

Legal Studies for Queensland



LEGAL EAGLE
PUBLICATIONS

Roger Woodgate
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Legal Studies 2025 - General Senior Syllabus



UNITS

Legal Studies for Queensland Units 3&4

Legal Studies 2025 Syllabus Volume 2, Ninth Edition

Our team of authors has an excellent blend of hands-on legal and educational experience that provides the reader with invaluable practical insights into the application of the law in a variety of real-life contexts.



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Law, governance and change

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Preface

The authors, a team of experienced legal practitioners and educators, welcome you to the Ninth Edition of *Legal Studies for Queensland (Volume 2)*.

This text is designed to support our readers with the knowledge and skills to understand and master the subject matter outlined in *Legal Studies 2025: General Senior Syllabus, Units 3 and 4*, through a wide range of practical activities.

The syllabus objectives that support student learning are identified in the following way:

- **[C]: Comprehend** legal concepts, principles and processes.
- **[S]: Select** legal information from sources.
- **[A]: Analyse** legal issues.
- **[E]: Evaluate** legal situations.
- **[R]: Create a response** to communicate meaning according to the intended purpose.

Our use of a **structured inquiry-based learning approach** also develops mastery of these syllabus objectives. Throughout each topic, students are given a contemporary legal issue, question, or problem and components (such as source material or activities) to develop their confidence and independence and become learners responsible for their own learning. At the end of each chapter, **Review** questions are designed to mirror the style of external exam questions, to develop student assessment skills.

As an experienced team of current and former legal practitioners and educators, we are committed to supporting your learning and understanding. We aim to provide accurate and engaging content that is also readable and approachable for senior school students, without compromising on its authority as a reference source for teachers. To the best knowledge of the authors, this text provides an accurate picture of the law at the time of writing.

We give special thanks to:

- our graphic designer, Jennifer Hillhouse;
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Roger Woodgate, Jeff Biggs and Kirsten Murray (Brisbane, January 2025).

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Unit 3

Law, governance and change

Unit 3 focuses on the role of legal institutions and lawmaking bodies in creating laws that reflect the values, needs, morals, and ethics of society, and the range of forces that drive change and reform to Australia's laws.

Topic 1

Governance in Australia

Topic 1 focuses on the processes and roles of government in shaping law in Australia and Queensland.

Chapter 1: What is governance?

Chapter 2: The Australian Constitution

Chapter 3: Australian parliamentary democracy—representative government

Chapter 4: Responsible government

Chapter 5: Making law in parliament

Chapter 6: Governance in action—the judicial system

Chapter 7: Governance in action—accountability

Governance in Australia

Chapter 1: What is governance?

1.1 The nature of governance

1.2 Australia's gun laws: an example of governance in action

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
 - the meaning of governance
 - the laws about the processes of governance.
- analyse Australia's gun laws, an illustration of best practice governance.

1.1 The nature of governance

Governance:

...the way that organisations or countries are managed at the highest level, and the systems for doing this.

Cambridge English Dictionary, <dictionary.cambridge.org>.

Establishment of policies, and continuous monitoring of their proper implementation, by the members of the governing body of an organization. It includes the mechanisms required to balance the powers of the members (with the associated accountability), and their primary duty of enhancing the prosperity and viability of the organization.

Business Dictionary, <businessdictionary.com>.

The concept of governance is widely used to describe the processes by which governments, organisations, and institutions promote and implement their policies, and seek to justify and explain their purposes. All of these bodies seek to operate according to processes which establish best practice for them as they carry out their different responsibilities.

The above definition from the *Business Dictionary* can be applied to the work of governments in Australia, whether it be at a Federal, State or Local level. It encompasses their obligations to:

- pass laws reflecting the policies expected by the Australian community;
- establish the institutions and organisations needed to apply, regulate, and enforce these laws;
- ensure that they (the governments) themselves and the institutions they have established operate according to the law and in the interests of the Australian community; and
- respond to the views of the community, and to changing circumstances, to introduce new laws and review existing laws when required.

Practical Application

The Commonwealth Government has passed legislation which sets guidelines for its governance, performance, and accountability.

Public Governance and Accountability Act 2013 (Cth)

5 Objects of this Act

The objects of this Act are :

- (a) *to establish a coherent system of governance and accountability across Commonwealth entities; and*
- (b) *to establish a performance framework across Commonwealth entities; and*
- (c) *to require the Commonwealth and Commonwealth entities :*
 - (i) *to meet high standards of governance , performance and accountability ; and*





Practical Application ...

- (ii) to provide meaningful information to the Parliament and the public ; and
- (iii) to use and manage public resources properly ; and
- (iv) to work cooperatively with others to achieve common objectives, where practicable;
- and
- (d) to require Commonwealth companies to meet high standards of governance, performance and accountability.

1. What is meant by 'a coherent system' and 'a performance framework'? [C]
2. In s5 (c) and (d), what are the 'Commonwealth and Commonwealth entities' required to do? [C]
3. In respect of each source item below, answer the following questions:
 - a. Describe the question/issue raised by each article. [C]
 - b. Identify the process used to resolve the issues raised. [C]
 - c. Do any of the matters raised appear within the scope of the objects of the *Public Governance and Accountability Act 2013* (Cth)? Give your reasons. [C] [A]

Source 1

SUSSAN LEY STANDS ASIDE AS HEALTH MINISTER PENDING TRAVEL EXPENSES INVESTIGATION

Health Minister Sussan Ley has stood aside following pressure over a number of taxpayer-funded flights to the Gold Coast, where she and her partner own property.

Prime Minister Malcolm Turnbull said Ms Ley had agreed to "stand aside without ministerial pay" during an investigation by the Secretary of the Department of Prime Minister and Cabinet.

"I expect the highest standards from my ministers in all aspects of their conduct, and especially the expenditure of public monies".

Source: Stephanie Anderson, 'Sussan Ley stands aside as Health Minister pending travel expenses investigation', *ABC News* (Online, 1 September 2017) <abc.net.au/news/2017-01-09/sussan-ley-stands-aside-over-travel-expenses/8169410?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web>.



Practical Application



Source 2

POWERFUL HOME AFFAIRS BOSS MIKE PEZZULLO SACKED AFTER INVESTIGATION INTO BACKCHANNEL LOBBYING

One of the most powerful figures in the public service has been sacked after leaked conversations revealed the depths of his attempts to influence the government on policy and the shape of government.

Mike Pezzullo, the head of the Home Affairs Department, was considered one of the most influential figures in the machinery of government, even before alleged private conversations with a Liberal powerbroker exposed he had seemingly spent years using a political backchannel to influence prime ministers and undermine others.

Home Affairs Minister Clare O'Neil stood aside Mr Pezzullo and referred the matter to the Australian Public Service Commission to investigate.

The inquiry found Mr Pezzullo had broken the public service code of conduct on at least 14 occasions.

Source: Jake Evans, 'Powerful Home Affairs boss Mike Pezzullo sacked after investigation into backchannel lobbying', *ABC News* (Online, 27 November 2023) <[abc.net.au/news/2023-11-27/home-affairs-mike-pezzullo-investigation-handed-down/103127944](https://www.abc.net.au/news/2023-11-27/home-affairs-mike-pezzullo-investigation-handed-down/103127944)>.



Source 3

QUEENSLAND AND NSW LOSE GST AS TAXPAYERS FORK OUT \$5.2BN FOR WA'S SPECIAL DEAL

Most states and territories will receive more GST revenue according to recommendations of the Commonwealth Grants Commission

Western Australia will receive \$6.2bn more GST this year as a result of a Turnbull government era deal backed by Labor, triggering \$5.2bn in payments to other states to ensure they are no worse off.



Practical Application

Those are the recommendations of the Commonwealth Grants Commission (CGC), which on Tuesday released its latest report on the carve-up of GST between the states and territories.

Decisions of the independent commission are applied by the federal government as a matter of course, despite protests from states losing GST, which this year includes New South Wales and Queensland.

Victoria's GST revenue will soar by \$3.7bn compared with 2023-24, which the commission explained was "largely driven by its reduced capacity to raise mining revenue" and increased urban population and density.

Source: Paul Karp, 'Queensland and NSW lose GST as taxpayers fork out \$5.2 BN for W.A.'s special deal', *The Guardian* (Online, 12 March 2024) <theguardian.com/australia-news/2024/mar/12/australia-gst-funding-labor-changes-nsw-qld-commonwealth-grants-commission>.



Research Task

A good way to comprehend the nature of governance is to study its operation in the secondary school which you attend. This involves identifying, describing, and analysing the systems which allow the school to operate successfully.

1. Select a part of the school program. For example, Sport, Music, or a subject area, such as English or Science ('your topic'). [S]
2. Describe the performance framework which operates in the school to deliver outcomes in your topic. [C]
3. Who are the stakeholders who operate, participate in, and benefit from, the system of governance in your topic? Describe the role of each stakeholder. [C]
4. Is it your experience that there is a '*coherent system of governance and accountability*' in the operation in the school of your topic? Give your reasons. [A]
5. Using the criteria set out in the *Public Governance and Accountability Act 2013* (Cth) s5, evaluate the system of governance which operates in your school in your chosen topic. [A] [E]

1.2 Australia's gun laws: an example of governance in action

The story of how Australia became a country with uniform gun laws that have protected its citizens from the violence and multiple killings which occur quite frequently in the United States of America, illustrates how it is possible for all of the stakeholders in the Australian legal system to come together and be involved in national law reform. This law reform was driven by the federal government, and is a good example of the exercise of governance in Australia. It introduces you to many of the institutions of government, and how they operate.



THE PORT ARTHUR MASSACRE

On the afternoon of 28 April 1996 a man armed with two military style semi-automatic rifles shot dead 35 people and wounded 18 others in and around the historic tourist precinct of Port Arthur, about 100 km from the Tasmanian capital of Hobart.

Most of those killed were tourists on a Sunday visit to Tasmania's busiest tourist site, ruins of a notoriously cruel prison established in 1830. 20 of the 35 were killed inside the Broad Arrow Cafe after the gunman entered, took a semiautomatic weapon from a sports bag and began shooting at people eating their lunch. The shooting rampage lasted about two minutes, during which time the killer laughed aggressively... The gunman was captured the next day and identified as Martin Bryant, a 28-year-old from a Hobart suburb who had no previous criminal record of violence nor any history of diagnosed mental illness. The event generated huge media attention, and for the next three months the nation witnessed an impassioned debate between those who argued that it was unconscionable to allow Australia to continue to 'go down the American path' and those opposed to virtually any form of gun control.

The media response

The Australian media described the massacre as 'the worst massacre by a single gunman in Australian history' and Bryant as 'the world's worst lone mass killer'.

The political response: the Australian government

The day after the murders, Australia's prime minister, John Howard, who had been in office only 57 days following his party's 13 years in opposition, announced his intention to introduce the most sweeping gun control reforms ever contemplated by any Australian government.

The political response: the State governments

The reforms were detailed in an historic agreement between all nine State, Territory and Commonwealth Governments, announced at an emergency meeting of the Australian Police Ministers Council (APMC) on 10 May 1996. The resolution committed every state and territory government to pass laws requiring the following:



Practical Application ...

1. A ban on the importation, ownership, sale, resale, transfer, possession, manufacture or use of:

- all self-loading centre-fire rifles, whether military style or not
- all self-loading and pump-action shot guns
- all self-loading rim-fire rifles.

There were 7 recommendations altogether, including recommendations for a compensatory 'buy-back' scheme, a licensing system for the registration of all firearms, which allowed a system of exemptions for ownership, such as the need for use on farms to control vermin and membership of an authorised target shooting club.

Source: Simon Chapman, 'Over Our Dead Bodies', Sydney University Press, 1998, 2013

The community response

Letter to the editor

The best living memorial the nation can produce to remember the dead at Port Arthur would be a comprehensive ban on automatic weapons, both pistols and rifles.

The best static remembrance would be a sculpture made of metal from melted weapons to stand in the place of the Broad Arrow Cafe.

Source: Marc A Cohen, 'Letter to the editor', *The Weekend Australian*, (11 May 1996) (Excerpts).

Please back bans, says grieving brother

The Queensland brother of one of the Port Arthur shooting victims, Brisbane businessmen Rod Moulton, has made a plea for community support for the gun laws in this letter to Queenslanders.

My sister Nanette Mikac and my two nieces Alannah and Madeline were murdered at Port Arthur on 28 April. My attitude towards guns in our society has not changed. I have always believed that (except in the armed services law enforcement and primary producers) they are not necessary. We do not need them. They should be removed. Sport and self defence are not justification for gun ownership.

The bipartisan decision of the Australian political leaders is to be applauded, but I still can not be convinced that any guns in our society are necessary (except singleshot: bolt-action rifles for primary producers).

Gun ownership has been a privilege not a right. The removal of that privilege is a small price to pay if we are to reduce the risk of similar incidents occurring again. People in our society have the right to live life without fear, to have a pleasant Sunday outing, as my sister and her children were having, without fear.

Source: 'Letter to the editor', *The Courier Mail* (15 May 1996) (Excerpts).



Practical Application ...

The legislation

Acts of Parliament were passed by the Commonwealth government and each of the State and Territories governments in the same terms and in accordance with the agreement between the governments. The legislation prohibited ownership and possession of firearms unless secured subject to a licence issued by the relevant government. Criminal penalties applied to breaches of the legislation.

Applying the legislation

Each state in Australia co-ordinated the collection of weapons which were prohibited by the legislation and paid compensation to the individuals who cooperated and handed in their guns.

1. Who are the stakeholders that were involved in the process of responding to the Port Arthur Massacre? [C]
2. Describe and explain the process which led to the passing of new gun laws by all governments in Australia. In your opinion, is this an example of **good governance**? Give your reasons [C] [E]

It should be apparent to you that Australia today is a very different Australia from that which existed prior to the enactment of the legislation which created an Australian Constitution. The example of the gun law reform which occurred in 1996 should make it very clear that the process of governing at that time, and now, not only involves the modern Australian community of today, but the institutions which came into being with the Australian Constitution. At this point, it would be useful for you to review what you already know from your year 11 study about the sources of Australian law. See, for example, Chapter 2, 'Law-Making', *Legal Studies for Queensland*, (Ninth Edition 2023).

Review

Comprehend

1. **Describe** the objects of the *Public Governance and Accountability Act 2013* (Cth). [C]
2. **Describe** governance. [C]

Analyse and evaluate

3. **Describe** the process by which new gun laws were introduced in Australia in 1996. **Explain** how this process illustrates the exercise of governance. Do you consider that in this instance the reforms to gun laws were an example of good governance? **Justify** using legal criteria. [C] [A] [E]

Governance in Australia

Chapter 2: The Australian Constitution

- 2.1 What is the Australian Constitution?**
- 2.2 Background to the establishment of the Australian Constitution**
- 2.3 The need for an Australian Constitution**
- 2.4 The key features of the Australian Constitution**
- 2.5 The role of the High Court of Australia**
- 2.6 Changing the Australian Constitution**
- 2.7 Separation of powers**

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
 - the key features of the Australian Constitution, including the division of powers and the amending of the Constitution
 - the role of the High Court of Australia.
- analyse and evaluate
 - the challenges of changing the Australian Constitution, the doctrine of the separation of powers and the importance of an independent judicial system
 - the role of s51 of the Australian Constitution and the residual powers, with reference to current and/or landmark cases.

2.1 What is the Australian Constitution?

A constitution is a set of rules by which a country or state is run. It sets out the rules that specify the powers, responsibilities and roles of the governing bodies within a state or country. It provides the basic rules for the government of Australia. The Constitution is the fundamental body binding everybody, including the Commonwealth Parliament and the parliament of each State. Even an Act passed by the Commonwealth Parliament is invalid if it is contrary to the Constitution. Most countries have constitutions, but not all countries. You will be aware that sporting clubs and other groups to which you may belong almost certainly have a constitution.

The Australian Constitution is the set of rules by which Australia is governed. The Australian Constitution created the Federal Parliament of Australia, which makes laws for the whole of Australia. But, the Federal Parliament can only make laws with respect to certain areas of Australian life, with State Parliaments making laws with respect to other areas. It is the Constitution which tells us which powers are given to the Commonwealth and which are to remain with the States. What powers were to be given by the States to the Commonwealth was the central question in determining what should be in the Australian Constitution.

The Constitution establishes a Federal system of government. It is because of this that the establishment of the Commonwealth in 1901 is referred to as **Federation**. Under a Federal system, powers are divided between a central government and regional governments. In Australia that distribution is between the Commonwealth and the six States of Australia.

2.2 Background to the establishment of the Australian Constitution

Before 1901 Australia did not exist as a nation. It was a collection of six British colonies which were partly self-governing, but were subject to the law-making power of the British Parliament in Westminster. There was a movement among the Australian colonies to establish a Federal government. As a result of that movement there was a series of Constitutional conventions in which all the colonies came together to debate what powers any Federal government should have, and, to in fact ultimately draft a Constitution. This would be the document which would establish the Federal Parliament and set out the powers of the Federal government.

These Constitutional Conventions occurred in the 1890's and by 1898 the colonies had agreed on a draft Constitution which was then taken back to their colonial Parliaments to be approved. The final draft of the Constitution was approved by a vote of the people in referendums held in each colony and was then taken to the British Parliament by an Australian delegation. After some changes being negotiated by the British Parliament, it passed the bill in July 1900. The bill was proclaimed by Queen Victoria on 17 September 1900 and the *Commonwealth of Australia Constitution Act 1900* (UK) of the British Parliament came into force. Section 9 of that Act contained the Constitution of Australia and the Act provided that on and after 1 January 1901 the colonies of New South Wales, Victoria, South Australia, Queensland and Tasmania would become part of the Commonwealth of Australia. At that time Western Australia hadn't conducted its referendum. Western Australia held it on 31 July 1900 two weeks after the Act was passed. However, provision was made in the Act for Western Australia to join the Commonwealth.

 By the QUEEN.
A PROCLAMATION.
 VICTORIA R.

WHEREAS by an Act of Parliament passed in the Sixty-third and Sixty-fourth Years of Our Reign intituled, "An Act to constitute the Commonwealth of Australia," it is enacted that it shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation, that, on and after a day therein appointed, not being later than One Year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

And whereas We are satisfied that the people of Western Australia have agreed thereto accordingly.

We therefore, by and with the advice of Our Privy Council, have thought fit to issue this Our Royal Proclamation, and We do hereby declare that on and after the First day of January One thousand nine hundred and one, the people of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

Given at Our Court at Balmoral this Seventeenth day of September, in the Year of our Lord One thousand nine hundred, and in the Sixty-fourth Year of Our Reign.

