rights (such as political or civil) which are equally as important, but often harder to write clearly into legislation.

C Collaborative Activity

Discussion

In a group, consider the arguments above. Can you think of other arguments for or against the proposition of developing a Constitutional bill of rights for Australia?

Discuss with the people around you, and then compare ideas with another group.

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END OF CHAPTER ACTIVITIES

C Collaborative Activity

Design a Bill of Rights

In small groups, design an Australian Bill of Rights.

You may use the 2019 Private Members Bill, the US Bill (or that of another country), the Victorian Charter, or any UN rights documents as inspiration for the content, length and structure of your bill.

Outline the contents of your bill, below:

In a short paragraph, explain the inspiration for your bill.

1. What rights did your group feel it was imperative to include?
2. What did you feel could be left out, and why?
3. To what degree could you trust the government and courts to uphold rights?

C Collaborative Activity (continued)

In a short paragraph, explain how you addressed the following competing tensions in your bill:

- Competing rights and responsibilities
- Fairness and efficiency
- The empowered and the disempowered
- Certainty and flexibility

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Essay Questions

Students are to choose one question from the selection below and write an essay response. Students are reminded to:

- Consider both sides of the argument
- Consider the quality of the sources used to write their essay response
- Consider multiple perspectives

1. Should Australia have a bill of rights? Using examples, evaluate this statement.
2. "A Bill of Rights is unnecessary in Australia as the rights of citizens are adequately protected by legislation." Using examples, evaluate this statement.
3. The Australian High Court is the champion of human and civil rights, and therefore, a bill of rights is unnecessary. Using examples, evaluate this statement.

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Further Reading

Students who wish to complete some further reading may wish to look further at the following sources used to write this chapter:

Gregoire, P 2020, *Australia: Recent events highlight the need for a bill of rights in Australia*. Accessed on 11 January 2021, from: https://www.mondaq.com/australia/human-rights/887386/recent-events-highlight-the-need-for-a-bill-of-rights-in-australia

Gregoire P & Nedim U 2020, *The Australian Constitution Doesn't Protect Our Rights.* Accessed on 15 January 2021, from: https://www.sydneycriminallawyers.com.au/blog/the-australian-constitution-does-not-protect-our-rights/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

McGinty, J 2010, A Human Rights Act for Australia, *The University of Notre Dame Australia Law Review*, 12(2), 1-32.

(Online access from: http://classic.austlii.edu.au/au/journals/UNDAULawRw/2010/2.pdf)

UNSW Australian Human Rights Institute, 2019, *Five Reasons Why Australia Should Adopt a Statutory National Bill of Rights*. Accessed on 21 January, 2021 from: https://www.humanrights.unsw.edu.au/news/five-reasons-why-australia-should-adopt-statutory-national-bill-rights

Williams, G 1999, *The Federal Parliament and the Protection of Human Rights*. Accessed on 21 January, 2021, from: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20

Young, M B 2015, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006.* Accessed on 11 January, 2021, from: https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/03/d5323e753/summary_report_charter_review.pdf

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3.6 An Australian Republic

SACE Considerations for Chapter 3.6

Big Questions

- Did the Constitution adopt the best features of other countries' constitutional systems?
- Does the Constitution reflect the needs of contemporary society?
- Should Australia become a republic?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Questions

- How could Australia become a republic?
- What are the different models of a republic?
- What are the arguments for and against Australia becoming a republic?

What is a Republic?

A republic is a form of government in which a state (or nation) is ruled by representatives of the people and where sovereignty rests with the people. Republics are representative democracies. The term can also be applied to any form of government in which the head of state is not an hereditary monarch.

Australia is a constitutional monarchy (refer to chapter 3.2 for more detail). Hence, Australians have no say over who the head state is. The head of our country is automatically the King or Queen of the United Kingdom. The Governor-General is their representative to Australia and acts on their behalf. The Governor-General has to approve every law made by our Parliament, every election and the appointment of every government.

Becoming a Republic

To become a republic, Australia would need to change its Constitution in order to remove hereditary rule. Australia would need to replace having a King or Queen, and their representative the Governor-General, with an Australian as head of our country. Depending on the model, in all likelihood an Australian republic would retain a Prime Minister as head of government and a Parliament to make laws, but the head of Australia would be an Australian.

The only way to change the Constitution is via referendum. The referendum process (s128 of the Constitution) is outlined in chapter 3.2. In short, every Australian voter would have the opportunity to vote 'yes' or 'no' to the proposed model. If more than half of all voting age Australians vote 'yes', and there is a majority in at least four of the six states, then the change would go ahead.