God Save the Queen.

There were many issues discussed in the Constitutional Conventions to achieve an agreement on the draft constitution. An example of one such issue was who should be able to vote to elect members to the House of Representatives and the Senate. This was a problem that needed addressing because different colonies had given the right to vote to different people. For example, at the time of Federation, women could vote in South Australia (which included the Northern Territory) and Western Australia. Women did not have the right to vote in New South Wales, Tasmania, Queensland and Victoria. Indigenous people in South Australia were allowed to vote in their colonial elections. Further, in Tasmania voters were required to own a certain amount of property before they could vote. In New South Wales any person in receipt of State aid was not entitled to enrol to vote. It was then of great concern as to how this could be solved by the representatives at the Constitutional Conventions. Included in the Constitution (s41), was a provision that no adult person who acquired a right to vote in elections for the lower house of Parliament in each colony could **NOT** be prevented by any law of the Commonwealth from voting at elections for either the House of Representatives or the Senate in the Commonwealth Parliament. This section of the Constitution will be referred to again later in this text.



Polling Booth - Brisbane - For referendum to approve Constitution

2.3 The need for an Australian Constitution

Prior to Federation the six British colonies were partly self-governing. However they were also subject to the laws passed by the British Parliament.

- They acted like six separate countries.
- They had their own governments and made their own laws.
- They each had their own defence force.
- They each issued their own stamps.
- The main source of revenue of each was the collection of tariffs on goods that crossed the border between the colonies, as well as on goods imported from overseas into the colonies.
- The colonies had customs officials on the borders between the colonies as one now sees operating at the borders of each country. The customs barriers and different railway gauges that the colonies had chosen and inter-colony tariffs all restricted the flow of people and commerce between the colonies. For the colonies to prosper there was a general feeling that Federation should occur.

We will now look briefly at three principal drivers for Federation:

(a) The need for uniform tariffs

In 1800 the colony of New South Wales introduced the first tariffs. These were introduced on the imports of alcoholic beverages, spirits and other strong drinks which were taxed at one shilling per gallon, wine at six pence per gallon and beer at three pence per gallon. About eighteen years later, tobacco also became the subject of tariffs. The tariff revenue were the first taxes of any kind levied in the colonies and the revenue raised was used to pay for the construction of the Sydney and Parramatta gaols and a bridge across the Tank Stream in Sydney.



After Victoria separated from New South Wales on 1 July 1851, in the following year, the Victorian Government passed its first *Customs Act*. Like New South Wales tariffs were imposed on alcoholic drinks, but also non-alcoholic drinks (tea and coffee), tobacco and other consumables such as sugar and flour.

After the gold rushes in the early 1850's in Victoria, very high tariffs were also imposed upon imported opium. New South Wales and other colonies followed the Victorian example by imposing tariffs on opium. (Opium remained a legal import until the Commonwealth Government declared it a prohibited import in 1906).

When they were first imposed, the tariffs were imposed to raise revenue. In the second half of the 19th century tariffs were imposed also as a means of protecting Australian industry and thus protecting employment in Australia. These tariffs could only be effective if the colonies adopted a uniform approach to tariffs on goods imported from overseas. This

shift to tariffs being used for the protection of Australian industry and employment was a significant driver for Federation. In the first parliament (1901 to 1903) *Custom Tariff Act 1902* (Cth) and *Excise Tariff Act 1902* (Cth) were passed quickly to provide revenue. For the first ten years, the Commonwealth relied exclusively on its import and excise duties for its revenue.

(b) Immigration issues

Australia was predominantly white and of European descent at the time of Federation. Most of the population in the Australian colonies was concerned about the influx of Chinese, which had occurred during the gold rushes. During the second half of the 19th century the Chinese had become very unpopular. Their unpopularity stemmed from many sources. Firstly the sheer numbers of Chinese in Australia after the discovery of gold in the 1850's caused a lot of concern among resident Australians. In 1861, 38,000 of the population in Australia were born in China. This represented 3.3% of the Australian population. The vast majority of these were, in 1861, on the Victorian and New South Wales goldfields. Then in 1870's when gold was discovered in Queensland at Palmer River, Charters Towers and Gympie there was an influx into Queensland of Chinese immigrants.

The majority of the Chinese miners paid for travel to Australia using a credit-ticket system – borrowing the cost of passage from Chinese businessmen. This necessitated repayment of the debt plus interest back to China. This and the desire to support families back in China gave rise to the concern that the Chinese were exporting the wealth of Australia back to China.



Some Chinese were also addicted to opium. Opium dens became common place in the goldfields. The Chinese were also accused of being filthy, thus causing diseases to spread. They lived in special quarters on the goldfields separated from the whites. Dissatisfaction spread on the goldfields because initially the Chinese claims, (which had been previously worked by the whites), were worked in organised gangs of up to a hundred people supervised by a Chinese foreman. They then started to peg new claims working in such gangs. This caused the white miners to resent the fact that the Chinese hadn't remained in what they regarded as their proper place. It developed intense ill-will towards the Chinese.

There was also a further concern about what had occurred in Queensland where Pacific Islanders had been brought to work in the sugar industry for low pay. The usual arguments about the Pacific Islanders and the Chinese accepting lower wages and thus competing with colonists for jobs were advanced.

It became important from the colonials point of view that there should be some form of restriction on immigration and that only a Federal government could achieve this. This view adopted by the colonies at that time was directly opposed to the British colonial view that there should be no discrimination on the grounds of race against a particular nation. It was important at that time (from the British point of view) that any restriction on immigration should not be overtly racist. This was particularly important because at that time Japan was an ally of Britain. It was not surprising therefore that after the Constitution was adopted, one of the first Acts of the first parliament of Australia (1901 to 1903) was the passing of the *Immigration Restriction Act 1901* (Cth), the intent of which was to establish a White Australia Policy. The mechanism for the restriction of non-Europeans was the adoption of a dictation test which in fact was specifically designed to keep out non-Europeans. The test is set out in s3(a) of the Act.

Immigration Restriction Act 1901 (Cth)

3. *The immigration into the Commonwealth of the persons described in any of the following paragraphs of the section (hereinafter called "Prohibited Immigrants") is prohibited, namely:-*

- (a) *Any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer....*

You will see from the above that initially the dictation test was to be taken in a European language. In the *Immigration Restriction Amendment Act 1905 (Cth)*, there was a significant change.

Immigration Restriction Act 1905 (Cth)

4. *Section three of the Principal Act is amended:*

- (a) *By omitting the whole of paragraph (a) and inserting in lieu thereof the following paragraph:-*
- (a) *Any person who fails to pass a dictation test: that is to say who when an officer dictates to him not less than 50 words in any prescribed language fails to write them out in that language in the presence of the officer ...'*

As a result of that change, dictation tests could then be given to prospective immigrants in any language. The officer administering the test chose the language at his own discretion which included Latin or Ancient Greek. This testing, under the guise of a test supposedly designed to measure the extent of education of the prospective immigrants, was designed in fact to result in the restriction of unwanted immigrants. The dictation test was administered 805 times in 1902-1903 with 46 people passing. It was administered 554 times in 1904 to 1909 with only 6 people passing the test. The dictation test could be given to any migrant during his or her first year of residence. If that person failed he or she was deported. If it was given to a migrant before he or she entered Australia and that migrant failed he or she was refused entry.

What do you think?

Would you describe the use of the dictation test as being a restriction on immigration which was not 'overtly racist'? In answering that question you should comment on the fairness of the test. [A] [E]



The first parliament of the Commonwealth of Australia also passed the *Pacific Island Labourers Act 1901 (Cth)*. You will see from the number of the Act that this was the 16th Act of parliament passed by the new Commonwealth parliament and was in fact passed immediately before the *Immigration Restriction Act 1901 (Cth)* referred to above. The object of this Act was to prevent Pacific Island labourers coming into Australia. It stated as follows:

Pacific Island Labourers Act 1901 (Cth)

3. *No Pacific Island labourer shall enter Australia on or after the thirty-first day of March, One thousand nine hundred and four.*
4. *No Pacific Island labourer shall enter Australia before the thirty-first day of March, One thousand nine hundred and four except under a licence.*

In the second Commonwealth Parliament of Australia (1903 to 1906) the *Pacific Island Labourers Act 1906* (Cth) was amended to allow the minister to exempt from deportation a number of categories of Pacific Islanders. Two of those categories of exempt Pacific Islanders were such islanders who owned freehold land in Queensland and such islanders who had resided continuously in Australia for not less than 20 years prior to 31 December 1906.

(c) Defence

Prior to Federation the colonies of Australia had a series of 'scares' which drew attention to the inadequacy of the defence forces of each of the colonies. It became clear to the colonies in the second half of the 19th century that the defence of Australia required a Federal approach.

**Practical Application****Source 1****AN ATTACK ON MELBOURNE: A CASE STUDY OF THE DEFENCE OF AUSTRALIA'S MAJOR PORTS IN THE EARLY 1890s**

{4} During and after the Crimean War, anxiety in Australia that ports and shipping were open to attack is revealed by the regularity with which 'scare' articles appeared in the press. The anxiety was justified, because so long as ports and coastal shipping remained inadequately defended (or, worse, lay entirely undefended), even a single cruiser could carry out a destructive raid with a minimum of danger to itself. It was thought that if Britain was involved in a war with other naval powers the "gold colonies were tempting baits and perhaps easy triumphs", and also that Australian targets could be taken by surprise. Before the telegraph link with Britain was established in 1872, Britain (and, therefore, her colonies) might well have been at war a month before news was received in Australia. For all these reasons, even good-will visits by friendly foreign warships, or by individual foreign vessels on surveying work, were regarded with suspicion.

{5} Two major 'war scares' had as profound an effect on the implementation of Australian coastal defence as they did on British imperial defence planning. The first occurred in 1877–78 and the second in 1885; on both occasions Britain came close to declaring war with Russia. Both were a result of Russia's expansion eastwards, first into the Eastern Mediterranean, which threatened the Suez Canal in Turkish Egypt, and then north of India to Vladivostok and the Sea of Japan.

{6} Once telegraph communication with Europe was established, news from that part of the world was received the following day. This immediacy involved Australians in European 'scares' on a day-to-day basis through the press. The long build-up to the Anglo-Russian crisis began with Russia's involvement in the revolutions against the Turks in Bosnia and Bulgaria in April 1877, and was followed avidly by Australians with increasing certainty that



Practical Application ...

Britain would declare war. The crisis came in December when Turkish resistance collapsed at Plevna. Then, fuelled by reports of 'jingoistic' excitement in London, the tension grew with news that a British fleet had forced the Dardanelles in February 1878 to prevent the fall of Constantinople, and of British mobilisation which followed in March.

Source: Michael Kitson, *Journal of the Australian War Memorial* 35, para. 4 to 6..

1. What constituted a temptation to other naval powers?[C]
2. Divide your class into three groups. Each group will briefly research one of the following:
 - a. The Crimean War
 - b. The Russo-Turkish War (1877 to 1878)
 - c. The Panjdeh incident (1885)

In the one you have chosen describe the relationship between Britain and Russia at the time. [C][A]
3. Describe the threat to Australia of a Russian attack as perceived by the colonies of Australia. [A]
4. How do you think Federation might have improved Australia's defences? [A]

Even though each colony had its own militia, it was woefully insufficient to defend Australia. Apart from the immediate fear of Russia there was a fear that Australia would be vulnerable to attack from the European countries which had colonised parts of the Pacific, as well as a fear that China and Japan (with their larger populations) could overrun the colonies.

2.4 The key features of the Australian Constitution

The Australian Constitution (*Commonwealth of Australia Constitution Act 1900*) is the primary piece of legislation in Australia, giving all levels of government throughout the country their powers of existence and their authority or jurisdiction to make laws for the people they represent. It greatly affects all our lives and is a document which we should all know more about.

It is the Constitution which tells us which powers are given to the Commonwealth and which are to remain with the States. The question of powers (authority to act) was an important one when the Constitution was being written. You can imagine that the States were keen to jealously guard and retain most of their powers. At the same time, they needed to give up powers to the new Federal Government.

There are three different types of powers that exist as a result of the Australian Constitution: exclusive, concurrent and residual.

Exclusive powers

Examples of exclusive powers in the Constitution, which may be exercised only by the Commonwealth Parliament, are as follows:

- Section 115 prevents a State from making its own money.
- Section 90 gives exclusive power to the Commonwealth to make laws on customs and excise duties.
- Section 114 prohibits States from having their own armed forces.
- Section 52 gives the Commonwealth exclusive power to make laws for its territories, including the Australian Capital Territory.

If a State Parliament or a local council makes a law dealing with any of the Commonwealth's exclusive powers, that law would be declared invalid and without legal effect by the High Court of Australia.

Concurrent powers

Most law-making powers in the Constitution are concurrent, which means they can be exercised by both the Commonwealth and State Parliaments. If, however, a State passes a law that conflicts with, or has a different outcome from, a Commonwealth law on the same concurrent area of law, s109 of the Constitution provides that the Commonwealth law will override that of the State.

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.

It should be noted that the Commonwealth Parliament does not have to pass laws using its concurrent powers. If it does not, then state laws relating to these powers remain valid. An example of this was that the Commonwealth Parliament did not pass laws with respect to 'divorce and matrimonial causes' (see ss51(xxii) on next page) until the passing of the *Matrimonial Causes Act 1959* (Cth) which set out the grounds for divorce for all Australians (this, in turn, was superseded by the no-fault divorce law contained in the Commonwealth *Family Law Act 1975*). Before 1959, each state had been governed by its own valid laws relating to this concurrent law-making power.

Section 51 of the Constitution specifically sets out powers which can be exercised by the Commonwealth (or by the States in relation to most of the lawmaking powers if the Commonwealth chooses not to pass laws). Some examples of the Commonwealth 'Heads of Power' in s51 are as follows.

Commonwealth of Australia Constitution Act 1900 (UK)

- (i) Trade and commerce with other countries, and among the States:*
- (ii.) Taxation; but so as not to discriminate between States or parts of States:*
- (v.) Postal, telegraphic, telephonic, and other like services:*
- (vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.*

- (ix.) *Quarantine:*
- (x.) *Fisheries in Australian waters beyond territorial limits:*
- (xi.) *Census and statistics.*
- (xii.) *Currency, coinage, and legal tender:*
- (xviii.) *Copyrights, patents of inventions and designs, and trade marks:*
- (xx.) *Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:*
- (xxi.) *Marriage:*
- (xxii.) *Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:*
- (xxvii.) *Immigration and emigration:*
- (xxix.) *External affairs:*
- (xxxi.) *The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:*
- (xxxv.) *Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:*
- (xxxvii.) *Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:*

2.5 The role of the High Court of Australia

It is the Constitution that established the High Court of Australia as guardian of the Constitution. Not only is it the court which decides disputes arising from the interpretation of the Constitution, but it is the ultimate Court of Appeal for all Australian courts. In this way it determines the state of the law in Australia binding every citizen. As part of the governance of Australia its role in interpreting the Constitution of Australia is hugely important. It decides what the meaning of words in the Constitution are. Both the Commonwealth Government and the State Governments are bound by the words of the Constitution and so its significance in the governance of Australia is profound.



There are seven judges of the High Court of Australia. The current Chief Justice of Australia is Chief Justice Stephen Gageler. All judges of the High Court of Australia must, as a matter of law, retire when they reach the age of 70.

In deciding the meaning of the words written in the Constitution, the High Court of Australia has had to decide the meaning of the words contained in the sub-sections in s51 of the Constitution. There have been many cases decided by the High Court on the meaning of the words in s51 sometimes to the disappointment of the Commonwealth government and sometimes to the disappointment of the State governments of Australia. One such really important case is the Tasmanian Dam Case which dealt with the meaning of the words in s51 (xxix).

Tasmanian Dam case

This case was decided on the 1st July 1983. The case arose as a result of a plan by the Tasmanian Hydro-Electric Commission owned by the State Government to construct a dam on the Gordon River below the Franklin River. The dam would have flooded a large section of the Franklin River in southwest Tasmania. There was a lot of opposition to the damming of the Gordon River for environmental reasons. Prior to the case, in fact on 22nd September 1981, the Premier of Tasmania, at that time Mr Lowe, had written to then Prime Minister of Australia (Mr Malcolm Fraser) requesting that there be a nomination of the parks (including Cradle Mountain, Lake St Clair National Park, the Franklin Lower Gordon Wild Rivers National Park, and the Southwest National Park – all in Tasmania) for listing in the World Heritage list.

Australia had ratified the World Heritage Convention in 1972. Countries that signed the World Heritage Convention pledged to protect their natural and cultural heritage. One aspect of a country being a party to that convention was that it could submit proposals for properties to be considered for inclusion in UNESCO's World Heritage list (the United Nations Educational Scientific and Cultural Organisation). When ratifying the World Heritage Convention, Australia pledged to conserve its world heritage sites and to report regularly to UNESCO on the state of those sites.

However, before the decision as to whether the parks should be listed as a world heritage site by UNESCO, legislation was passed in Tasmania enabling the building of the dam. The new Premier of Tasmania Mr Gray requested the Prime Minister at that time to withdraw the nomination of the parks for inclusion in the world heritage list. The Prime Minister declined to do so. The Premier strongly objected to the Prime Minister rejecting his request.

The World Heritage Committee met in December 1982 and entered the parks in the World Heritage list. The listing of the area as a World Heritage site was not of itself sufficient to prevent construction of the dam. To prevent the dam being constructed, a law of the Commonwealth Government was needed to incorporate the obligations adopted by Australia under the World Heritage Convention and in particular to prevent the desecration of any World Heritage sites. No such Commonwealth law had been passed. The Tasmanian government passed legislation allowing the dam to proceed and in fact preliminary works were commenced for the construction of the dam. At that time there was an Australian Federal election in 1983, in which the Labor Party, under the leadership of Mr Bob Hawke, had promised to prevent construction of the dam if the Labor Party was elected. The Liberal Party at that time led by Mr Malcolm Fraser refused to use external powers set out in Section 51(xxix) to intervene to stop the dam. Labor won the election and subsequently in accordance with its promise, passed Acts of Parliament, principally the *World Heritage Properties Conservation Act 1983* (Cth) which prohibited clearing, excavation and other activities within the Tasmanian Wilderness World Heritage area. The position at that stage was that the Tasmanian Parliament had passed Acts of Parliament which allowed the Tasmanian Hydro-Electric Commission to do the work sufficient to construct the dam and the Commonwealth Parliament had passed Acts

expressly prohibiting the doing of such works. The Commonwealth in passing the *World Heritage Properties Conservation Act 1983* (Cth) had relied primarily on its external affairs power set out in s51(xxix). The Tasmanian Government refused to halt construction of the dam arguing that the Commonwealth Government did not have the power under the Commonwealth Constitution to stop them constructing the dam. The Commonwealth Government argued that the external affairs power in s51 of the Constitution gave them the power to legislate to put into effect legal obligations which arose from Australia entering into agreements and treaties internationally. It then fell to the High Court of Australia to determine the width of the meaning of the words 'external affairs' in s51(xxix) of the Constitution.

Case Study



Commonwealth v Tasmania [1983] HCA 21

Facts: The Tasmanian Government, authorised by the *Gordon River Hydro-Electric Power Development Act 1982* (Tas) began construction of the dam on the Gordon River downstream of its junction with the Franklin River including the building of a power station. This law came into effect on 12 July 1982. The construction work commenced on 14 July 1982. The Commonwealth Parliament passed the *World Heritage Properties Conservation Act 1983* (Cth) and made regulations pursuant to s69 of the *National Parks and Wildlife Conservation Act 1975* (Cth) thus rendering it unlawful to construct a dam except with the consent of a Commonwealth minister.

Legal Issue: Was the *World Heritage Properties Conservation Act 1983* (Cth) a valid exercise of power by the Commonwealth Government? If valid, is the Commonwealth Act of Parliament inconsistent with the State Act of Parliament, the *Gordon River Hydro-Electric Power Development Act 1982* (Tas)?

Decision held by majority 4:3

The *World Heritage Properties Conservation Act 1983* (Cth) was a valid exercise of power by the Commonwealth Government. S51(xxix) confers upon the Commonwealth the legislative power necessary for carrying the World Heritage Convention into effect including the power to make laws for procuring the performance within Australia of all or any of the obligations assumed by Australia under the Convention. To the extent that the Tasmanian Act of Parliament, the *Gordon River Hydro-Electric Power Development Act 1982* (Tas) was inconsistent with the Commonwealth Act, it was invalid pursuant to s109 of the constitution.

In his judgment the Hon. Justice Mason said:

'Accordingly, it conforms to established principle to say that S51(xxix) was framed as an enduring power and broad in general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900. This circumstance is often overlooked by those who are preoccupied with the impact that the exercise of the power may have in areas of legislation traditionally regarded by the States as their own.'

In his judgment the Hon. Justice Brennan said:

'When considering whether obligations had been imposed on Australia by its ratification of the Convention'.... an obligation can be taken to be an obligation for the purposes of s51(xxix) if a failure to act in conformity with those terms is likely to affect Australia's



Case Study ...

relations with other nations and communities. That can be easily tested. Would those relations be affected if Australia failed to take any step in accordance with Articles 4 and 5 towards the protection and conservation of a property situated in Australia of such outstanding universal value that it is part of the cultural heritage or natural heritage of the world... when a step is needed to avert or minimise damage to the property? Unless Australia were to attribute hypocrisy and cynicism to the international community, only an affirmative answer is possible.'

Questions

1. What does s109 of the Constitution state? [C]
2. When the Act of Parliament passed by the Commonwealth government was valid, what was the effect on the Tasmanian government law referred to above? [C]
3. One of the arguments advanced by the Tasmanian government was that the effect of allowing the Commonwealth government to enter into any treaty with other countries and then passing domestic legislation, allowed the Commonwealth government to override a very large amount of state legislation. That is, giving a wide meaning to the words 'external affairs' has the effect of increasing enormously the powers of the Commonwealth government and reducing the powers of the State governments. What do you think of this argument in light of what the Hon Justice Brennan and the Hon Justice Mason had to say above? [A][E]

2.6 Changing the Australian Constitution

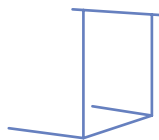
Key Terms

Referendum: The Constitution can only be changed by way of a referendum. There have been forty five referendums held since 1901 and only eight of those have been successful.

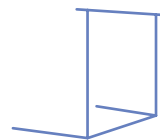
How the Constitution is changed



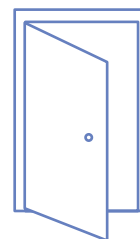
1. The proposed change (amendment) must be passed by a majority (over 50%) in both houses of Federal Parliament



2. Over 50% of Australian voters must vote in favour of the change



3. A majority (four) of the six states must each have over 50% of voters in favour of the change



Australian Constitution 'Change Room'

The First Referendum

The first referendum was held in November 1906. The change to the Constitution that was proposed was that elections for both Houses of Parliament, that is the House of Representatives and the Senate, should be held concurrently. This referendum was carried. Every state of Australia voted in favour of the referendum and approximately 83% of Australian voters throughout Australia voted yes.

The most successful referenda were put to the Australian voters in April 1967. There was a majority in every state of Australia and almost 91% of Australian voters voted 'yes' to the changes proposed. The referendum involved two main changes to the Constitution. These were changes to s51(xxvi) and the removal of s127 of the Constitution.

Remembering that s51 sets out the powers of the Commonwealth Parliament, s51(xxvi) gave the power to the Commonwealth Parliament to make special laws with respect to the people of any race except the 'Aboriginal race'. Before the referendum, s51(xxvi) and s127 were as follows:

<i>s51(xxvi)</i>	<i>The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:</i>
<i>s127</i>	<i>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.</i>

You may wonder why Section 51(xxvi) was inserted in the Constitution in the first place. The answer which is usually given is that the Commonwealth Parliament should have the power to make laws discriminating against racial groups for the good governance of Australia. You have seen the Commonwealth Parliament exercising such power in the passing of the immigration laws previously referred to concerning the Pacific Islanders in Queensland. It was felt at the time by some that such power should not be exercised against Aboriginal peoples in Australia because such laws may well be discriminatory. Generally that argument is the most commonly advanced argument for the insertion of Section 51(xxvi) in the Constitution. The problem was that the Commonwealth Parliament had no power to make laws for the benefit of Aboriginal peoples unless those words were removed from the Constitution. In other words the passing of positive discriminatory legislation some believed was prohibited by Section 51 (xxvi).

This argument was used for many years by many Australians. In particular the Prime Minister of Australia, Mr Robert Menzies, argued against changing the section stating that if those words were removed, then the Commonwealth Parliament could set up a whole new system of laws dealing only with Aboriginal peoples and such laws could be extremely discriminatory. The reverse argument of course was that the Commonwealth Parliament had no power to make laws for the benefit of Aboriginal peoples unless those words were removed from the Constitution. It was only after the longest serving Prime Minister Robert Menzies announced his intention to retire (in the second half of 1965) that a referendum for change gained momentum. The new Prime Minister, Harold Holt announced the holding of the referendum in relation to not only Section 51 (xxvi) but also the removal of Section 127 which on the face of it in 1960's Australia, clearly severely discounted the role that Aboriginal peoples played in Australian life.

Many Aboriginals supported the changes. Mr Charles Perkins, who was the first Aboriginal to graduate from university in Australia led the Freedom Rides into north western New South Wales. The Freedom Ride activists blocked the entrance to the Moree swimming pool in 1965 protesting against their racist entrance policies. Aboriginal adults were banned from the pool

and Aboriginal children were only allowed to swim at certain times of the week. There was confrontation between white residents and the activists which required police intervention. The activists however led by Charles Perkins prevailed and the Aboriginal residents were allowed to use the pool. Similarly at Walgett, Charles Perkins and other activists protested outside the Walgett RSL because of its policy to only accept Aboriginal people on Anzac Day. The Freedom Rides led by Charles Perkins were a significant event in Australian history.

The other Aboriginal activist who you may recognise was Oodgeroo Noonuccal, a famous poet who was the first Aboriginal Australian to publish a book of verse. She was a Queenslander who was born Kath Ruska (which she changed to Kath Walker when she married in 1943). She was active in Aboriginal rights especially during the referenda held in 1967.



What do you think?

The two main arguments for both the removal of the words 'other than the Aboriginal race in any State' and the retaining of those words were based on what was to be good for the Aboriginal people of Australia. What were those two arguments? [C][A]

The most recent referendum – The Voice

The most recent referendum was held on 14 October 2023. The referendum was to see if the Constitution should be altered by the addition of a new chapter and section. This change being proposed was the addition of the following to the Constitution of Australia.

Chapter ix Recognition of Aboriginal and Torres Strait Islander People

S129 Aboriginal and Torres Strait Island Voice

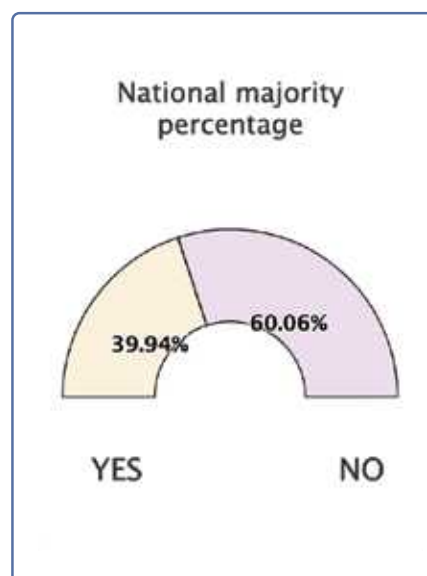
In recognition of Aboriginal and Torres Strait Islander people as the First Peoples of Australia:

- 1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.*
- 2. The Aboriginal and Torres Strait Island Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;*
- 3. The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice including its composition, functions, powers and procedures.*

The results of the voting on this referendum are set out best in the National results published by the Australian Electoral Commission on 2 November 2023.

They were as follows, as illustrated in the accompanying diagram.

1. The National majority percentage (that is the votes of all Australians who are eligible to vote irrespective of which State they resided in) was 60.06% votes for 'no' and 39.94% votes for 'yes'. The referendum therefore failed on the first test by not having 50% of Australian voters voting in favour of the change.
2. As to the voting in each State, six out of the six States of Australia had a majority percentage of voters who voted against the change proposed in the referendum. The referendum therefore failed on the second test as well. It did not have a majority of six States in favour of the change. In fact no State had a majority of voters in favour of the change.



In these results the Northern Territory and the Australian Capital Territory are included. Both of these territories were relevant for the first question, that is, whether over 50% of Australian voters voted in favour of the change. Their votes are not relevant for the second issue as to whether the majority of voters in the majority of States voted for a change because they are not States.

2.7 Separation of powers

Separation of powers doctrine

An important feature of Australia's democratic government established by the Constitution, is the separation of powers doctrine, which aims to keep separate the powers of parliament, the powers of the executive, and the powers of the judiciary. Each of those three groups works within its defined area of responsibility, keeping a check on the actions of the others. It is no coincidence that the first three chapters of the Constitution are:

Chapter I: The Parliament.

Chapter II: The Executive Government.

Chapter III: The Judicature.

The power to make (the parliament), put into effect (the executive), and to interpret (the judicature) the laws of Australia are divided between these three groups.

Separation of powers

An important feature of Australia's democratic government established by the Constitution is the separation of powers doctrine, which aims to keep separate the powers of making, implementing and interpreting law.

1. The **making of law** is called legislative power and rests with the representative governments of the Commonwealth and States, when assembled as parliaments.

2. The **implementing or carrying out of law** is called executive power and is handled by the executive or Cabinet, consisting of the Governor and the Ministers of the Government in the States, and by the Governor-General and the Commonwealth Ministers federally. There is an overlap between the legislative and executive powers in our electoral system, as the Executive is made up of Ministers elected from the ranks of the political party which gains the greater number of seats in parliament after an election. Police forces and other agencies of enforcement, for example, are directed by the Minister responsible to parliament for the effective maintenance of law and order. This party system of government means that a relatively small group of Cabinet Ministers, largely to the exclusion of other members of parliament, controls what laws will be proposed and passed, as well as being responsible for overseeing public servants in their execution of their duties. This overlapping of powers makes a fiction of the purity of the Westminster principle, embodied in Commonwealth and State Constitutions, of the separation of government powers.

Adding to the fiction is the fact that the High Court judges are also appointed by the Governor-General upon the advice of the Executive. This also constitutes an overlap of powers. One expects that such judges are appointed on merit and such appointments have no connection whatsoever to the political outlook of potential judges. If it is otherwise, then there is no effective separation of the executive and judicial powers. This also applies to the Federal Court of Australia and other Federal judicial appointments. There is a similar lack of separation of powers in the State jurisdictions of Australia. Judicial officers are appointed in Queensland by the Executive Government of Queensland, that is, by the Attorney General.

3. The **interpretation of law** is called judicial power and is carried out by the the courts and tribunals. Judges are prohibited from being members of parliament or of the executive arm of government. The Boilermakers' case (*Attorney-General (Commonwealth) v R; ex parte Boilermakers Society of Australia* (1957) 95 CLR 529) is an important High Court of Australia case authority that stresses the vital importance of maintaining the independence of judges from the influence of the parliament or the executive in their passing of judgments based upon their interpretation of the law.

The importance of keeping separate the executive and judicial arms of government is illustrated with the following case.



Case Study

Wilson v Minister for Aboriginal & Torres Strait Island Affairs ("Hindmarsh Island Bridge case") [1996] HCA 18

Facts: The Commonwealth Government in 1984 passed the *Aboriginal & Torres Strait Island Heritage Protection Act 1984* (Cth). The purpose of the Act was to preserve and protect from injury or desecration, areas in Australia and in Australian waters, which were of particular significance to Aboriginals. To give effect to the purposes of the Act the Minister under the Act was given the power to make a declaration under s10, to protect and preserve such areas from injury or desecration. The Minister had received an application seeking the preservation or protection of Goolwa and Hindmarsh Island and the surrounding waters, forming the mouth of the Murray River, in South Australia. In particular one of the proposed actions being proposed was the building of a Hindmarsh Island Bridge. This was opposed by Aboriginal and other Australians. When the Minister received such an application, s10 allowed the Minister to nominate a person to provide a report with respect to those proposals. The Minister nominated the Hon. Justice Matthews of the Federal Court of Australia to provide the report. Justice Matthews had agreed to provide the report. It was common ground that in providing



Case Study ...

the report Justice Matthews (she) would not be exercising any judicial function but was simply providing a report. The report was to be provided after considering representations by interested parties setting out the particular significance of the area to Aboriginals, the nature and extent of the threat or injury to that area, and the effects of the making of any declaration visited on the property interests of persons other than Aboriginals. The report was to make recommendations for any prohibitions and restrictions to be put into effect by the Minister's declaration.

Legal Issue: Was the preparation of the report by the judge constitutionally incompatible with the holding of office as a Federal judge?

Decision: Held by majority that the appointment of the judge by the Minister under s10 was invalid because it was in breach of the separation of power provisions in the Constitution. The majority said:

1. The Act must be examined in order to determine first whether the function (to be performed by the judge) is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government. If the function is closely connected with the Legislature or the Executive Government there is constitutional incompatibility.
2. The power conferred by s10 of the Act *'is the power conferred on the Minister to make a declaration'*. The report is a condition precedent to the exercise of the Minister's power to make a declaration. The function (of the report...) is an integral part of the process of the Minister's exercise of power. The performance of such a function (that is writing the report) by a judge places a judge firmly in the echelons of administration. The judge is placed in a position equivalent to that of a ministerial advisor.
3. The report had to look at the competing interests of Aboriginal applicants and others, whose proprietary or pecuniary interests are liable to be affected by the making of a declaration. Such a determination of these competing interests is essentially a political function. The reporter (in this case the judge) may choose to act independently of the Minister in determining which of the competing interests are to be preferred. But the Act does not require the reporter to disregard ministerial instruction, advice or wishes in preparing the report. If the Minister has no policy instructions to give to the reporter, the reporter himself or herself then must make political decisions. For example: *'the extent of the area that should be protected'*, *'the prohibitions and restrictions to be made'* and *'the duration of the period of the declaration'*. These decisions which would need to be made by the reporter are political in character. The function of reporting is therefore incompatible with the holding of office as a judicial officer because the act of reporting breaches the separation of powers set out in the Constitution.

Questions:

1. Where is Hindmarsh Island? [C]
2. What is meant by saying that the report was an integral part of the process of the Minister's exercise of power? [C][A]
3. What political decisions would necessarily have to be made by the reporter? [C]
4. Given that the judge was not acting as a judge but as a reporter, do you think she should have been removed? [E]

A vital part of the separation of powers is the need for the independence of the judiciary. In Chapter 6 of this text the independence of the judiciary is dealt with more fully.

Review

Comprehend

Describe and **explain** the following:

- a. What is the Australian Constitution?
- b. The principal drivers for Federation.
- c. The dictation test in relation to the restriction of immigrants into Australia.
- d. The restriction on Pacific Islander labourers coming into Australia.
- e. Exclusive powers of the Commonwealth parliament in the Constitution.
- f. Current powers in the Constitution.
- g. The principal role of the High Court of Australia in relation to the Constitution.
- h. The referendum of 1967.
- i. The purpose of the most recent referendum. [C]

Evaluate

Describe the principle of the separation of powers as an important feature of Australia's democratic government. At the same time set out examples of a failure in our system of government of the principle of the separation of powers.

- a. Do you see those failures as being significant defects in our system of government? [E]
- b. Can you think of a means of reducing the defects in the failure to separate out such powers? [C] [E]

Governance in Australia

Chapter 3: Australian parliamentary democracy – representative government

- 3.1 The nature of democracy
- 3.2 The evolution of democracy
- 3.3 The Australian electoral system
- 3.4 Australian elected governments
- 3.5 Membership of the federal parliament and Queensland state parliament
- 3.6 Cultural, ethnic and gender diversity in Australian parliaments

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
 - the meaning of representative democracy
 - representative democracy in Britain and Australia prior to federation
 - the nature of representative democracy introduced by the Australian Constitution
 - the nature of suffrage (entitlement to vote) set out in legislation after federation
 - the levels of government existing in Australia, and the present form
 - that governments were able to influence voting systems to their advantage
 - the need for, and introduction of independent electoral commissions in the Commonwealth and the States of Australia
 - the nature and extent of the involvement of First Nations Peoples in Australian representative democracy.
- analyse and evaluate legal issues about representative democracy.

3.1 The nature of democracy

Key Term

Democracy: Government by the people, a form of government in which the supreme power is vested in the people and exercised by them or by their elected agents under a free electoral system.

Source: *Macquarie Dictionary*, 2nd ed., 1991.

People who live together in communities have always needed some way of making decisions with which the members of the community agree. Or at least, a majority of the members agree with the decision, and those who do not agree are accommodated in a way which is satisfactory to everyone. As you can imagine, in a small community, it is probably much more likely that the members of the community are well-informed about decisions so that they can participate in a decision in a knowledgeable way. Imagine, for example, if your drama class is expected to produce an item for a school concert and the class is asked to participate in the making of a decision about your performance. Unless your teacher is a dictator, which is unlikely, the whole class will probably choose the item. If you and your teacher choose some options to consider and a vote is held which determines the item you will do, this would be an example of what we call **direct democracy**. All the eligible members of your class are entitled to vote to choose the item.