At a Glance

Changing the Constitution via Referendum (from chapter 3.2)

The referendum process can be summarised as follows:

- Initiate/propose the holding of a referendum
- Public consultation to facilitate positive public debate
- Arguments for and against the proposed change prepared
- Precise wording of the question decided
- Passage of a Constitutional Alteration Bill through the Commonwealth Parliament.
- Conducting a successful referendum which meets the dual criteria (democratic and federal criterion)
- Assent of the successful Constitutional Bill into an Act
- Formal change of the Australian Constitution by proclamation and gazettal

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Should Australia become a Republic?

The precise model for an Australian republic remains a contentious issue. The main issue of debate is whether an Australian head of state should be elected or appointed, not attained by birthright as is the current practice for the King or Queen in the British Westminster model.

Australian Republic Movement

The Australian Republic Movement believes everyone who leads Australia and Australians should state allegiance to our people and to our place. Australia is unique–our land and our society are distinctive in the world. Our nation's great achievement is the creation of a democratic, multicultural, egalitarian society where everyone is equal no matter their family, faith or national background. We should never take this for granted and we should always try to improve it. This is why we should replace our current foreign monarchy with an Australian as Australia's head of state. Our head of state should be a patriotic, democratic person who embodies service to our country and its people. Our head of state should be an Australian chosen by Australians, not a foreign monarch who inherits the job. We're an inclusive, member-controlled, volunteer-led campaign calling for a national vote to change our constitution.

https://republic.org.au/

Arguments for Australia becoming a Republic

The head of our country (our 'head of state') is currently the British Queen. Republicans believe the head of our country should live in Australia and be proud to be Australian. Anyone who holds public office in Australia should be an Australian citizen with allegiance to Australia. For example, any person elected to Federal Parliament must be a citizen of Australia and cannot be a dual citizen, while the Queen of Australia is not. The criteria to appoint a President would be identical to those for candidates standing for election to the Commonwealth Parliament. In *Sue v Hill & Anor* in 1999 the High Court held that a person standing for parliament cannot have an 'allegiance, obedience or adherence to a foreign power' as defined in Section 44(i) of the Australian Constitution. Clearly, the British Queen is the monarch of a foreign power. It is irrelevant a friendly foreign power is the source from which we inherited many of our customs, traditions and system of government. Britain has acknowledged this independence by enacting the Statute of Westminster in 1931 to allow its old Dominions to control their own affairs.

Australia is a largely egalitarian society. We see our country as being a meritocracy holding fairness, equality and merit in the highest esteem. However, as it stands the only way anyone can be head of Australia is to be born into the British Royal Family. This does not represent the independent, modern and democratic nation Australia purports to be. All Australians could aspire to be the Head of State, not only the hereditary heir to the British throne. That is, appointment is based on merit, not birthright. This principle is consistent with Australia's democratic and equal opportunity principles.

Republicans also feel the head of Australia should be chosen by Australians and it is wrong an Australian cannot be the head of Australia with Australians not having any say in who this person might be.

Australia's head of state should not hold allegiance to any specific religion. This is consistent with section 116 of the Australian Constitution which prohibits the Commonwealth from making laws about the observance to any religion in government affairs. The British Monarch is the titular head of the Church of England which is also inconsistent with the principles embedded in Australia's multicultural policies.

Australia should be fully independent. It is not right for Australia's democracy to be subject to a foreign monarch. Australia would become an independent nation in the world community. Many Australian's are embarrassed by foreign heads of state toasting the Queen at official functions, rather than an Australian head of state. Similarly, it is awkward people who become Australian citizens, have to swear allegiance to the Queen at their citizenship ceremony.

Australia is proudly multicultural, including Indigenous Australians who are the living embodiment of one of the oldest civilisations on Earth. Having a foreign head of state is incongruous with this. Australia is widely acclaimed as one of the world's most successful countries. As an independent, diverse and proud nation, becoming a republic would strengthen the best things about Australia for the future.

No Republic: Australians for Constitutional Monarchy

Australians for Constitutional Monarchy is the nation's oldest and largest organisation dedicated to the defence of our constitutional system of government.

https://norepublic.com.au/home-3/

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Arguments against Australia Becoming a Republic

Australia is the sixth oldest continuous democracy in the world after Britain, USA, Canada, Switzerland and Sweden. It is a stable democracy which has operated effectively and lawfully since 1901, so 'if it ain't broke, don't fix it'. Our present system, as it has evolved over time, has provided Australia with an enviable record of democratic government. No system of government is perfect, but a Constitutional Monarchy is the least imperfect form of government yet devised and it should endure in Australia indefinitely.

The Queen, and her representative, the Governor-General, are apolitical and hold no allegiance to any side of politics. They have performed their roles with distinction and command the respect of the Australian people. Electing a President could place impartiality and respect in jeopardy. The Crown in our Constitution has served our nation well. The Crown is symbolic of the standard of duty and service for all branches of our government. A President would not simply be able to assume the same roles as the Governor-General, as a special relationship exists between a Governor-General and the Crown. There is no guarantee an elected President will honour the conventions of responsible government so rigidly observed by all past Governors-General.