So far as the writer is aware ancient Greece was the world's first working democracy. Records from the sixth century BC establish that the male citizens of the city-state of Athens all voted in decisions that concerned them. (Evidently, eligible voters did not include slaves and women). Suppose in our example above of the drama class, it was decided that a committee formed from the members of the class should make a decision on behalf the class to choose the item for performance. Can you think of reasons why this might be the case? Do you think it might be easier to discuss options and whether they were suitable or not? When it became difficult in ancient Greece for every citizen to be present at every vote, each citizen would receive a token representing him, and a number of male citizens voters were chosen each day to make decisions for a time for the entire city-state. This was an early form of representative democracy.



What do you think?

Some characteristics of democratic decision-making are able to be identified from the drama class example. We have listed these below. You should examine them critically and decide if they are appropriate. You may prefer to restate them differently.

- Equality in voting
- Effective participation
- Informed understanding of the issue
- Control of the process (agenda)
- Involvement (inclusion of all members of the class)

Indicate why you think these describe democracy in action, and add any criteria which occurs to you as being relevant. Give your reasons. [A] [E]

3.2 The evolution of democracy

Key Term

Representative government: is a representative democracy where voters elect candidates to carry out the business of government on their behalf.

To understand how democracy works in Australia today, it is useful to look at some features of the history of English democracy and of the history of the colonies in Australia prior to federation. This is because they provided examples for the founding fathers when they were writing the Australian Constitution and because the colonial states were to become part of the Federation of Australian States thereby forming the Commonwealth of Australia. Of course, these were not the only examples of democratic governments to which our founding fathers could look, for example, the United States of America.

English democracy

The seeds of English democracy were sown in the *Magna Carta 1215*, which attempted to give the people a voice and to establish rights. The members of parliament in the English Parliament were not elected by a vote of the English population for many years. The very early parliamentary representatives were those chosen by knights and by business people who had the funds to acquire seats in parliament. Gradually the rules changed so that members of parliament were elected by voters, but there were restrictions on who could vote. Initially only male property owners were allowed to vote. Significant changes were made in 1832 by an Act of Parliament called the *Reform Act*. The Act included the following:

- an increase to the number of voters by allowing men who rented property above a certain value to vote, which increased enfranchisement to over 1 million; and
- changing the mediaeval boundaries of counties and boroughs, giving a fair representation to the cities that had sprung up during the Industrial Revolution. Before this electorates were of wildly varying size. Yorkshire had more than 20,000 people, Westminster 12,000, Dunwich 32, and Gatton 7 voters, but each electorate only had one member of Parliament.

Campaigns for women's suffrage go as far back as 1817 in England, when the utilitarian philosopher Jeremy Bentham wrote *Plan of Parliamentary Reform*, in the *Form of the Catechism*, with... The Lawbook Exchange, Ltd., advertised Jeremy Bentham's book in the terms set out in the following activity. From 1817, there was a continuous campaign for women to get the vote in England. In 1893 New Zealand became the first self-governing country to allow women to vote. In the early 20th century the Women's Social and Political Union (called suffragettes in a less than complimentary way in a newspaper article at the time) took to direct, and sometimes violent action. They chained themselves to railings, there were arson attacks and even bombings. Many were imprisoned, and some went on hunger strikes. One young woman, Emily Davison, died at the Epsom Derby in 1913.



Practical Application

PLAN OF PARLIAMENTARY REFORM, IN THE FORM OF THE CATECHISM, WITH...

Bentham, Jeremy

Bentham, Jeremy. *Plan of Parliamentary Reform, in the Form of the Catechism, with Reasons for Each Article. With an introduction, Shewing the Necessity of Radical, and the Inadequacy of Moderate Reform.* Originally published: London: T.J. Wooler, 1818. Reprinted 2002 by the Lawbook Exchange, Ltd....



The legendary law reformer points his pen directly at the British class system as it is manifested in the parliament and its processes, calls for expansive democratic reform in the form of 'democratic ascendancy', and praises the United States Constitution. After publication of this volume in 1818, his plea for **universal suffrage** was criticised by the *Edinburgh Review* for the expectation that it would lead to attacks on property.

THE EPSOM DERBY (1913)-EMILY DAVISON TRAMPLED BY KING'S HORSE

Emily Davison ran in front of the King's horse, Anmer, holding the banner of the Women's Social and Political Union, trying to reach the horse's bridle and stop it from racing. The horse fell, dislodging the jockey, but Emily Davison was critically injured. The horse and jockey recovered.

Source: The Guardian, 'Emily Davison trampled by the king's horse' *The Guardian*, (YouTube 4 June 2013) <youtu.be/8qkU_imbFoE?si=3Q3yS5llcE0sGD4->.

The *Representation of the People Act 1918* (UK) gave women the vote for the first time in England and removed all property restrictions from male voters.

1. In 1901, when the Australian Federation was established, describe the example the founding fathers would have received, about the nature of representation in the English Parliament in accordance with voting rights. [C]
2. There were no women in the English Parliament until after 1918. Do you think that giving women the vote would change this? Why or why not? (In England the first woman to be elected to parliament, was Nancy Astor, representing Plymouth Sutton, in 1920) [E]

State democracy in Australia before Federation

In the decade prior to the *Commonwealth Constitution Act 1900* (Cth), all Australian states had been granted responsible government by the British government, and had passed laws establishing voting systems for Parliament. Systems of representation were not the same throughout all of the states of Australia, but were sufficiently similar to enable the founding fathers to negotiate an agreed draft Australian Constitution. The diagram below reflects the electoral system of each state in 1900.

STATE ELECTORAL SYSTEM (CIRCA 1900)

STATE	LOWER HOUSE	UPPER HOUSE
NSW	All adult male residents in NSW could vote except paupers, prisoners and persons of unsound mind. Women in NSW could not vote in NSW elections or Commonwealth elections until the <i>Women's Franchise Act 1902</i> (NSW) and <i>Commonwealth Franchise Act 1902</i> (Cth) were passed. Aborigines could not vote.	Indirectly elected by the members of the Lower House. Aborigines were not eligible to be elected.
QLD	All adult male residents in QLD could vote except paupers, prisoners, and persons of unsound mind. Adult males owning property in more than one electorate could cast additional votes where they owned property. Women in QLD could not vote in QLD elections or Commonwealth elections until 1905. Aborigines could not vote.	The Legislative Council members were appointed by the Governor, not elected.
SA	All adult male residents in SA including Aboriginal males were eligible to vote. Adult women were eligible to vote in 1894.	Voting for the Legislative Council was restricted to owners or occupiers of property worth a minimum amount. Voting was not open to all adults until 1973.
VIC	All adult male ratepayer residents who reside in VIC could vote. Women and Aborigines were not eligible to vote. Women received the vote in 1911.	All adult male ratepayer residents who reside in VIC could vote.
TAS	All adult male ratepayers could vote. Women and Aborigines could not vote.	All adult male ratepayers could vote. Women and Aborigines could not vote.
WA	All adult male and women residents in WA could vote. All Aborigines and non-Europeans could not vote.	All adult male and women residents in WA could vote. All Aborigines and non-Europeans could not vote.

Against the above background, the Australian Constitution enabled the federal government to establish a representative system of government. In 1901 the first federal election of the Commonwealth Parliament was held under state legislation and Edmund Barton became Australia's first Prime Minister. The Commonwealth Parliament met for the first time in Melbourne on 9 May 1901 with 75 members of the House of Representatives and 36 senators (6 for each state). State franchises applied at the first federal election. This meant that disqualification varied according to the state in which an individual resided. Most men over 21 years could vote in New South Wales, Victoria, Queensland and Tasmania. In South Australia and Western Australia, men and women over 21 could vote. At the first Commonwealth elections, voting was voluntary in all states. Voting systems varied between states.



What do you think?

If you were a member of the new Commonwealth Parliament in 1901 what changes do you think you would want to make to ensure that there was a representative democracy operating in Australia which was fair to all voters? Justify your answer using legal criteria. [E]

3.3 The Australian electoral system

Key Terms

Bicameral: means 'two chambers', and in practice refers to a government structure involving two houses, or two legislative bodies, that are separate in deliberation from one another.

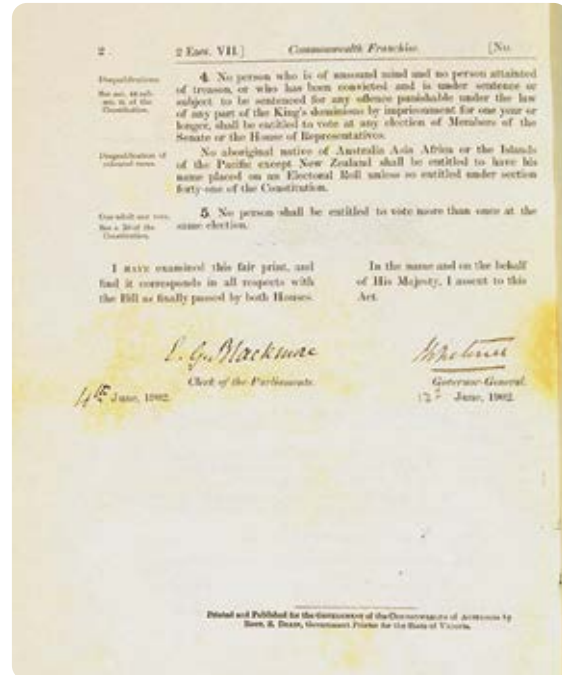
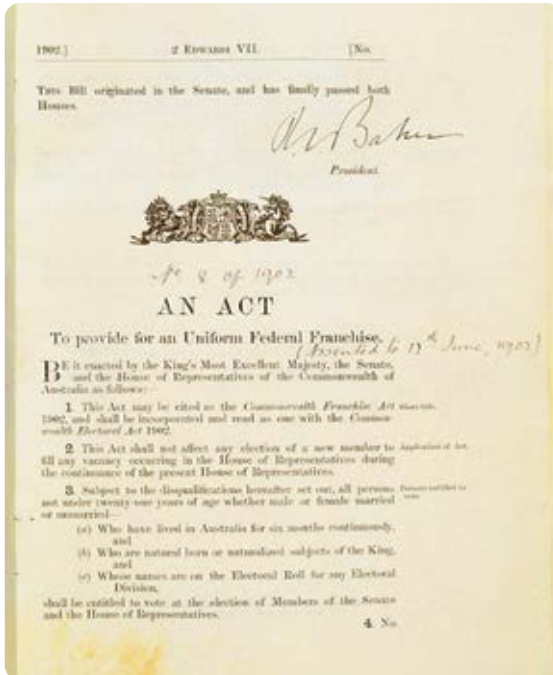
Unicameral: a type of legislature consisting of one house or assembly that legislates and votes as one.

One of the first things that the new Commonwealth Parliament did was to pass legislation determining who could vote, and setting up electorates that ensured that whether you voted in any of the Australian states, that as far as possible, the value of your vote was comparable. We have already looked at the theory of representative democracy and you can see that this is necessary for a representative government for the whole country to work satisfactorily. The other issue is who is entitled to vote. As you can see above, relying on the persons whom each state was prepared to allow the vote, differed from state to state. As a consequence, the Commonwealth government passed the *Commonwealth Franchise Act 1902* (Cth) and the *Commonwealth Electoral Act 1902* (Cth).

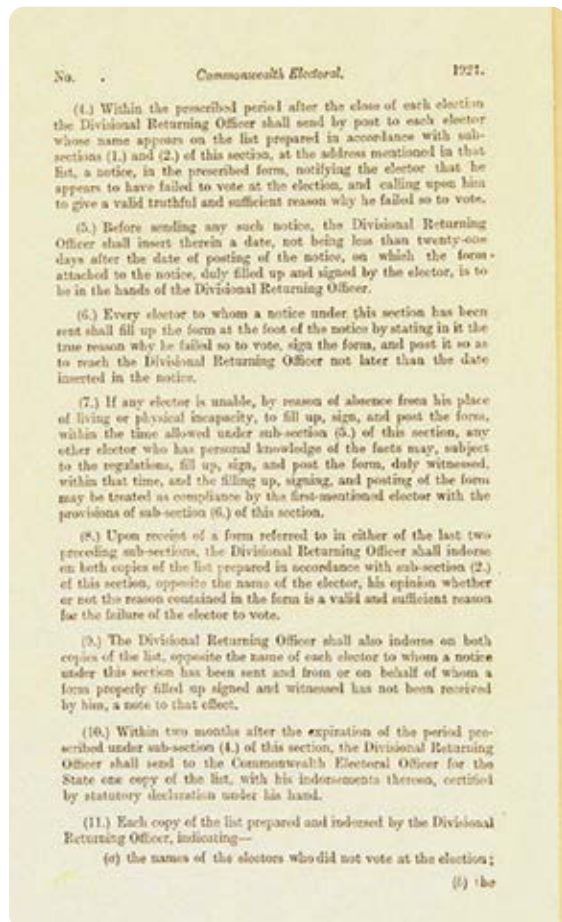
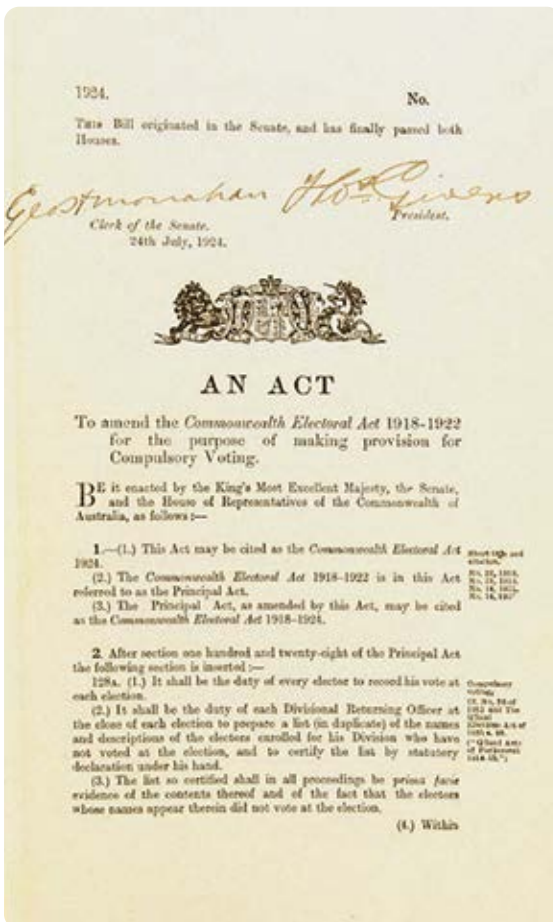


Practical Application

Commonwealth Franchise Act 1902 (Cth)



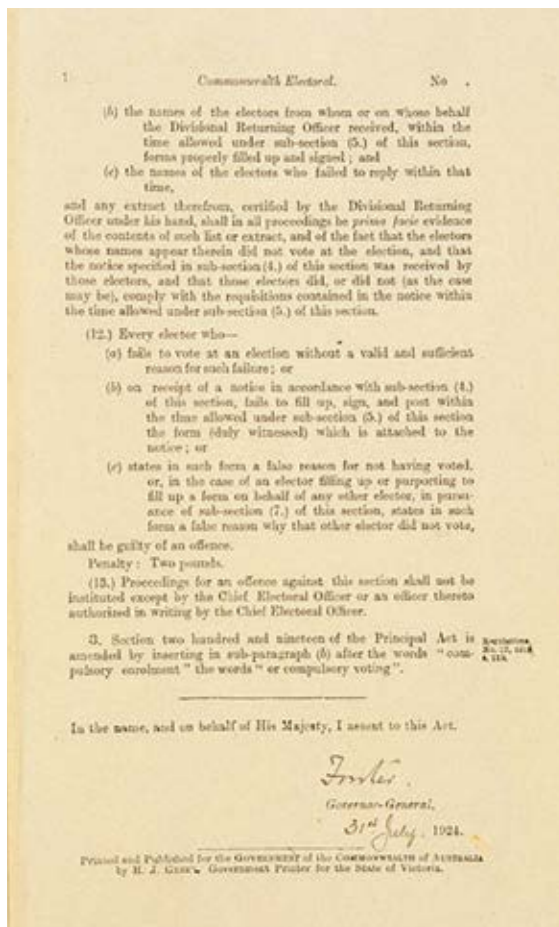
Commonwealth Electoral Act 1902 (Cth)





Practical Application ...

Commonwealth Electoral Act 1902 (Cth)



1. Describe and explain the purpose of the *Commonwealth Franchise Act 1902* (Cth) (the Franchise Act) and the *Commonwealth Electoral Act 1902* (Cth) (the Electoral Act). [C]
2. Describe who can vote according to s3 of the *Franchise Act*. [C]
3. Describe and explain how according to s12 and s15 of the *Electoral Act* the members of the House of Representatives are distributed into Electoral Divisions in the different states of Australia. [C] [A]
4. Describe the matters which s16 of the *Electoral Act* requires the Commissioner to take into account when determining the boundaries of Electoral Divisions in each state. Are there any other matters which you consider the Commissioner should take into account in the distribution of seats? [C] [A]
5. Describe the process which the *Electoral Act* sets out in ss17-23 to be followed so that Parliament can approve a redistribution of any state in the divisions whenever directed by the Governor-General by proclamation. [C]

6. Do you think that it would be a fairer system, less open to criticism, if the redistribution of any State into Electoral Divisions, was totally independent from, or more independent from the Parliament? Give your reasons. [E]



Research Task

It is clear that Aboriginal and Torres Strait Islanders (First Nations Peoples) did not get the vote in 1902. They were not regarded as citizens of Australia. Research online to find out when in fact in the States and Territories, and in the Commonwealth, First Nations Peoples became entitled to vote just like everyone else. Research online to find out when First Nations Peoples became entitled to vote in Commonwealth and State elections. [C] [S]

All Australian States and Territories, and the Commonwealth of Australia, have established electoral commissions which now independently carry out the necessary activities to ensure that all governments in Australia are elected by fair systems of representation, without unnecessary political interference. These electoral commissions were not established at the same time for various reasons, as in some cases political control and interference ensured that different political parties stayed in power. This was the case in Queensland for many years and we will see what occurred and when the Queensland Electoral Commission (QEC) was established. First, however, we will look at the Australian Electoral Commission (AEC), established on 21 February 1984, following major amendments to the *Commonwealth Electoral Act 1918* (Cth).