Australia achieved complete independence long ago. The purpose of the *Australia Acts 1986* was "to bring constitutional arrangements affecting the Commonwealth and the States to be brought into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation". Australia's independence is also symbolised by the Queen's title being changed, by her own consent and by Act of the Australian Parliament, to Queen of Australia. Australia's system of government combines all of the advantages of constitutional monarchy with the full measure of independence and egalitarianism which republicans espouse. The Crown plays no real role in the governance of Australia, and Governors-General have been Australian citizens for decades. For all purposes, Australia is a 'crowned-republic', a system which is serving Australia well and should not be subject to experimentation. Australia now enjoys all the desirable features of a republican government and a constitutional monarchy without any disadvantages of either system.

Finally, a republic referendum is an expensive exercise which will cost well in excess of $50 million. Australia has many other more important challenges to face, and the money could be better allocated to pressing social issues which have far greater urgency, such as reconciliation with Aboriginal Australians, unemployment, education and health. Furthermore, in 1999, a referendum was put to the Australian people to vote on whether they wanted Australia to become a republic or not and Australians voted to retain the current system.

At a Glance

Arguments for and against Australia becoming a republic

Arguments for Australia becoming a republic

- Australia's head of state
  - should be an Australian and should have allegiance to Australia
  - should be appointed based on merit not birthright
  - should be chosen by Australians
  - should not be aligned with or have allegiance to any specific religion
- Australia should be completely independent
- Australia is a multicultural country with a rich Indigenous history

Arguments against Australia becoming a republic

- If it ain't broke, don't fix it
- Special role of Crown and Governor-General
- Australia is already an independent nation
- It is an expensive process, and the money would be better spent on other things
- It has already been voted on and decided

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C Collaborative Activity

Whole Class Activity

Discuss the arguments for and against Australia becoming a republic and complete the table, explaining each argument in your own words and then filling in counter points:

Argument	In Your Own Words	Counter point
FOR:		
Australia's head of state should be an Australian		
Australia's head of state should be appointed based on merit not birthright		
Australia's head of state should be chosen by Australians		
Australia's head of state should not be aligned with or have allegiance to any specific religion		
Australia should be completely independent		
Australia is a multicultural country with a rich Indigenous history		
AGAINST:		
If it ain't broke, don't fix it		
Special role of Crown and Governor-General		
Australia is already an independent nation		
It is an expensive process, and the money would be better spent on other things		
It has already been voted on and decided		

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Different Models

An Australian President would be different to other presidents around the world. In all likelihood, an Australian republic would keep our current parliamentary democracy with a Prime Minister, but an Australian citizen would replace the King or Queen of the United Kingdom and their representative, the Governor-General, as head of our country. This is the kind of republic which works well in countries like Germany, Ireland, Finland, Iceland, Austria and India today.

Inquiry Activity

the 1999 Model – an Australian Head of State Appointed by Parliament

In 1999, Australia had a referendum to decide whether or not to become a republic. In short, it proposed that an Australian Head of State be appointed by Parliament.

Go to https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/AustralianRepublic

Write a summary of the 1999 model and the yes/no questions asked in the referendum.

I Inquiry Activity

Directly Elected President

Choose an example of a of republic that has a directly elected president – like Germany, Ireland, Finland, Iceland, Austria or India – and research how it works and then evaluate its effectiveness.

Would this model work in Australia?

I Independent Activity

Creating Your Own Digital Response to Sources on the 1999 Referendum

Using the Response to Sources in chapter 1.7 on page 113 as a model, your task is to create your own digital response to sources, focusing on the 1999 referendum.

Sources might include the ballot/proposal/questions, a news article, an advertisement, a cartoon, a graph

C Collaborative Activity

Compare the Three

In groups of three, compare and contrast the following three models:

- A Constitutional Monarchy – Australia's current system
- A Head of State appointed by Parliament – the 1999 Model
- A directly elected President – Germany, Ireland, Finland, Iceland, Austria or India

What are the positives of each? What are the negatives? Which would you prefer? Justify your decision.

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Independent Activity

Article Review and Reflection

Go to the link provided and read the article

"A model for an Australian republic that can unite republicans and win a referendum"

https://theconversation.com/a-model-for-an-australian-republic-that-can-unite-republicans-and-win-a-referendum-89919

Write a brief review and reflection. What is the article proposing? What are your thoughts? Justify your response.

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Independent Activity

Article Review and Reflection

Go to the link provided and read the article

"Is Australia ready for another republic referendum? These consensus models could work"

https://theconversation.com/is-australia-ready-for-another-republic-referendum-these-consensus-models-could-work-142646

Write a brief review and reflection. What is the article proposing? What are your thoughts? Justify your response.