Practical Application



The Australian Electoral Commission (AEC)

The AEC is a non-corporate Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) and an independent statutory authority established under the *Commonwealth Electoral Act 1918* (Cth).

Purpose

The AEC's **purpose** is to maintain an impartial and independent electoral system for eligible voters through active electoral roll management, efficient delivery of polling services, and targeted education and public awareness programs.

In line with the *Electoral Act*, it does this by:

- conducting successful electoral events, including federal elections, by-elections and referendums, and industrial elections and ballots
- ensuring confidence in the Commonwealth Electoral Roll
- regulating political party registrations and financial disclosure
- supporting electoral redistributions
- undertaking public awareness activities.

It also provides a range of electoral information and education programs, both in Australia and in support of Australia's national interests. It measures performance against our key activities, which outline the distinct or significant work that contributes to achieving its purpose.

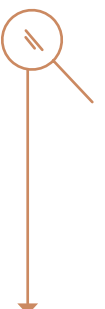
Source: Australian Electoral Commission, 'The AEC's Role', (Web Page, 17 January 2024) <aec.gov.au/About_AEC/>.

1. Does the *Public Governance Performance and Accountability Act 2013* (Cth) (PGPA Act) apply to the AEC? [C]
2. Describe the performance framework of the AEC. [C]
3. How does the AEC intend to maintain an impartial and independent electoral system? [C]

In the Australian democracy, we place a very high value on achieving results at elections, which ensure that the parliamentarians that are elected truly represent the communities that they serve. We have universal suffrage, compulsory voting, and we have independent and impartial commissions designed to make participation in voting as easy and painless as possible. The AEC is clearly working to enrol all voters so they can participate in the political process.

Inquiry Focus

How does the AEC manage disadvantage, specifically the disadvantages of First Nations Peoples? Are there barriers to their involvement?





Research Task

Consider the following categories of voters to whom the AEC must deliver polling services:

persons of impaired vision (including blind persons), persons who are elderly and unable to attend a polling booth, persons in remote locations, persons with language and reading difficulties (literacy), and First Nation Peoples.

Go to the aec.gov.au and find the AEC's initiatives which put into practice their commitment to deliver polling services to the electorate.

1. What are the initiatives the AEC has taken to meet the needs of voters to enable them to exercise their right to vote? [C]
2. Can you think of additional initiatives which might be necessary? [E]

Practical Application

The AEC is responsible for maintaining an up-to-date electoral roll which ensures all Australians can exercise their right to vote. Of particular importance was ensuring that First Nations Peoples were all enrolled prior to the referendum in October 2023.

Indigenous enrolment estimates as at 30 June 2023				
State	Estimated Indigenous voting age population	Estimated Indigenous enrolled	Estimated Indigenous unenrolled	Enrolment Rate
NSW	185,327	180,675	4,652	97.5%
VIC	42,777	40,865	1,912	95.5%
QLD	156,887	149,590	7,297	95.3%
WA	72,270	62,804	9,466	86.9%
SA	29,714	27,534	2,180	92.7%
TAS	20,012	19,551	461	97.7%
ACT	6,197	5,937	260	95.8%
NT	54,344	47,253	7,091	87.0%
National	567,528	534,209	33,319	94.1%

Practical Application ...

Indigenous enrolment estimates as at 30 June 2020				
State	Estimated Indigenous voting age population	Estimated Indigenous enrolled	Estimated Indigenous unenrolled	Enrolment Rate
NSW	173,203	149,803	23,400	86.5%
VIC	39,070	30,359	8,711	77.7%
QLD	143,325	109,146	34,179	76.2%
WA	68,241	46,154	22,087	67.6%
SA	27,949	20,431	7,518	73.1%
TAS	18,991	16,149	2,842	85.0%
ACT	5,467	4,388	1,079	80.3%
NT	52,847	36,320	16,527	68.7%
National	529,093	412,750	116,343	78.0%

The AEC Indigenous enrolment rate estimates use self-identified Indigeneity data made available to the AEC by Services Australia, combined with population data from the Australian Bureau of Statistics and compared with the Electoral Roll data.

Source: Australian Electoral Commission, 'Indigenous enrolment rate,' (Web Page, 24 July 2023) < aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm>.

1. What are the sources of data for the estimates of the Indigenous voting population? [C]
2. Have the numbers of the Indigenous enrolled population increased over time? Has the trend been consistent? What does this suggest to you about the work being done by the AEC to enrol Indigenous voters? [C] [A]

Practical Application

BARRIERS TO VOTING IN REMOTE FIRST NATIONS COMMUNITIES

Past policies have put obstacles in place to voting in remote First Nations communities.

The rate of voter participation in federal elections by people living in remote Indigenous communities has been **lower than the national average** since First Nations people were granted the right to vote in 1962. In recent years, the rate has been in decline.

Measuring the number of First Nations people (or any particular demographic group) who vote in federal elections is challenging. Electoral rolls do not include information about cultural identity. Census figures, which could be used as a basis for comparison against voter turnout rates, are imprecise.



Practical Application ...

Decisions made at the federal level over the last three decades appear to have provided significant obstacles to voting in some First Nations communities.

First is the 1996 abolition of the Aboriginal and Torres Strait Islander Election Education and Information Service.

Established in 1979, this service existed specifically to increase voter registration rates among First Nations people. This was done by, for example, providing voter education and election materials in Indigenous languages.

The second decision was the 2005 abolition of the Aboriginal and Torres Strait Islander Commission.

First Nations people participated in five of the Commission's elections administered by the same Australian Electoral Commission responsible for federal elections. Although voting was voluntary, analysis shows participation was higher in northern and central Australia than in southern Australia.

The third relevant policy change was the passage of the 2006 Electoral Integrity Bill. This introduced more stringent rules for the identification required to vote, making it more difficult for people in at least one remote community to register to vote.

The fourth policy decision was a 2012 change to the Commonwealth Electoral Act, known as the "Federal Direct Enrolment and Update".

This enabled the Australian Electoral Commission to register eligible Australians to vote based on information available through several government agencies. These include Centrelink/the Department of Human Services, the Australian Taxation Office, and the National Exchange of Vehicle and Driver Information Service.

But the Electoral Commission has chosen not to use this mechanism for enrolment in parts of Australia where mail is sent to a single community address ("mail exclusion areas").

This means people living in many remote communities are not automatically added to the electoral roll, unlike most of the rest of Australia.

A survey of residents in one remote community on South Australia's APY lands found a lack of information contributed to low participation in elections.

Obstacles included:

- a lack of materials available in appropriate languages
- uncertainty about how to cast a formal vote
- problems related to literacy, and
- a lack of appropriate identification necessary to enrol.

Source: Morgan Harrington, 'Barriers to voting in remote First Nations communities', *Australian National University Newsroom*, (Blog, 19 April 2022) <anu.edu.au/news/all-news/barriers-to-voting-in-remote-first-nations-communities>.

1. Why is it challenging to measure the number of a particular demographic group who vote in federal elections? [C]

2. What has happened to the rate of voter participation of First Nations Peoples since 1962? [C]

Practical Application ...

3. What decisions were made at the federal level which appear to have provided significant obstacles to voting in some First Nations communities? Explain the effect of each decision. [C]
4. What obstacles to participation in voting at a remote South Australian community were identified in a survey? [C]

Practical Application

AEC 2023–24 CORPORATE PLAN (EXCERPTS)

Electoral participation and outreach

The AEC's priorities include supporting electoral participation for all Australians. We seek to engage voters from culturally and linguistically diverse backgrounds, First Nations peoples, people with disability, young people, people experiencing homelessness, and people in prison.

In October 2021, the then government announced additional funding of \$9.4 million to increase the participation of Aboriginal and Torres Strait Islander Peoples in Australian elections. In October 2022, the government announced funding of \$16.1 million to further enhance programs to enable their enrolment and participation. The additional funding is delivering an expanded Indigenous engagement program, designed and delivered in partnership with First Nations organisations, other government agencies and communities.

The AEC collaborates with community organisations and other service providers to share electoral information, raise awareness of election processes, and to promote recruitment opportunities. The AEC also works with state and territory electoral commissions, and other government agencies to achieve electoral participation outcomes for communities. The AEC chairs the Disability Advisory Committee, which fosters accessibility, inclusion and participation in the electoral process by people with disability.

Source: Australian Electoral Commission, *Corporate Plan 2023-24*, (Web Page, 21 August 2023) <aec.gov.au/About_AEC/Publications/corporate-plan/index.htm>.

1. Describe the performance framework of the AEC designed to support electoral participation for all Australians. Do you think that the performance framework of the AEC will enable it to meet the objectives for the Australian electorate? Give your reasons. [C] [A]

Practical Application

LARGEST ENROLMENT IN HISTORY AHEAD OF 2023 REFERENDUM

17,676,347 Australians are enrolled to vote in the upcoming 2023 referendum

The AEC has today announced that a record **97.7%** of eligible Australians are enrolled to vote in the upcoming 2023 referendum.

Australian Electoral Commissioner, Tom Rogers said such a complete electoral roll is a result of years of hard work by the AEC.

“With many nations around the world campaigning to get even three quarters of their population enrolled to vote, this result is a continuing source of Australian democratic pride.”



Practical Application ...

Mr Rogers said.

"In between the announcement of the referendum date and close of rolls, approximately **79,000** people were added to the roll with **376,000** other eligible Australians updating their details."

"The youth enrolment rate has also increased to **91.4%** which means approximately **1.8 million** 18-24 year olds are ready to vote and have their say in their first referendum."

In terms of First Nations enrolment, this sits at **94.1%** and is the highest it has ever been."

Source: Australian Electoral Commission, 'Largest enrolment in history ahead of 2023 referendum', (Media Release, 21 September 2023) <aec.gov.au/media/2023/09-21a.htm>.

1. Describe the position of the Australian electorate with respect to voters as at 21 September 2023 according to the AEC. [C]
2. Do you think the AEC and Australian voters are entitled to be proud of the results that it announced? If you were the Australian Electoral Commissioner, what would you propose for the organisation immediately, and continuing? Give your reasons. [A]

Electoral Commission of Queensland

The Electoral Commission of Queensland (ECQ) is established under the *Electoral Act 1992* (Qld) as an independent statutory authority, responsible for the impartial conduct of Queensland elections.

Our Purpose and Vision	
Our purpose is to support the Democratic electoral process by preparing for, conducting and reporting elections in Queensland.	
Strategic Objectives	
Objective 1.	Promote awareness of and participation in electoral matters
Objective 2.	Ensure equitable representation across Queensland electoral boundaries
Objective 3.	Deliver fair and just Queensland elections
Objective 4.	Drive improvements to election services

Electoral Commission Queensland, 'About us', (Web Page, 2024) <ecq.qld.gov.au/about-us>.



What do you think?

Do you think there is a need in Queensland for an independent statutory authority which is responsible for the impartial conduct of elections? Can you think of any additional objectives to those set out on the website of the Queensland Electoral Commission? [E]

The Queensland Gerrymander

We have seen that fairness in elections is substantially determined by who is entitled to vote, and the procedures put in place to ensure equal representation. In the process we have referred briefly in the historical discussion of the evolution of English democracy, to the situation where electorates or divisions which elected members of parliament had vastly different numbers until there was reform. This clearly meant that the **value of a vote** cast by an elector varied from electorate to electorate.

Gerrymander is defined in the *Macquarie Dictionary* as follows:

... an arbitrary arrangement of the political divisions of the constituency, made so as to give one party an unfair advantage in elections.

This clearly means, so far as Queensland is concerned, to set the boundaries of electorates so that one political party is advantaged over another.



Joh Bjelke-Peterson

Practical Application

VOTING IN QUEENSLAND

Electoral boundaries

... In 1949, the Hanlon Labor Government increased the Parliament to 75 and introduced a controversial zonal system, whereby the state was divided into four zones-Metropolitan, South-eastern, Northern and Western-with vote weightings ranging from 4000 electors in rural zones to 12,000 in the metropolitan. After the defeat of Labor in 1957, the Country-Liberal coalition, which originally opposed zonal introduction, decided to retain the system and, in 1958, increased the Parliament to 78 members, but reduced the number of zones to 3.

Under Premier Bjelke-Peterson, the four-zonal system was resurrected in 1971 and further refinements on this basis occurred in the redistributions of 1977 and 1985. The number of members also increased to 82 in 1977 and 89 in 1985. Over this period, many criticisms focused on the vote weighted between the country and the city zones, as well as the artificial demarcation of rural areas away from the provincial cities. However, in 1989 the ALP won government on the electoral boundaries allocated by the 1985 redistribution....

Electoral reform

In 1989, the *Fitzgerald Commission of Inquiry Report* recommended an overhaul of Queensland's electoral laws.. the Goss Labor Government... passed legislation and established the Electoral Commission which eliminated the zonal system, reintroduced optional preferential voting, and provided for future redistributions which would maintain electoral equality.





Practical Application ...

THE 1972 ELECTION				
Party	Votes cast	Percentage	Seats won	Percent of Seats
Labor	424,002	46.7	33	40.2
Liberal	201,596	22.2	21	25
Country	181,404	20	26	31.1
DLP	69,757	7.7	0	0
Independent	23,951	2.6	0	2.4
Other	6236	0.7	0	0
Invalid	14,817	1.6	0	0

Source: Queensland Parliament, 'Voting in Queensland', (Web Page, 2023) <parliament.qld.gov.au/Visit-and-learn/About-Us/The-Queensland-Electoral-System>

1. What was the zonal system introduced by the Hanlon Government in 1949? Why was it controversial? Do you think it was a fair system of electoral distribution? Give your reasons. [C] [A]
2. What were the main criticisms of the zonal system retained by and applied during the Bjelke-Peterson era? Do you think these criticisms were valid and fair? [C] [A]
3. In the table 'THE 1972 ELECTION':
 - a. Which party received the greatest number of votes? [C]
 - b. How many votes, on average, did it take for each of the Labor, Liberal, and Country Parties to win a seat in the Queensland Parliament? Which of the parties does this comparison suggest had an unfair advantage electorally? (The Liberal and Country parties formed a coalition in government). [C] [A]

3.4 Australian elected governments

We have seen that in Australia, the Commonwealth government and all State governments and Territories, are elected by systems of representative democracy, and that the systems are now as fair as one would expect them to be, given that they are operated by independent electoral commissions. As a result, unless a government takes away this independence, this fair system will continue into the future. This does not mean that the system is perfect, and there are many issues which you could examine where allegations and suggestions have been made to improve our electoral systems. Some of the issues will be raised in this part of the chapter.

Three levels of law-making

Australia has three levels of law-making. These are sometimes referred to as the three levels of government. We have seen that the Federal Parliament makes laws for the whole of Australia, and that subject to the Australian Constitution, State and Territory Parliaments make laws for their state or territory. Pursuant to state laws, there are over 560 Local Councils, which make local laws, called by-laws, for each regional district. These three levels of government are illustrated below.

The Three Levels of Government



Source: Parliamentary Education Office, 'Three Levels of Government: Governing Australia', (Web Page, 19 July 2022) <peo.gov.au/understand-our-parliament/how-parliament-works/three-levels-of-government/three-levels-of-government-governing-australia>.

This next part confines itself to the Commonwealth and Queensland Parliaments.

The Federal (Commonwealth) Parliament of Australia

The Federal (Commonwealth) Parliament is Australia's national law-making body, passing laws that apply to all Australians. Located in Canberra, the Commonwealth Parliament consists of:

- Crown
(the King represented by the Governor-General)
- House of Representatives
(the citizens that represent their electorates)
- Senate
(senators who represent their state or territory as a whole)

The Australian Parliament



Parliamentary Education Office, 'Australian Parliament' (Web Page, 22 July 2024) <peo.gov.au/understand-our-parliament/introducing-our-parliament/australian-parliament>.

a. Crown

The Australian Constitution established the Federal (Commonwealth) Parliament. Australia is a **constitutional monarchy**, which means that our Constitution states that the people and parliaments of Australia are subject to the ultimate authority of the King or Queen of Britain. **The Governor-General is the King's representative in Australia.** A new Governor-General is appointed by the Prime Minister every five years. The Constitution states at s61:

... the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative.

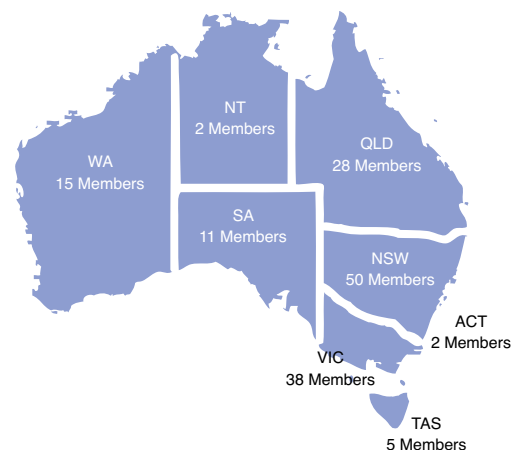
This means that the Governor-General is a part of the Parliament and the Executive (Prime Minister and Cabinet).

b. HOUSE OF REPRESENTATIVES

151 Australian citizens sit in the House of Representatives of the Federal Parliament-also known as the lower house and the people's house. Each member of the House of Representatives represents approximately 75,000-80,000 voters in a geographical area, called an **electorate**. This means that the most heavily populated states of New South Wales, Victoria and Queensland have the most representatives in the House of Representatives.

The **major functions** of the members of the House of Representatives are to:

- represent the interests of their constituents (of their electorates); and
- introduce, debate and then pass or reject proposed laws.

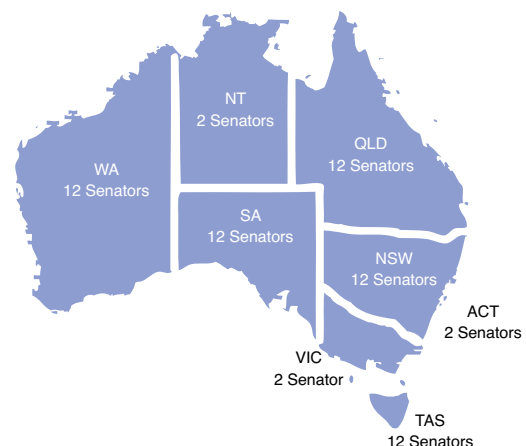


c. SENATE

The Senate is the upper house of the Federal Parliament. It is also known as the States' house and the house of review. It is made up of 76 senators. The citizens of each of the six states of Australia elect 12 senators to represent them, while the citizens of the Northern Territory and the Australian Capital Territory (ACT) elect 2 senators each.

The **Senate** has the following **major functions**:

- **each state is represented in equal numbers of members** regardless of the size of each state. To protect the interests of the citizens in the smaller states, the Constitution states that each state must have the same number of representatives in the Senate, no matter what the population of the state;
- also known as the house of review, the Senate **reviews Bills sent to it from the House of Representatives**. The Senate cannot amend a Bill but has the power to reject a Bill if a majority of the members of the Senate disagree with it. The Senate has the power to introduce a bill to the Federal Parliament. Any Bill passed first by the Senate must be approved by the House of Representatives before it becomes law; and



- the Senate also **makes sure that the Ministers of the Government and their departments are made accountable** by the members sitting on committees which examine whether the government is doing its job properly. Estimates of government expenditure are referred to Senate committees as part of the annual budget cycle. There are hearings before the Senate committees which are known as the Senate Estimates Hearings.

Practical Application



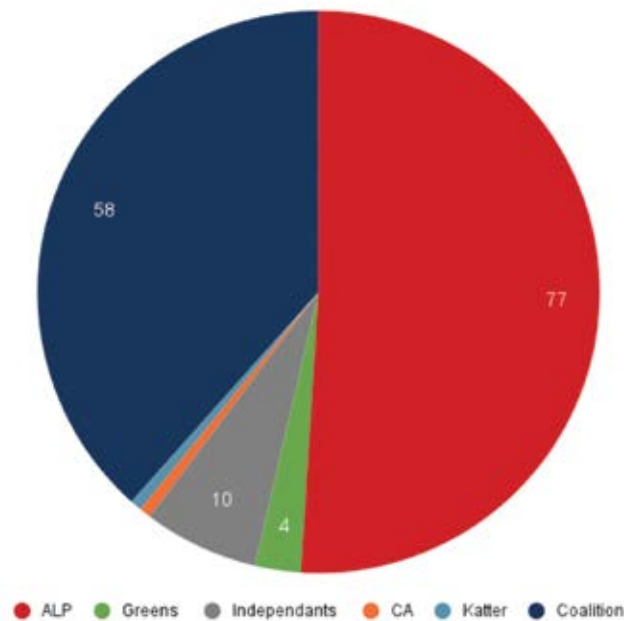
THE 2022 AUSTRALIAN FEDERAL ELECTION RESULTS

The 2022 Federal Australian election was held on the 21st of May, 2022. The Australian Labor Party was elected into majority government under leader Anthony Albanese, defeating the incumbent Coalition government, led by Prime Minister Scott Morrison. The Labor Party last held government in 2013 and has not held a majority in the Lower House since 2010.

The House of Representatives

There are 151 seats in the lower house (House of Representatives) and a party requires 76 seats to govern.

The House of Representatives (2022)



Party	2022 election	2019 election	Seats Changed
ALP	77	69	+ 8
Coalition	58	76	– 18
Independents	10	3	+ 7
Minor Parties	6	3	+ 3



Practical Application ...

The Senate

There are 76 Senators in the Australian Senate. Six senate seats from each state and two senate seats from each of the Territories, totalling 40 senate seats, are elected at each election.

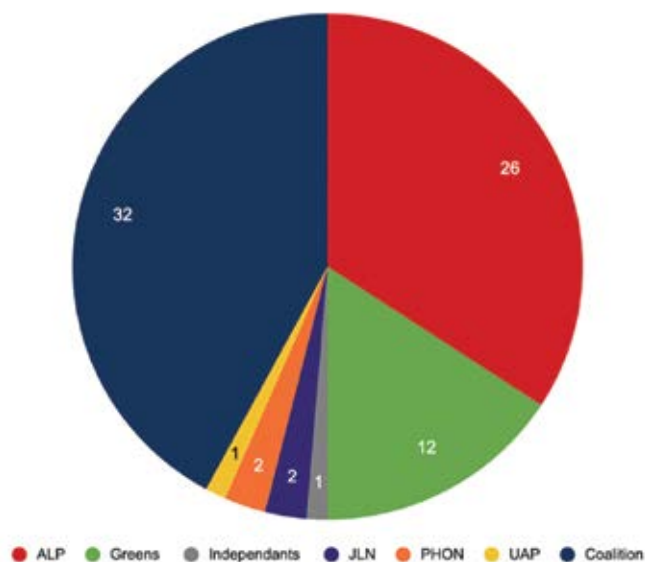
The Senators elected in the 2022 Election are:

	QLD	NT	ACT	WA	NSW	VIC	TAS	SA	Total
Coalition	2	1		2	3	2	2	3	15
ALP	2	1	1	3	2	2	2	2	15
Greens	1			1	1	1	1	1	6
Other	1		1			1	1		4
Total	61	2	2	6	6	6	6	6	40

Each of the six states have elected at least 2 Labor, 2 Coalition and 1 Greens Senator.

The complete composition of the Senate, including Senators' elected in 2019.

Senate Composition 2022- 25



Neither major party holds a majority in the Senate. Labor will require the support of either the Coalition or the support of the Greens and another member of the Cross-Bench to pass legislation in the upper house.

Source: Simon Banks, 'The 2022 Australian Federal Election results', *HawkerBritton* (Blog, 21 June 2022) <http://hawkerbritton.com/blog/2022/06/21/the-2022-australian-federal-election-results/>.

1. Which political party is capable of forming government? How many seats does it hold in the House of Representatives? [C]
2. Which political party will be known as the Opposition? Why is that? [C]



Practical Application ...

3. Are there minor parties and independents in the House of Representatives? Does the government need the support of the minor parties or the independents to pass legislation in the House of Representatives? Why should it consider their point of view, in any event? [C] [A]
4. Does the party capable of forming government also hold a majority of the seats in the Senate? How many seats does the Opposition hold in the Senate, and are there minor party representatives and independents? [C]
5. Describe and explain what is meant by 'the balance of power' by reference to the Senate. [C]

State and Territory Parliaments

Each Australian State and Territory has its own independent parliament which makes decisions about how the State or Territory is run. The Queensland Parliament makes laws for everyone within the state. In Queensland, there are 93 representatives elected to the Legislative Assembly (Lower House) of the State Parliament. The King's representative in Queensland is the Governor.

Queensland's Parliament—uniquely unicameral

Queensland's Parliament was a mirror image of the **bicameral** (two house) Commonwealth Parliament until 1922 when the **upper house**, known as the **Legislative Council**, was **abolished**. Queensland's **unicameral** (one house) Parliament is unique in Australia. Every other Australian state has retained two Houses of Parliament. The Queensland Parliament abolished the Legislative Council based on arguments that it was obstructionist (tended to prevent bills that had already passed through the Lower House from becoming law) and inefficient (a slow process of passing new laws through the parliament).

The main purpose of an Upper House of Parliament is to avoid laws being hastily passed without proper consideration of its effects on all of the competing interest groups in our society. The Upper House is intended to be a check on the government in the Lower House. In the Queensland Parliament, however, it was argued that good quality debate and careful consideration of proposed laws by the Legislative Assembly was adequate protection of the interests of Queensland's citizens. The great expense of retaining the Legislative Council was also a popular reason for abolishing it.

Parliament of Queensland 2023 Election Results

(composition of the Legislative Assembly, 57th Parliament)	
Liberal National Party	52
Labor Party of Queensland	36
Katter's Australian Party	3
Queensland Greens	1
Independent	1
Total declared seats	93



Queensland Coat of Arms

Local Authorities (Councils and Shires)

Each Australian State Parliament has passed *Local Government Acts* to create local councils and shires as a third level of government. These local authorities have been given wide powers to make laws for their local areas or regions, without having to seek the approval of their State government for each matter. It is important to note, however, that **local authorities are subject to the higher law-making authority of the relevant State government**. A local authority can be abolished, merged with another local authority, or a new local authority created simply by an act of the relevant State Parliament.

3.5 Membership of the federal parliament and Queensland state parliament

Membership of federal parliament

The *Commonwealth Electoral Act 1918* (Cth) as amended sets out the criteria to be satisfied by a person who applies to the Australian Electoral Commission (AEC) to become a member of federal parliament. The applicant must:

- have reached the age of 18 years;
- be an Australian citizen; and
- be an elector, or qualified to become an elector, who is entitled to vote in a House of Representatives election.

Hand-in-hand with eligibility, is the fact that a person who may be eligible may be disqualified from being a member by other reasons. These reasons can be both **constitutional** (see *Commonwealth Constitution Act 1900* (Cth) s44 and/or **statutory** (see *Commonwealth Electoral Act 1918* (Cth) s163).

Constitution of Australia disqualification

Inquiry Focus

When can a member of parliament be deemed incapable of being chosen as or of sitting as a member of the Senate or the House of Representatives?

Practical Application

Commonwealth Constitution Act 1901 (Cth)

44 Disqualification

Any person who--

- (i.) *Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or*

Practical Application ...

- (ii.) *Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or*
- (iii.) *Is an undischarged bankrupt or insolvent: or*
- (iv.) *Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or*
- (v.) *Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:*

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives

45 Vacancy on happening of disqualification

If a Senator or Member of the House of the Representatives –

- (i) becomes subject to any of the disabilities mentioned in the last preceding Section; or*

his place shall thereupon become vacant.

1. What are the circumstances set out in s44(i) to s44(v) which give rise to a person being incapable of being chosen as, or sitting as, a Member of Parliament. [C]

Case Study

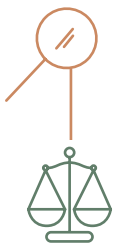
Re Canavan; Re Ludlam; Re Waters; Re Roberts [No. 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45

Facts: In this case the High Court of Australia was asked to determine whether seven members of the Australian Parliament elected in 2016, were incapable of being chosen or of sitting as members of Parliament because to do so would be in breach of s44 of the Constitution. The seven members were Senator Matthew Canavan (Senator for Queensland), Mr Scott Ludlam (Senator for Western Australia), Ms Larissa Waters (Senator for Queensland), Mr Malcolm Roberts (Senator for Queensland), Mr Barnaby Joyce (Member of the House of Representatives), Ms Fiona Nash (Senator for New South Wales) and Mr Nick Xenophon (Senator for South Australia).

Legal Issue: Before we refer to the decision of the High Court of Australia consider each of the following possibilities in light of s44(i). You should interpret s44(i) yourself in answering each of the following. These questions became legal issues in the case:

1. Would a Member of Parliament who is only a citizen of a foreign country and not a citizen of Australia be disqualified by s44(i)? Give your reasons. [A]
2. If an Australian citizen holds a dual citizenship, that is, is a citizen of another country other than Australia, as well as Australia, would such citizen be disqualified by s44(i)? Give your reasons. [A]





Case Study ...

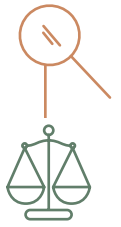
3. If an Australian citizen has a close connection to another country, for example, having been born there, but is not a citizen of that country, would he or she be disqualified by s44(i)? Give your reasons. [A]
4. If an Australian citizen holds dual citizenship but that citizen has not voluntarily obtained (or voluntarily retained that citizenship) is such citizen disqualified by s44(i)? Give your reasons. [A]
5. If a citizen of Australia was born in another country and has become a naturalised Australian but did not take any steps to renounce his or her citizenship of the foreign country would that citizen be disqualified by s44(i)? Give your reasons. [A]
6. If an Australian citizen (by birth) did not know of his or her citizenship of another foreign country which arose as a result of being born in that foreign country (for example having been born there while parents were on holidays) then would that citizen be disqualified by s44(i)? Give your reasons. [A]
7. Would a citizen of Australia who was eligible to be a citizen of another country, then applied for citizenship of that other country and was granted such citizenship, be disqualified by s44(i)? Give your reasons. [A]
8. If a citizen of Australia discovers that he or she has foreign citizenship and then takes all reasonable steps to renounce that citizenship would such citizen be disqualified by virtue of s44(i)? Give your reasons. [A]

The High Court of Australia considered similar situations to those referred to above in determining exactly what the meaning of the words in s44(i) were. Some of those situations applied to the members of Parliament being considered.

Decision: The High Court of Australia unanimously agreed on the proper meaning and effect of s44(i) of the Constitution. The Court held that:

- (i) The section operates to render a person incapable of being chosen, or incapable of sitting, if that person is a subject or citizen of a foreign power.
- (ii) Whether such a person is a foreign subject or citizen is determined by the law of the country that has granted the citizenship in question.
- (iii) The candidate's knowledge of his or her foreign citizenship or knowledge that she could possibly be a foreign citizen is not necessary to bring about the disqualifying operation of s44(i).
- (iv) The candidate who at the time he or she nominates for election is a subject or citizen of a foreign power will be disqualified by reason of s44(i). The only exception to this principle is when such a person has demonstrated that he or she has taken all steps that are reasonably required by the foreign law which grants citizenship, to renounce that citizenship.

Of these seven members under review by the High Court of Australia only two, Senator Matthew Canavan and Senator Nick Xenophon were not disqualified by the operation of s44(i). Senator Matthew Canavan was found not to be an Italian citizen as well as an Australian citizen and Senator Nick Xenophon was found not to be a British citizen as well as an Australian citizen. The other five, Mr Scott Ludlum, Ms Larissa Waters,



Case Study ...

Mr Malcolm Roberts, Mr Barnaby Joyce and Ms Fiona Nash were found to have dual citizenship and thus citizenship of a foreign power and were disqualified pursuant to s44(i).

1. Look back now at the answers to your questions. Do your answers accord with the decision of the High Court of Australia? [C]



Research Task

Locate the above High Court of Australia decision on Austlii.edu.au or the High Court of Australia website and answer the following questions:

Ms Larissa Waters

Look at paragraphs 93 to 98 of the judgment.

1. Why was Ms Waters disqualified under s44(i) by the High Court of Australia? [C]
2. Some people might describe Ms Waters' disqualification as being harsh. Set out the reasons why her disqualification could be described in that way? [E]
3. Do you think that the High Court of Australia's decision was right in any event? [E]

Mr Barnaby Joyce

See paragraphs 104 to 111 of the judgment.

1. Explain how Mr Joyce was a New Zealand citizen? [C]
2. Mr Joyce had not been aware of the possibility that he held dual citizenship before enquiries in late July 2017 came to his attention, and Mr Joyce had never applied to become a New Zealand citizen. Nor had Mr Joyce sought or accepted any privileges as a citizen of New Zealand. Should any of these make any difference to the decision that Mr Joyce was disqualified by virtue of s44(i)? [E]
3. Mr Joyce renounced his New Zealand citizenship on 12 August 2017. Why was that renunciation insufficient to allow him to remain as a member of the Commonwealth Parliament? [C]





We have seen above how pursuant to s44 (i) that those persons who seek to be members of parliament are disqualified if they do not comply with the section. The response of Parliament to allegations that members of both major political parties and minor parties should be disqualified from sitting in parliament was a long-running issue in the 44th federal parliament. In fact, over the years, there have been quite a number of petitions to the High Court of Australia, and referrals by the Houses of Parliament to the High Court of Australia sitting as the Court of Disputed Returns, about sitting members. Some of these cases, other than those decided under the citizenship issue in s44 (i) are set out below.

Case Study

High Court of Australia (sitting as The Court of Disputed Returns)

1. Mr Rodney Culleton, 3 February 2017. Section 44 (ii)

Facts: The Senate referred the qualifications of Mr Rodney Culleton as a Senator for Western Australia to the Court of Disputed Returns. Prior to his nomination for election Mr Culleton had been convicted in his absence in the Local Court of New South Wales for the offence of larceny, making him liable to be sentenced for a maximum term of two years. The Court later granted an annulment of the conviction.

Legal Issue: Was Mr Culleton incapable of being chosen as a Senator as a consequence of his being convicted at the time he was chosen pursuant to s44 (ii)?

Decision: The Court of Disputed Returns ruled on 3 February 2017 that, at the date of the 2016 election, Mr Culleton was a person who had been convicted and was subject to be sentenced for an offence punishable by imprisonment for one year or longer, and that the subsequent annulment of the conviction had no effect on that state of affairs. It followed that Mr Culleton was incapable of being chosen as a Senator, and that there was a vacancy in the Senate for the place for which he had been returned.

2. Mr Philip Cleary, 25 November 1992. Section 44 (iv)

Facts: On 11 April 1992 Mr Philip Cleary, a teacher, had been on leave without pay at the time of nomination and polling, but had resigned from his teaching position before the declaration of the poll. A petition to the Court of Disputed Returns disputed the election on the ground that Mr Cleary had held an office of profit under the Crown by reason, inter-alia, of his being an officer of the Education Department of Victoria.

Legal Issue: Was Mr Cleary duly elected or was his election void because he held an office of profit under the Crown, at the relevant time pursuant to s44 (iv).

Decision: The majority judgment of the court, delivered on 25 November 1992, was that the word 'chosen' in s44 (iv) related to the whole process of being elected, which commenced from and included the day of nomination. Mr Cleary was therefore 'incapable of being chosen' because he was a permanent officer in the teaching service at the relevant time.

3. Mr Robert Day, 5 April 2017, Section 44 (v)

Facts: Mr Robert Day was a Senator for South Australia. On 7 November 2016 the Senate referred his qualification as a Senator to the Court of Disputed Returns. The Court Ruled on 5 April 2017 that, prior to and at the date of the 2016 Federal Election, premises leased by the Commonwealth for use by Mr Day as his electorate office had been owned by a company indirectly associated with Mr Day and the company had directed on 26 February 2016 that rental payments be made to a bank account owned by Mr Day.

Case Study ...

Legal Issue: Was Mr Day a person who had an indirect pecuniary interest in an agreement with the Public Service of the Commonwealth thereby making him incapable of being chosen or of sitting as a Senator as and from 26 February 2016.

Decision: The Court of Disputed Returns (the High Court) decided that the circumstances amounted to a breach of s44 (v), and that Mr Day was incapable of sitting as a Senator on and after 26 February 2016, making him ineligible for the 45th Parliament.

1. How are the cases of Culleton, Cleary and Day similar and different? [A]
2. What is the purpose of ss44 (ii), (iv) and (v)? In your opinion, in the case studies outlined above, have the decisions ensured that the Constitution has achieved what you consider to be its purpose? [A]

Research Task

1. Section 163 of the *Commonwealth Electoral Act 1918* (Cth) sets out the ways in which a person is incapable of being chosen or of sitting as a member of Parliament. Search the Act online and read the section. Outline the circumstances in which this section restricts eligibility or disqualifies a sitting member. [C] [S]
2. Go to s64 of the *Parliament of Queensland Act 2001* (Qld) which sets out the eligibility criteria an applicant must satisfy to be a candidate for election in the Queensland state government, as well as the criteria which disqualify a person from being eligible. Outline these criteria and compare them to those which apply to persons seeking to be members of the Commonwealth Parliament. [C] [S]

3.6 Cultural, ethnic and gender diversity in Australian parliaments

An important way of analysing representative government, is to focus on the background of members of parliament and how they have been elected. This can be a major issue for different groups, some of whom are minority groups in our community, and others who have significant numbers, but may be underrepresented or not represented at all. What, in fact, is the evidence?