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Essay Questions

Choose one of the following statements:

1. 'The Australian Constitution adopted the best features of other countries' constitutional systems.'
2. 'The Australian Constitution reflects the needs of contemporary society.'
3. 'Australia would be better served in the future by becoming a republic.'

Evaluate your chosen statement with reference to examples and one or more of the following competing tensions:

- Competing rights and responsibilities
- Fairness and efficiency
- The empowered and the disempowered.
- Certainty and flexibility

(800+ words)

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3.7 Evaluation of Australia's Constitutional System

SACE Considerations for Chapter 3.7

Big Questions

- Does the Australian High Court have too much power?
- Does the Australian constitutional system adequately protect the rights of individuals and groups?
- Does the Constitution reflect the needs of contemporary society?
- How does the Constitution provide for both certainty and flexibility?
- Does the original purpose of the Senate as a 'States' house' adequately serve contemporary Australia?
- How has the division of power between the States and the Commonwealth changed since federation, and what is the significance of this?
- Has the High Court of Australia been an effective guardian of the Constitution?

Competing Tensions

- Fairness and Efficiency
- Empowered and the disempowered
- Competing rights and responsibilities
- Certainty and flexibility

Inquiry Question

- What are the strengths and weaknesses of Australia's Constitutional System?

"But though the Constitution is much, it must not be supposed to be everything. It is, in itself, merely the means to an end; merely the dead mechanical framework of national unity. The life and soul of the union must be breathed into it by the people themselves. When a Constitution has been framed and adopted, the work of the Australian union will have begun, not finished. The nation will be a nation, not of clauses and sub-clauses, but of men and women; and the destiny of Australia will rest with the Australian people, rather than the Australian Constitution. The work now in hand–the making of a Constitution–is great and important; but it is the beginning, not the end."

Sir Robert Garran, 1897, *The Coming Commonwealth*, pg 185.

C Collaborative Activity

Discussion

Consider the above quote from Sir Robert Garran. What is the significance of the ideas expressed above? Be prepared to share your answers with the class. To inform your discussion, find out as much as you can about Mr Garran as the storyteller through the above quote. What might another from a different time and place say about our constitution?

Introduction

This chapter will require students to consider what they have learned so far in this topic to analyse the effectiveness of Australia's constitutional system of government.

Australia has a reasonably stable political system. It is one of the oldest, continuous democracies in the world, and has not radically changed its constitution over time. With only eight of forty-four changes proposed at referendum passing into law, it can be argued Australians are happy with their system as it currently stands. However, no system is perfect, and there are elements of the Australian constitutional system arguably in need of reform.

Students will be given the opportunity to evaluate some of these areas below.

Other areas of potential Constitutional reform, such as developing a Bill of Rights (Chapter 3.5), or Australian becoming a republic (Chapter 3.6), have been evaluated in previous chapters, and will not be repeated here.

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Evaluation of Federalism

The legal, social and political process of federating is outlined in Chapter 3.1.

Much thought and debate went into framing the Constitution and considering the model of government best suited to Australia. The Founding Fathers never seriously considered creating a unitary system of government (where the states would be abolished, and a single, federal government would exist in its place). Rather they chose a federation enabling states to retain some autonomy, with a national government uniting them in a nation called The Commonwealth of Australia.

Arguments in support of a federation model

- A federal model of government decentralises power as there are multiple parliaments making laws under their own jurisdictions. Both the federal and state governments have their own constitutional power to make laws to meet the needs of their region. State parliaments can decentralise lawmaking power further by delegating lawmaking power to institutions like local government councils.
- The federal system is flexible. While the constitutional model of Australia's federation is written into the constitution, it can be changed through the referendum process if required, to meet the needs of the Australian people. The states have also demonstrated on many occasions they are willing to work with the federal government to help them achieve their legislative agenda if they do not have the specific head of power to legislate in a particular area. This is demonstrated through states entering into cooperative agreements in order to achieve national consistency on a legislative issue. Chapter 3.2 gave an overview of some examples of federal cooperative agreements.
- A federal model allows for a single defence force; an arrangement more cost effective and efficient than each state attempting to maintain their own fragmented defence.
- Federalism allows the nation's resources to be divided equally amongst all citizens. For example, by allowing the federal government to manage social security payments, all Australian citizens are eligible for the same payments, regardless of their geographic location.

Arguments against use of a federation model

- It is inevitable a federal model of government leads to fragmentation of laws, as each jurisdiction creates laws suiting their own circumstances. As each state makes their own criminal laws for example, there are different penalties attached to crimes depending on the jurisdiction, creating inconsistencies across the nation. Not only can this make the legal system more difficult to navigate, but it also creates inefficiencies across the system, as duplicated government departments do the same work in different jurisdictions.
- The autonomous nature of the states also makes it difficult to implement uniform laws nation-wide which are in the national interest. While, as outlined above, sometimes the states show cooperation and a willingness to work with the federal government on these issues, this is not always the case. A current example is the Murray-Darling River. New South Wales, Queensland, Victoria and South Australia share this resource, but regularly disagree about its management. A single government approach would make managing this vital resource much easier.
- The federal system results in disputes between governments about power-sharing arrangements which must be resolved by the High Court. These disputes create discord between states, or between states and the federal government, which can create political and social instability until the dispute has been resolved.
- The proportional voting system for the Senate usually results in a higher number of independents and minor parties being elected to the chamber. This will often result in the Government needing to negotiate and make concessions with these members to pass their laws. While this has its benefits, it also means that nation-wide laws are being significantly impacted by parties representing a minority of Australians.

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Independent Activity

SWOT Analysis - Evaluation of Federalism

Using the arguments above, and any arguments students may generate themselves, fill in the SWOT analysis below.

Strengths	**W**eaknesses
Opportunities	**T**hreats

After completing this analysis, do you think the choice of creating a federation was the right choice for the foundational structure of Australia's government? Justify your response.

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Evaluation of the changing division of powers

Once it had been decided by the Founding Fathers to create a federal system, they needed to outline which legislative powers the new federal government would have, and what the states could retain.

Initially, the federal system ran as a coordinate model–meaning the federal partners (the federal and state governments) operated relatively independently of each other. As time progressed and the world changed, it became increasingly necessary for laws to be made at national level, especially with regard to international concerns, the environment and in response to changes in technology. However, the Commonwealth Government was largely unable to achieve what they wanted under the heads of power prescribed in s51 as they were written at federation, due to their limited scope.

In the passage of time, the Commonwealth Government has implemented a raft of changes in order to attain more lawmaking power, with and without the consent of the states. Such changes have shifted (or transferred) the balance of power from the states to the federal government, and can be categorised in three ways, as outlined below.

- Changes supported by the States
- Changes through Federal Government Initiatives
- Changes through High Court Interpretation of the Constitution

State Supported Changes

As previously mentioned, there are situations in which the states will voluntarily assist the federal government in acquiring more power in order to do the work it needs to.

Referral of Power

Section 51(xxxvii) of the Constitution allows the Federal Government to take over any powers willingly referred to them by the States. Any federal laws made subsequent to the head of power only apply to the State(s) which referred the power back to the Commonwealth. States are generally hesitant to refer their power back to the Commonwealth, as the transfer is permanent.

Example – Ex-nuptial Children

An example of a transfer of power to the Commonwealth is ex-nuptial children (children born outside of a legal marriage). In 1987, SA, NSW, Victoria and Tasmania transferred their power over ex-nuptial children to the Commonwealth, so Family law cases involving them could be resolved by the federal Family Court, rather than State courts.

Example – Corporations Power

In 2000, each Australian state referred their 'corporations' power to the Commonwealth so the federal government could enact the *Corporations Act*, national uniform legislation surrounding the creation and regulation of companies. States were required to repeal their own legislation in this area upon the passing of Commonwealth law.

Concurrent Powers

Most of the specific heads of power in s51 of the Constitution are concurrent with the states, meaning both tiers of government can make laws in that area. However, due to the inconsistency rule (s109 of the Constitution), if there is a clash between state and federal law, the federal law will prevail to the extent of the inconsistency. Through this method, the federal government can expand their powers at the expense of the states.

Quite often, where the inconsistency rule is applied by the High Court, it is simply because the Commonwealth Government is using a power for the first time. This occurred with the passing of the Commonwealth Marriage Act in 1961.

Example – Family Law

Laws surrounding marriage and divorce were made by individual states prior to federation. These laws remained valid after federation, as the federal government had not passed any of its own legislation in this area. However, in 1959, the Commonwealth Parliament passed the *Matrimonial Causes Act* in order to create uniform legislation with regards to divorce. With this new federal law, state laws were necessarily repealed.

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Commonwealth Initiatives

Referendum Process

While the limited success rate of referenda does not guarantee change to the Constitution, it has nonetheless been a method of transferring some power from the States to the Commonwealth. In each of these instances, however, the States did not object to this transfer of power.

Powers changed via referendum are:

- **s105A** (in 1928) – the national debt power, which allows the Commonwealth to control the borrowing of public monies
- **s51(xxiiiA)** (in 1946) – the social security power, which gives the Commonwealth increased power to provide social security payments
- **s51(xxvi)** (in 1967) – the race power, which allowed Indigenous affairs to become a specific power of the Commonwealth.

Role of the Senate

The intended role of the Senate was to be a 'States' House; a House of parliament where each state had equal representation, regardless of population, and would be able to critically analyse bills from the perspective of their state alone. In practise, however, the Senate rarely fulfills this function anymore, and largely operates as a second 'Party' house, where members are expected to vote along party lines.