Source 1

CULTURAL DIVERSITY IN THE 47TH PARLIAMENT

Of the 230 parliamentarians (153 Members and 77 Senators) who have served in the 47th Parliament to date, 59 parliamentarians have identified as having at least one non-English speaking ancestry (26%).

Aboriginal and/or Torres Strait Islander (8 Members and 3 Senators) and Italian (9 Members and 2 Senators) are the equal most common non-English speaking ancestries among 47th Parliament parliamentarians. The second most common is Greek (4 Members).

At the 2021 Census, 3.2% of the Australian population identified as Aboriginal and/or Torres Strait Islander in total (2.9% Aboriginal, 0.1% Torres Strait Islander, and 0.1% both Aboriginal and Torres Strait Islander). In comparison, 4.8% of the 47th Parliament identify as Aboriginal and/or Torres Strait Islander or as having Aboriginal and/or Torres Strait Islander ancestry.

Italian is the seventh largest ancestry in Australia. 4.4% of the Australian population identified as having Italian ancestry at the 2021 Census, compared to 4.8% of the 47th Parliament's MPs and Senators.

Chinese is the most common non-English-speaking ancestry and the fifth most common ancestry in Australia (after English, Australian, Irish and Scottish). 5.5% of Australians identified as Chinese or as having Chinese ancestry at the 2021 Census. In comparison, only 1.3% of the 47th Parliament or 3 parliamentarians have Chinese ancestry: ALP MP for Reid NSW Sally Sitou (Chinese-Lao), ALP MP for Tangney WA Sam Lim (Chinese/Malay) and ALP Senator for SA Penny Wong (Malaysian, Malaysian-Chinese).

1.3% of the Australian population identified as having Vietnamese ancestry at the last Census. Independent MP for Fowler Dai Le is the only parliamentarian with Vietnamese ancestry (0.4% of the 47th Parliament). Of note, the most common ancestry in the Fowler electorate is Vietnamese, with 18.9% of individuals residing in Fowler (NSW) identifying as Vietnamese.

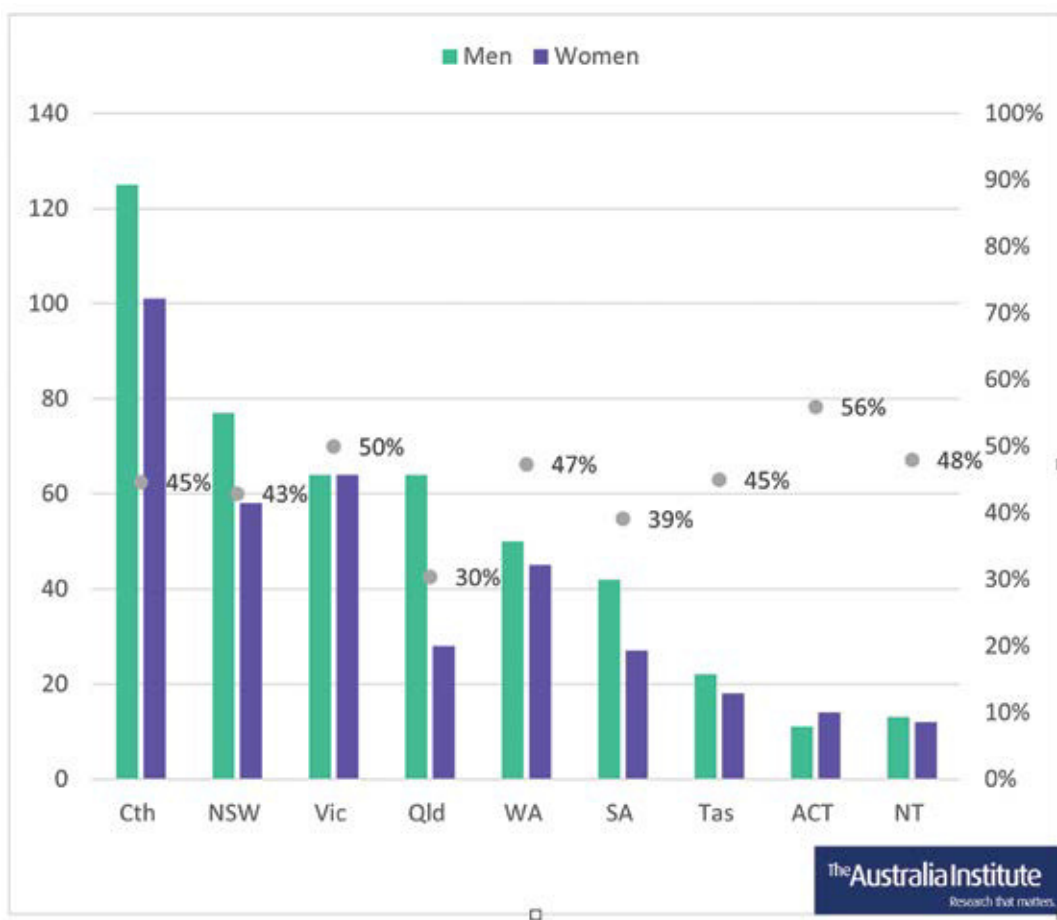
Lisa Richards, 'Cultural diversity in the 47th Parliament', *Parliament of Australia* (Document, 4 September 2023) <aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/rp/rp2324/Quick_Guides/CulturalDiversity47thParliament>.

Source 2

WOMEN STILL UNDERREPRESENTED IN AUSTRALIAN PARLIAMENTS

Women are underrepresented in seven of Australia's nine parliaments. Only in the ACT are there more women than men: 14 to 11. Victoria has exact gender parity, with 64 men and 64 women. In the Queensland Parliament, women are outnumbered more than two to one.

Figure 1: Women in Australian parliaments (as of January 2024)



Source: Laing and Hough (2024) Gender composition of Australian parliaments by party

Source: Laing and Hough (2024) Gender composition of Australian parliaments by party

Across the nine Australian parliaments, there are more women than men in only two parties: the Labor Party (50% women) and the Greens (63% women). The community independents, mostly women, were very successful at the 2022 federal election – but across Australia as a whole most independents are men, as are most minor party parliamentarians.

.....in 2015 both the Labor and Liberal parties set the same target: for 50% female representation by 2025. (The Liberal Party's junior coalition partner, the Nationals, do not appear to have a gender representation target.)

In none of Australia's nine parliaments do women make up half or more of the Liberal party room. Only 71 out of 228 of Liberal and LNP parliamentarians (31%) are women.

The Labor Party achieved gender parity two years ahead of its 2025 target...

By contrast, the Liberal Party has fewer women in parliaments than it did when it set its target of 50% representation...

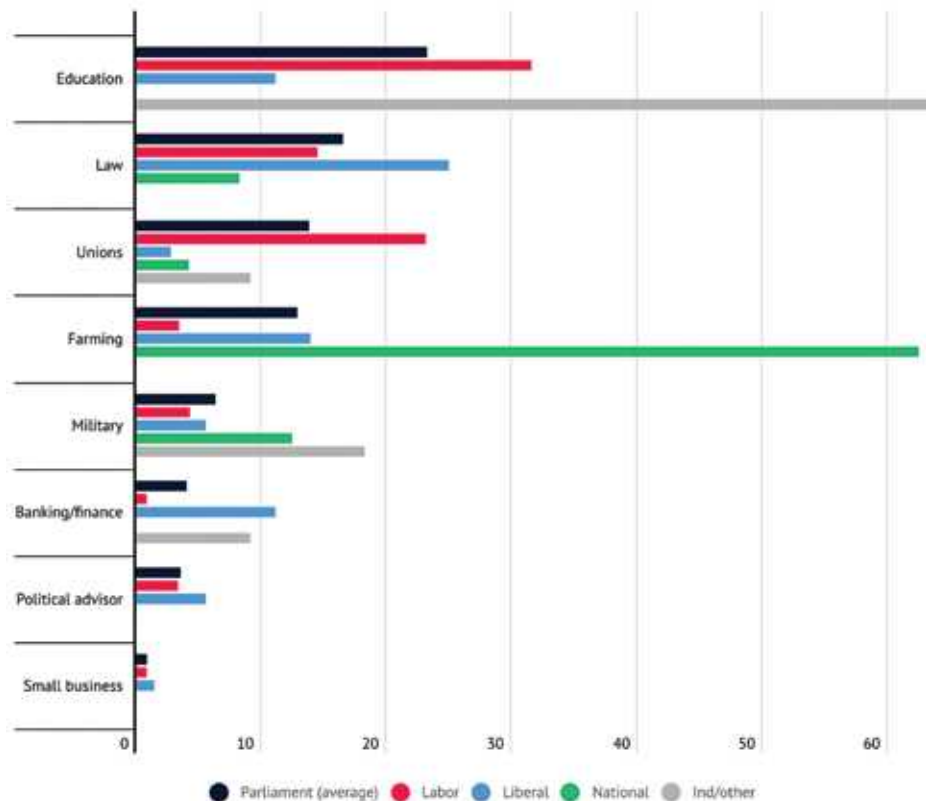
It is no secret what works. Labor brought in a pre-selection quota for women in 1994 (to be fully realised by 2002), followed by seat quotas in 2012.

Source: Bill Browne, 'Women still underrepresented in Australian parliaments', *The Australian Institute*, (Web Page, 5 March 2024) <australiainstitute.org.au/post/women-still-underrepresented-in-australian-parliaments/>.



Source 3

NO MORE DIVERSITY, LOTS MORE STAFFERS CONFIRMATION BIAS



Parliament is no more diverse than it was in 1988, as the government and opposition benches swell with white men, political staffers, unionists, lawyers and bankers... Only one side of politics, Labor, has made any real progress on female representation, but overall only a third of federal MPs are women-compared to 51% of the population. The Nationals have only added one female MP in 30 years... The results in the Per Capita report have prompted MPs from both sides of politics to speak out, warning **policy and politics is being compromised** by Parliament's **narrow perspective**, and **lack of empathy** and **real-world experience**.

Liberal MP Jason Falinski said...the ability of Australians to move into Parliament has atrophied over the last 30 years, creating a 'policy elite' that played political theory but did not understand real-world consequences. "It's not just people from staffing backgrounds, it's people from think tanks, it's trade union lawyers, investment bankers and management consultants," he said. "These are all the people who are beneficiaries of new laws. It has become the policy elite."

Outgoing Labor MP Emma Hussar said... Parliament needed fewer political 'lifers' who only ever had jobs in the party. (They do not) "give the ordinary punter any comfort that those who seek to represent them have an idea about their life ."

Gender

The change to female representation in Parliament was driven mostly by the ALP quadrupling its female representation through quotas. The Liberal party increased its female representation from 9.4% to 22.6% without them.

Source: Eryk Bagshaw, 'No more diversity, lots more staffers', *Sydney Morning Herald*, (Online, 19-20 January 2019), <smh.com.au/politics/federal/parliament-is-no-more-diverse-now-than-it-was-in-1988-as-political-staffer-ranks-explode-20190116-p50rol.html>.

Source 4

PRE-SELECTING CANDIDATES FOR ELECTION

A person who wishes to stand for election simply needs to meet the qualifications required under the relevant electoral act, whether state or federal, make application and pay the nomination fee. In practice it was quite unusual for people to do this without belonging to a political party. Persons who stand for election and are not members of a political party are called Independents. In the 2022 federal election a significant number of independents were elected. This may continue to happen. However, the members of the relevant political party in an electorate decide who the candidate will be to represent their party in their electorate. There are various methods by which political parties do this, some more directly democratic than others. For example, a plebiscite of all members of the party in the particular electorate. In other cases the members are represented by committees which send individuals to a body which considers the applicants and decides who the candidate will be. This sometimes leads to conflict between the individual party members and those persons who have power in the party. Clearly at this level, the choice of a candidate, will significantly determine the composition of the Commonwealth and State Parliaments, as well as Local Government Authorities.

Preselection and the law

The political parties have constitutions by which they operate, and sets of rules which the members must follow when conducting preselections. These rules vary from party to party, and have occasionally been subject to the jurisdiction of the court.

In *Cameron v Hogan* (1934) 51 CLR 358 (*Hogan's case*), the High Court held that the rules of the Victorian Labor Party were merely a social agreement and not an enforceable contract. An essential element of the contract was missing. There was no evidence in the rules that the members of the party intended them to be enforceable in a court of law. The High Court relied on 19th-century English authorities which had decided that agreements to associate for scientific, philanthropic, social, or religious purposes were not agreements which courts of law could enforce in the absence of clear intentions to the contrary. The High Court overturned a decision in favour of Mr Hogan in the Supreme Court of Victoria, where he sought relief against the Central executive of a voluntary association called the 'Australian Labor Party State of Victoria'.

Since *Cameron v Hogan* it has become common to incorporate clubs and societies because of the protection incorporation provides to the members against legal action for negligence. It is also simpler to operate the financial affairs of a club or society when incorporated. As a result, where incorporation has occurred any dispute will be subject to the enforceability of the rules in the courts. Political parties have not followed this trend. There have been quite a number of cases which suggest that the High Court's original decision may be distinguished, but this question is yet to be decided by the High Court.

One case which distinguished *Hogan's case* was the Queensland case of *Baldwin v Everingham* (1993) 1 QdR 10 (Dowsett J) 10 January 1992 (*Baldwin's case*). Dowsett J decided on the basis of 1983 amendments to the *Commonwealth Electoral Act* to allow public funding of political parties election expenses, that legislative recognition made the rules of registered political parties enforceable at the behest of any and every member, whether or not electoral funds are in issue. Mr Baldwin brought an action against the Liberal party executive committee because he was excluded as a nominee for preselection for a federal electorate. Dowsett J said:

for a very long time the Parliamentary system functioned upon the assumption that parties had no official status... such is no longer the case... On general principles, where

an albeit voluntary association fulfils a substantial public function in our society, it may appear indefensible that questions of construction concerning its Constitution should be beyond judicial resolution.

1. On what factual circumstances did the Hon Justice Dowsett rely to distinguish the High Court of Australia case of *Cameron v Hogan*? [C] [A]
2. Should political parties be left to run their own disputes about party rules, or is legal action in courts a legitimate means of ensuring fairness in pre-selections? [A]

Source 5

DILEMMAS OF REPRESENTATION

Different concepts of representation have shaped Australia's evolution as a parliamentary democracy. Currently there is renewed debate over both principles and practice of representation coinciding with a loss of faith by many citizens that their views are being represented in Australia's parliaments. Some citizens are attracted to forms of plebiscitary democracy, such as Citizen Initiated Referenda or CIR, that sideline the role of the representative and solve in this way the perceived gap between the policy preferences of policy elites and of the public. Others advocate quotas for women, reserved seats for indigenous Australians, increased representation of Australians from non-Anglo backgrounds or of those with disabilities, to make parliaments more representative.

In this chapter, I examine changing concepts of representation, ... I suggest that the Senate is well positioned to become a guardian, as well as an exemplar, of more inclusive forms of representative democracy.

Source: Marian Sawers, 'Dilemmas of representation', Parliament of Australia, (Web Page, Date Unknown) <aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop34/c07>.

Practical Application

Using Sources 1-5, and any other research you have completed yourself on representative democracy in Australia, answer the following questions:

1. Describe the main features of representative democracy in Australia. [C]
2. Identify and describe any areas which are of concern to you in your answer to Question 1. Analyse your concerns. In your answer you should consider these areas both in their historical context and in their present character. [A]
3. What do you think is meant by 'underrepresentation' in Australian democracy? Can you identify any groups of people in the community you regard as being underrepresented? Can you give examples where this has happened and explain how it has occurred? Is there justification for this underrepresentation? [A] [E]



Tip

Each of the Sources 1-5 can be accessed by using the references provided, and there are longer readings available in each, which may build on your knowledge, and extend the scope of your answers.

Review

Comprehend

1. **Describe** the following:

a. Democracy	f. The Commonwealth Parliament
b. Direct democracy	g. The Crown
c. Representative democracy	h. The Executive (Cabinet)
d. Gerrymander	i. The Australian Electoral Commission.
e. The Queensland Parliament	j. The Queensland Electoral Commission
- [C]

Comprehend, analyse and evaluate

1. **Describe** the current involvement of Aboriginal and Torres Strait Islander Peoples in the electoral system, and the role of the Commonwealth Electoral Commission in achieving high levels of enrolment on the electoral role and voting in elections. Present legal alternatives to ensure electoral participation by Aboriginal and Torres Strait Islander Peoples in the electoral system.

[C] [E]
2. Outline the arguments for and against a policy which provides for a quota system for preselection of women candidates in a political party. **Decide** the position that you think is appropriate in the current Australian political system, and **justify** using legal criteria.

[A] [E]
3. **Describe** and **explain** 'underrepresentation', using examples from the Australian democratic system. **Analyse** and **evaluate** how significant this is in the system. What does the future hold for Australian democracy and its institutions?

[C] [A] [E]

Governance in Australia

Chapter 4: Responsible government

- 4.1 The concept of responsible government
- 4.2 Forming government in Australia
- 4.3 Parliament
- 4.4 Governor-General
- 4.5 Other mechanisms of accountability in parliament

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
 - the concept of responsible government
 - accountability of parliament and the rule of law
 - the role of the King (represented by the Governor-General or Governor), and the upper and lower houses of parliament
 - the implications of single majority, double majority and minority governments.

4.1 The concept of responsible government

Key Term

Responsible government: a principle that the executive government (the prime minister and key ministers) are responsible and accountable to the parliament.

Some of the central components of our system of government (such as the principle of responsible government we will learn about in this chapter) are not specifically defined within the pages of our founding document but come from custom and convention (unwritten rules developed over a long period of time) that come from the Westminster system.

In the *Australian Capital Television Pty. Ltd and Others and The State of New South Wales v The Commonwealth of Australia and Another* [1992] HCA 45, (1992) 177 CLR 106, Sir Anthony Mason AC KBE CBE KC (then Chief Justice of the High Court of Australia) explained the concept of responsible government when he wrote (emphasis added):

*It is true that no attempt was made to spell out what responsible government entails—but there is sufficient to make it readily apparent that the system that was adopted was that of **responsible government, that is, the system by which the executive is responsible to the legislature and, through it, to the electorate...the principle of responsible government was described as pervading the Constitution...***

Thus, in addition to asking the people to elect their representatives (which is one way the effectiveness of a government is judged), the parliament as a whole is responsible for holding the government to account.