As the Senate has moved away from its original design, Australians have seen Senators vote for bills which have removed powers from states and given them to the Commonwealth. A Parliament during the Howard years was noted for having clear Liberal majorities in both the House of Representatives and the Senate, resulting in the passing of Acts without sufficient bi-cameral scrutiny.

Example – Uniform Tax Legislation

In 1942, the Federal Parliament passed the *Uniform (Income) Tax Agreement Bill*, which effectively removed the ability for states to collect income tax from their citizens. (The state's challenge to this bill is outlined in the next section.) Even though it was against the interests of the states in this instance, members of the Senate chose to approve the bill and pass it into law on the advice of their parties, thereby putting party discipline ahead of state interest.

Grants Power

Under section 96 of the Constitution, the Commonwealth parliament has the ability to give money to the states under any condition it deems appropriate. This power is often used by the Commonwealth to pressure states into adopting certain projects, or adopting the legislative agenda of the Commonwealth, pursuant to their residual powers in exchange for a grant. These are often referred to as 'tied grants', and are very effective, as approximately 35-40% of states income is estimated to be derived from the federal government.

Example – Education

Education is a state residual power, and subsequently, the main way the federal government can exert any sort of control or policy change is through the use of tied grants. In 2004, under Prime Minister Howard's government, education funding was tied to several different policy ideas, including:

- Compulsory physical exercise sessions in primary schools to help combat childhood obesity, and
- Ensuring all schools had a functioning flagpole which flew the Australian flag.

Schools failing to abide by these measures, would risk their federal funding.

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Unchallenged Legislation

The Commonwealth government has arguably enacted many pieces of legislation it does not have the legal authority under a head of power to enact. However, if these pieces of legislation are not challenged in the High Court, they stand. Some of these pieces of legislation have remained law (particularly if they are viewed as being beneficial for society), but others have been challenged in the High Court.

Example – Snowy Mountains Hydro-Electric Scheme

In 1949, the federal government created the *Snowy Mountain Hydro-Electric Act*, exercising its defence power, to create the Snowy Mountains hydro-electric dam. There have been many academics who have stated it is unlikely that this Act would hold up under scrutiny by the High Court, as s100 of the Constitution states, "The Commonwealth shall not… abridge the right of a State or of the residents therein the reasonable use of waters or rivers for conservation or irrigation." This dam still stands today, and in fact, the government is currently seeking to expand the dam.

Example – Williams v Commonwealth (1) and (2)

This is an example of legislation made without the proper head of power successfully challenged by an individual. The Commonwealth government was funding school chaplains for their *National School Chaplaincy Program*, and engaged a private organisation to undertake some of the work on their behalf in Queensland. A parent, Mr Williams, challenged the funding arrangement in the High Court, stating the federal government arrangement could not be entered into under s61, and was also prohibited by s116. The High Court agreed with Mr Williams and found against the Federal Government.

This forced the Federal Government to make new arrangements to fund their school chaplaincy program, which Mr Williams challenged again (in Williams (no. 2)), and the High Court found against the Government a second time.

It is highly likely, if unchallenged, the initial funding arrangement for school chaplaincy programs would still be in use.

C Collaborative Activity

Discussion

Consider the **competing tensions** of:

- The empowered and the disempowered
- Certainty and flexibility

How do they apply to the change in the power balance between the states and the Commonwealth?

Discuss this with the person next to you, and be prepared to share your answers with the class.

High Court interpretations of the Constitution

Arguably the most significant factor in changes to the division or balance of power between the Commonwealth government and the States has come from the original jurisdiction of the High Court. As explained in Chapter 1.5, the original jurisdiction of the High Court (outlined in s76 of the Constitution), is tasked with the role of being the 'Guardian of the Constitution'–the body which interprets the words in the document to give it meaning and clarity.

A common result from disputes between the States and the Commonwealth in the High Court is the Commonwealth is awarded more power, at the expense of the States.

The results of these High Court cases can also be categorised into three main groups:

- Financial dominance of the Commonwealth
- Use of the external affairs power
- General Commonwealth powers

Financial Dominance of the Commonwealth

Through several key High Court cases, the Commonwealth government has become the dominant financial partner in the federal balance.

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1926 – Federal Roads Case

This was a dispute regarding s96 of the Constitution–the 'grants power' (outlined above). Victoria claimed the federal government did not have the authority to allocate grants to states with requirements for spending outside their heads of power. In this instance, the Commonwealth granted Victoria some funding for roads, but specified how the money was to be spent, by nominating specific roads for upgrades.

The High Court disagreed and stated the *Federal Roads Act 1926 (Cth)* was a valid exercise of power. This decision gave broad power to the Commonwealth infringing on the residual powers of states through the use of grants.

1942 – First Uniform Tax Case

Before World War II, both the states and the Commonwealth government raised monies through forms of taxation. However, during the war effort, the federal government passed several laws allowing them to collect the majority of the taxes across Australia, in order to finance the war. To achieve this, the laws stated the States would be ineligible for federal government grants if they continued to charge their own income taxes. This effectively stopped all states from being able to collect income taxes, should they wish to have access to federal government grants and financial support.

This legislation was challenged by South Australia in *South Australia v Commonwealth 1942*. Lawyers for South Australia argued the legislation was invalid. However, the Full Bench of the High Court disagreed, stating it was a valid use of the Commonwealth's taxation power. States have never had this power reinstated, hence the current situation where they are heavily reliant upon additional GST revenue and a range of 'pseudo-taxes' for example, the Emergency Services Levy and Land Tax.

1997 – Tobacco Excise Case

In *Ha v NSW 1997*, the High Court held that the NSW government could not put a franchise tax on cigarettes, as it was effectively an income tax, and was an exclusive power of the Commonwealth. This decision further reduced the types of taxes state governments could implement, and the income they could generate.

Currently, a significant proportion of Commonwealth grants provided to states are linked to specific government programs. Together, the taxation and grants powers held by the Federal government are powerful tools of persuasion and influence over the States.

External Affairs Power

In s51(xxix), the federal government has the specific head of power to create legislation in regards to 'external affairs'. The High Court has interpreted this on several occasions to mean the federal government can create legislation with regards to areas outside of their heads of power, if they are in response to an international treaty signed by the Australian Government.

Two cases outlined earlier in this book upholding this principle are:

- Koowarta v Bjelke-Petersen 1982 (pages 106, 277)
- Commonwealth v Tasmania 1983 (Tasmanian Dams Case) (pages 269, 277)

A couple (slightly more recent) cases examining the use of the 'external affairs' power are outlined below.

Victoria v The Commonwealth 1996 (Industrial Relations Act Case)

This case centres around the Commonwealth Parliament creating legislation around industrial relations. The legislation passed by the Commonwealth Government in this case related directly to a provision in the *International Covenant on Economic, Social and Cultural Rights*, and the ability of workers to protest.

The significance of this case comes from the judgments affirming the decisions of the justices in Koowarta and Tasmanian Dams. The decision affirms that,

'*...where… the Executive ratifies a convention which calls for action affecting powers and relationships governed by domestic legal order, legislation is needed to implement the Convention.*' (1996, 138 ALR 143)

This case also affirmed when legislation for this purpose is passed by the Commonwealth,

'*...the intrusion of Commonwealth law into a field that has hitherto been the preserve of State law is not a reason to deny validity to the Commonwealth law provided it is, in truth, a law with respect to external affairs.'* (1996, 138 ALR 144)

The legislation passed by the Commonwealth Parliament was upheld by the High Court.

Toonen v Australia 1994

The Toonen case is slightly different to the cases outlined above, as it didn't reach the High Court of Australia. Mr Toonen, a homosexual Tasmanian man, challenged the validity of Tasmania's criminal legislation, which criminalised sexual activity between men. Mr Toonen took his case to the Australian Human Rights Committee, arguing Tasmania's criminal laws were infringing on his right to privacy, covered by Article 17 of the International Covenant on Civil and Political Rights, a treaty to which Australia was a signatory. The Australian Human Rights Committee agreed, but as their views have no binding force in Australian law, they passed the issue along to the Commonwealth Government. The Commonwealth Parliament subsequently passed the *Human Rights (Sexual Conduct) Act 1984*, effectively overriding the Tasmanian legislation. They again used their 'external affairs' power to legislate in this area.

Tasmania initially began a challenge against the Commonwealth legislation, but eventually resolved the issue by repealing the relevant sections of their criminal law act to avoid the inconsistency between state and federal laws.

The only real limitations the High Court has placed on the use of the external affairs power is that laws must not contradict the Constitution in any way. Additionally, the Commonwealth Government should not be entering into a treaty for the sake of attempting to expand their own powers, but in 'good faith' only.

Students can read more about each of these cases outlined above, in the context of the use of the external affairs power, by reading this publication by the Victorian Government.

https://www.parliament.vic.gov.au/archive/fsrc/report1/body/chapter2.htm#fn20

General Powers of the Commonwealth

In its original jurisdiction, the High Court has resolved many Constitutional disputes between the states and the Commonwealth. These disputes have awarded a variety of different powers to the federal government.

A range of cases demonstrating this power transfer are below:

- Amalgamated Society of Engineers v Adelaide Steamship Co Ltd 1920 (Engineers Case)
- R v Brislan, Ex parte Williams 1935 (Brislan's Case)
- Murphyores Inc Pty Ltd v Commonwealth 1976
- Kable v Director of Public Prosecutions (NSW) HCA 1996
- South Australia v Commonwealth 2006 (Work Choices Case)

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I Independent Activity

Case Research

Choose one of the cases above, and undertake some research into the case. Compile your notes to outline:

- The general facts of the case
- The power transferred from the states to the Commonwealth

Your work should be 2-3 paragraphs in length.

Once you have completed your work, find a classmate who has chosen a different case to you, and share your findings with each other to broaden your knowledge and understanding.

C Collaborative Activity

Discussion: The High Court of Australia – The Guardian of the Constitution?

Consider what you have just learned about the change in the balance of power between the Commonwealth and the States, and the role of the High Court in this process.

The Founding Fathers initially drafted the Constitution with a deliberately separate federal government with limited, specific powers, to protect the residual powers and autonomy of the Australian states.

1. Do you think the interpretations of the HCA with respect to cases you have read above, and the transfer of powers from the States to the Commonwealth, is the correct interpretation of the Constitution in this context? Explain your response.
2. Has the High Court been an effective guardian of the Constitution in these circumstances?
3. Should the High Court put more emphasis on protecting the original intent of the Constitution, or focus on the national interest when considering how to interpret the Constitution?

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Evaluation of the High Court's use of power

The High Court sits in a very powerful position in Australia's legal system. It is the most superior court in the nation, and is the final court of appeal. In its original jurisdiction, the High Court interprets the Constitution to resolve constitutional disputes, and these interpretations cannot be overruled by any parliament in Australia. In its appellate jurisdiction, the decisions set the state of law in all branches of law in Australia as its decisions are binding on all other courts. (Students can turn to Chapter 1.5 if they would like more information about the role and structure of the High Court.)

The High Court has played a significant role in the change in the division of powers between the Commonwealth and the States throughout Australian legal history. As these changes have largely benefited the Commonwealth at the expense of the states, it is worth considering whether or not the High Court has too much power in the Australian legal system.

High Court has too much power

- Justices of the HIgh Court are appointed, not elected, and are not held democratically accountable for the decisions they make.
- The parliament alone does not have the legal authority to overrule or overturn a High Court interpretation of the Constitution, technically giving the High Court sovereignty in this respect.
- Justices of the HIgh Court are not bound by their own precedents, which can make their decision making unpredictable, and can produce inconsistencies in case law.
- There is no higher judicial body for review of High Court decisions. Formerly, High Court decisions could be appealed to the Privy Council in England, but this legal avenue of appeal was abolished in 1986 through the introduction of the *Australia Act 1986 (Cth)*.
- Under principles of judicial independence, a Justice can only be dismissed for proved misbehaviour or incapacity. This means Justices cannot be dismissed for poor decisions.
- The referendum procedure is an insufficient method of judicial supervision in this context, as the process is slow, expensive and often unsuccessful.

High Court does not exercise too much power

- The High Court was created based upon the outline of its structure in the Constitution. This document was approved democratically at referendum in each colony, and there have been no changes to the power of the Court in referendums held since then. This suggests the public are happy with the power being exercised by the High Court.
- If the public are concerned with a decision made by the High Court, they are able to overrule the decision by changing the Constitution at referendum.
- Judges in the High Court are subject to the rule of law and the same standards of conduct as other judges around Australia, preventing an abuse of power.
- The government has the ability to scrutinise candidates before their appointment to the High Court, to ensure the candidates are capable of undertaking their duty with integrity and in accordance with the law.
- Parliament can remove Justices from their positions for proved misbehaviour or incapacity.
- It is important to appoint Justices to the High Court under the protections and principles of judicial independence, to ensure the federal government can be held to account.

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END OF CHAPTER ACTIVITIES

Response to Source

Accessed from: https://independentaustralia.net/australia/australia-display/australias-locked-constitution,4644

What is the main message of this political cartoon?

Who does the author of the cartoon seem to cast responsibility onto for this lack of change?

Knowing what you now know about the Australian Constitution, do you think this comment is valid? Justify your answer.

Essay Questions

Students are to choose one question from the selection below, and write an essay response. Students are reminded to:

- Consider both sides of the argument
- Consider the quality of the sources used to write their essay response
- Consider multiple perspectives

1. 'High Court constitutional challenges have resulted in too much power residing with the Commonwealth parliament.' Using examples, evaluate this statement.
2. 'Human rights will never be properly protected under Australian law without the inclusion of a bill of rights in the Constitution.' Using examples, evaluate this statement.
3. 'The Australian Constitution is too rigid and unchanging to support the needs of the Australian people in 2021.' Using examples, evaluate this statement.
4. 'The referendum process is too ineffective as a mechanism to change the Constitution, and a new mechanism or process must be developed.' Using examples, evaluate this statement.

Students may also wish to use a 'Big Question' from the beginning of the chapter to answer as an extended response.

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