This chapter will examine the concept of responsible government by looking at:

- who is the government,
- how government is formed,
- the critical roles within the government,
- how the government interacts with, and is held accountable by the legislature and the judiciary, and
- other ways the government is held accountable for its actions or scrutinised.

While this chapter focuses on Australia, many of these concepts are seen and applied in every State and Territory, including Queensland.

To learn more about Queensland Parliament visit parliament.qld.gov.au

4.2 Forming government in Australia

The government

Approximately every three years (sometimes sooner) we vote to elect a person (called a member of parliament) to represent us in the Parliament of Australia. At the same time, we also elect a government.

But, what is a 'government'? In Australia, the government is:

- the political party or coalition of parties **with the most seats** which also equals the majority of members of parliament in the House of Representatives (called a majority government), or
- in circumstances whereby an election does not give a clear majority, **the political party (or coalition of parties) with the most seats can gain the support of the majority of members of parliament in the House of Representatives** (called a minority government) to form government.

We will now examine the implications of the different forms a government can take using an inquiry approach.

In Queensland, an election is held every four years on the last Saturday in October. In Queensland, the government is:

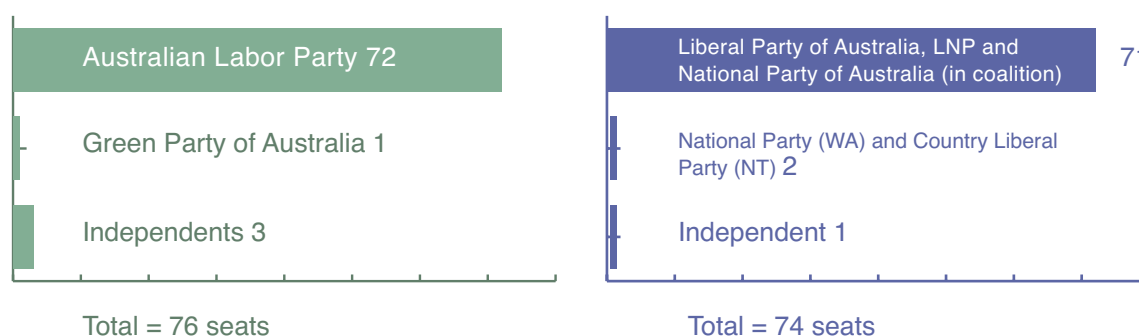
- the political party **with the most seats** which also equals the majority of members of parliament of the Legislative Assembly (called a majority government), or
- in circumstances whereby an election does not give a clear majority, **the political party with the most seats can gain the support of the majority of members of the Legislative Assembly** (called a minority government).

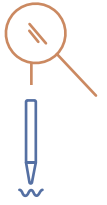
Inquiry Focus

In what ways do majority and minority governments influence the legislative process, policy outcomes, and the stability of governance within a democratic system?

Practical Application

43rd Parliament of Australia





Practical Application ...

After the 2010 election Labor was entitled to **form a minority government**, as it gained the support of the Green Party of Australia and three Independents.

47th Parliament of Australia



After the 2022 election Labor was able to form government as it held the majority of seats in the House of Representatives.

1. How many seats are found in the House of Representatives? [C]
2. How many seats would a party require to form a majority government in Australia? [C]
3. In 2010, how many seats did the Labor Party of Australia win? Were they able to form a majority government? If not, what did they do? [C]
4. Which party won the most seats in the 2022 Federal election? Were they able to form a majority government? Explain. [C]

Majority government

As you learnt previously, majority governments occur when one political party (or a coalition) can form government. As Australia has a two-party system, this means either:

- the Labor Party of Australia will form government, or
- a coalition made up of the Liberal Party of Australia and the National Party of Australia will form government.

The 47th Parliament of Australia saw the Labor Party of Australia form government without needing the support of minor parties or independents.

This has many benefits, as it means that the government can easily pass any proposed laws (called bills) through the House of Representatives; although a bill's passage through the Senate is not guaranteed as it's rarer to hold a double majority. **A double majority occurs when a political party has the majority in both the House of Representatives and Senate.** Former Canadian public servant Daniel Gagnier wrote in 2011:

There is little doubt that majority governments allow for more freedom of action both on commitments and political priorities.

Arguments often raised in favour of majority governments

- Majority governments are more stable, as the majority of members of parliament hold the same political ideology, support the same policy agenda and will retain the confidence of the lower house for the entire term of parliament.
- Majority governments are able to pass legislation more quickly, as the government does not have to negotiate with other parties or make compromises.
- Majority governments have the support of most Australians, which gives the government the confidence to implement its election promises.

Overall, a majority government is often perceived as providing the stability, efficiency, and accountability necessary for effective governance.

What do you think?

Are majority governments effective at providing 'good governance' in Australia? Ensure you use legal criteria to support your point of view. [E]

The growth of minority governments?

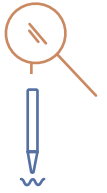
In Australia we have long had a dominant two-party structure. This means most seats are held by either a member of the Labor Party of Australia, or the Liberal Party of Australia and the National Party of Australia (who form a coalition). This has often meant we have elected majority governments. However, in many recent Australian and State elections, voters are electing more representatives from minor parties or independents, which may cause more frequent incidences of minority governments.

In the following activity you will explore the reasons behind the growth of minority governments and the implications of this type of government.

Practical Application

Read Sources 1 to 5 and answer the following questions, ensuring you correctly cite the source you are using.

1. Explain the reason(s) why some people believe minority governments may become more common in the future. [C]
2. Identify an example of a majority government in Australia. Who was the prime minister? [C]
3. What is a double majority government? Identify an example of a double majority government in Australia. Who was the prime minister? [C]
4. Create a table that summarises the benefits and disadvantages of a minority and majority government in Australia raised by all the sources. [C]
5. Identify which groups of people are likely to hold the viewpoint that minority governments are not a positive outcome. Analyse one of these viewpoints, examining the reasons why this person may hold this point of view and its implications. [A]
6. If you were the Prime Minister of Australia, would you prefer to lead a majority or minority government? Justify your position. [E]



Practical Application ...

Source 1

FROM 'UNSTABLE' TO 'STABLE' MINORITY GOVERNMENT: REFLECTIONS ON THE ROLE OF THE NATIONALS IN FEDERAL COALITION GOVERNMENTS

In contrast to some other jurisdictions, in Australia, governments relying on minor parties and independents to enact policies and especially to hold power, are readily characterised by oppositions and commentators as unstable, even chaotic and an undesirable deviation from the stability of majority parliaments.

Source: Linda Botterill and Geoff Cockfield, 'From 'Unstable' to 'Stable' Minority Government: Reflections on the Role of the Nationals in Federal Coalition Governments' (2015) 61(1) *Australian Journal of Politics and History*, 53 <<https://doi.org/10.1111/ajph.12086>>.

Source 2

MINORITY GOVERNMENT IN AUSTRALIA

The minority government is sustained by independents, and at times by minor parties, backing all budget (supply) bills, and by not partaking in votes of no confidence sufficient to bring it down. This chapter reviews the experience of the 2010–13 Labor minority government, the most substantive federal minority government to date. It never lost a vote, ran full term, and was a reformist government, and Australia's most legislatively successful federal government; but it failed to be re-elected and its supporters largely suffered in its aftermath.

Source: Kate Crowley and Cath Hughes, 'Minority Government in Australia: Lesson Learning and Making It Work', in Bonnie N Field, and Shane Martin (eds), *Minority Governments in Comparative Perspective, Comparative Politics* (Oxford, 2022; online edn, Oxford Academic, 17 Nov. 2022), <<https://doi.org/10.1093/oso/9780192871657.003.0014>>.

Source 3

MINORITY GOVERNMENT FEAR CAMPAIGN

Effective minority government is common around the world. It is a form of government which depends on compromise and negotiation and can deliver more inclusive outcomes. At the same time it can be slower, apparently messier and less decisive. It can also give too much power to individual MPs.

Those who don't like minority government include the major parties which prefer a two-party system with government alternating regularly between the two...The big parties don't like any interference with executive government when they hold the reins of power.

Australia doesn't have a true majoritarian system anyway. It has a bicameral system with two chambers of parliament, the House of Representatives and the Senate. At any one time there are many power possibilities and we have had most permutations and combinations recently.

The Howard majority government also controlled the Senate in 2005-2007.

The Rudd majority government lacked Senate control in 2007-2008 as did the Abbott majority government in 2013-14.



Practical Application ...

The Gillard minority government had effective Senate numbers with Greens support in 2010-2013.

The Abbott-Turnbull majority governments lacked Senate support in 2014-2016.

Source: John Warhurst, 'Minority government fear campaign', *Sydney Morning Herald* (Online, 18 May 2016) <smh.com.au/opinion/minority-government-fear-campaign-20160518-goxm5u.html>.

Source 4

THE ERA OF MAJORITY RULE IS ENDING. HERE'S WHAT HAPPENS NEXT

An ethnically diverse society – less amenable to political labelling – is leading a profound shift from the old two-party divide towards European-style minority government.

According to one negative scenario, minority politics Australian style would boil over into a political stew full of contentious issues such as energy, housing, immigration, tax and gender.

However, there's another view. Dr Peter Chen, a senior lecturer in politics at Sydney University, argues many Australians are 'more amenable' to consensus or minority-style politics while journalists 'maintain majoritarianism as a universal political value'.

Source: Andrew Clark, 'The era of majority rule is ending. Here's what happens next', *Australian Financial Review* (Online, 28 March 2024) <afr.com/politics/federal/the-era-of-majority-rule-is-ending-here-s-what-happens-next-20240325-p5ff4d>.

Source 5

OPINION: NSW MINORITY GOVERNMENT IS A SIGN OF THE TIMES

In the Australian political system, governments depend on the 'confidence', or support, of most members of the lower house of parliament. When one party holds a majority of the seats, this is easy enough – its leader becomes Premier or Prime Minister. When no party holds a majority of the seats, the Premier or Prime Minister relies on the confidence of one or more crossbench parliamentarians.

This allows for alternative points of view to be ventilated and for legislation to be considered from the perspective of voters outside of Labor's constituency.

It is good that minority governments can be productive and constructive, because Australians can expect more of them in the future.

As mapped by veteran election watcher and politics expert Ben Raue, the vote for major parties in federal elections is at an all-time low, down from about 90 per cent in the 1960s to 69 per cent at last year's election.

Minority governments can deliver important and enduring reforms.

When the crossbench holds the balance of power, it can hold up legislation, but that can lead to that legislation being improved – or rejected if it is not up to scratch.

Source: Bill Browne, 'NSW minority government is a sign of the times', *The Australian Institute* (Online, 2 April 2023) <australiainstitute.org.au/post/nsw-minority-government-is-a-sign-of-the-times/>.

Regardless of whether Australia has a majority or minority government, **the cornerstone of forming a government is that it holds the confidence of the parliament as a whole.** This crucial element forms the basis of responsible government.

What do you think?

Decide whether having a majority or minority government supports the concept of a 'responsible government' more effectively, or are both equally effective. Justify your viewpoint using legal criteria. [E]

The prime minister, ministers and cabinet

The prime minister

You may have heard in the news the phrase, '*Albanese Government*' or '*Morrison Government*'. This suggests that a person, called the prime minister, is an essential feature of a government. **The prime minister is the leader of the Australian Government.** The position is not mentioned in the *Constitution*—instead, it is governed by conventions. After an election, the Governor-General calls on the leader of the political party who can form government and commissions him or her to be prime minister.



Anthony Albanese, the 31st Prime Minister of Australia.

What do you think?

Based on what you know so far about the principle of 'responsible government' in what ways do you think the principles of responsible government can both empower and constrain political leaders? [A]

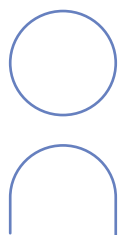
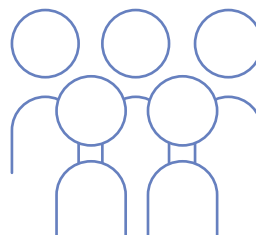
The **prime minister is also the leader of the political party that wins government**—he or she is not chosen by the people of Australia.

In Queensland the Premier is the leader of the government. The Premier is also the leader of the political party that secures the most seats in the Legislative Assembly.

The ministry and the cabinet

After an election is held and a result is called, the prime minister and their ministry visit the Governor-General at Government House to receive their appointments and swear an oath of allegiance. **A minister is a member of the government who oversees a portfolio.** In the 47th Parliament of Australia the Hon. Penny Wong was the Minister for Foreign Affairs, and the Hon. Dr Jim Chalmers was the Treasurer of Australia. The *Ministers of State Act 1952* (Cth) s4(b) allows up to 30 ministers to be appointed.

A selection of top-level ministers, along with the prime minister, meet regularly to develop policy and make decisions about issues facing Australia. This is called the cabinet.

The Cabinet**Prime Minister****Key Ministers****Practical Application****Source 1****HISTORIC FIRSTS AS ALBANESE'S NEW CABINET IS SWORN IN**

Anthony Albanese's new cabinet has been sworn in at Government House in Canberra.

Governor-General David Hurley swore in Labor's new ministry, which includes a record number of women and MPs from non-Anglo backgrounds.

Mr Albanese's 30-member cabinet was announced on Tuesday night. It includes 13 women.

Source: The New Daily, 'Historic firsts as Albanese's new cabinet is sworn in', *The New Daily* (Online, 1 June 2022) <thenewdaily.com.au/news/politics/australian-politics/2022/06/01/albanese-cabinet-sworn-in>.

Source 2***Commonwealth of Australia Constitution Act 1901 (Cth)*****42 Oath of affirmation of allegiance**

Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

Schedule**Oath**

I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. SO HELP ME GOD!

Affirmation

I, A.B., do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE – The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time).

Practical Application ...

1. Describe the event occurring at Government House in Source 1? [C]
2. Identify how many ministers form Anthony Albanese's cabinet. [C]
3. To whom do ministers swear an oath or affirmation to? [C]
4. To whom do you think ministers should be responsible? Why? [E]

Although we will apply the principle of 'responsible government' to different situations later, in 2020 and 2021, then Prime Minister Scott Morrison appointed himself to ministry positions that were already held by members of his Cabinet.

Practical Application

MORRISON'S MULTIPLE MINISTRIES LEGAL BUT FLOUTED PRINCIPLE OF 'RESPONSIBLE GOVERNMENT': SOLICITOR-GENERAL

Scott Morrison's action in having himself appointed secretly to multiple ministries was legal but breached 'the principle of responsible government', according to advice from the Solicitor-General, Stephen Donaghue.

The solicitor-general said the constitution's section 64 empowered the governor-general to appoint multiple ministers to administer a single department.

But under responsible government, outlined in chapter II of the constitution, the executive was responsible to parliament and, through it, to the electorate.

'It is impossible for the Parliament and the public to hold ministers accountable for the proper administration of particular departments if the identity of the Ministers who have been appointed to administer those departments is not publicised.'

Governor-General David Hurley has come under public criticism for apparently not questioning the strange arrangement Morrison was making.

The solicitor-general noted, 'The governor-general has no discretion to refuse to accept the prime minister's advice in relation to such an appointment.'

Source: Lukas Koch and AAP, 'Morrison's multiple miniseries legal but flouted principle of 'responsible government': solicitor-general', *The Conversation* (Online, 23 August 2022) <theconversation.com/morrisons-multiple-ministries-legal-but-flouted-principle-of-responsible-government-solicitor-general-189227>.

1. What did Scott Morrison do in 2020 and 2021? [C]
2. Did Scott Morrison's actions breach the law? [C]
3. Describe the Governor-General's role in this situation. [C]
4. Locate and select information from *Commonwealth of Australia Constitution Act 1901* (Cth) s64 that supports the viewpoint that it gives the Governor-General the power to appoint multiple ministers to a single department. What level of power does it appear they possess and what are the implications of this on the application of the concept of responsible government? [S] [A]
5. Explain the relationship between *Commonwealth of Australia Constitution Act 1901* (Cth) Chapter II, s64 and the concept of responsible government, as described by the Solicitor-General, Stephen Donaghue. [A]

4.3 Parliament

Key Term

Rule of law: the doctrine that all people are equal before the law, and that the government is subject to the law; a concept implying the subordination of the three arms of government (the executive, the legislative and the judiciary) to legal process, and the equality of all before the law; the absence of arbitrary executive power.

Commonwealth of Australia Constitution Act 1901 (Cth)

1 Legislative power

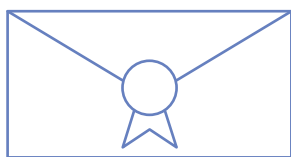
The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth.

The *Constitution* gives legislative power to the Parliament (s1). The Australian Parliament is made up of:

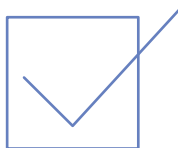
- the King or Queen (represented by the Governor-General)
- the Senate and the House of Representatives.

The relationship between the government and parliament is the foundation of responsible government. Responsible government means that the prime minister and ministers (who form the executive government) are responsible and accountable to the parliament.

The role of Australian Parliament



Makes, repeals or amends law



Represents the people



Forms government



Scrutinises the government

The government can only remain in power if it holds the confidence of the parliament. We are going to use an inquiry approach to find out what this means.

Inquiry Focus

Does losing a vote on the floor of the House of Representatives always mean a sitting government has lost the confidence of parliament?

What does 'confidence' in the parliament mean?

Responsible government ensures ministers (the executive) are held accountable to the parliament (the legislature). This is the separation of powers in action—an important feature of the rule of law. To remain in government, a political party must maintain the confidence (or support) of the House of Representatives.

To understand this further let's analyse a legal situation that occurred in 2018.

Practical Application

Source 1

28 March 2018

Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 is introduced and read for the first time in the House of Representatives.

20 August 2018

The Bill is passed by the House of Representatives. The First Reading of the Bill occurs in the Senate.

6 December 2018

The Senate passes the Bill with a number of amendments.

12 February 2019

The House of Representatives agrees to the amendments made by the Senate. The House of Representatives also make amendments to the Bill.

13 February 2019

Senate agrees to the amendments. The Bill passes both Houses of Parliament.

1 March 2019

Governor-General gives the Bill royal assent.

A brief summary of the legislative history of the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018, now *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth).

1. What law was passed by the House of Representatives? [C]
2. Explain what occurred in the Senate and the impact of its actions on the Bill. [C]

Source 2

PRIME MINISTER SCOTT MORRISON TALKS DOWN THREAT TO COALITION AFTER LOSS IN PARLIAMENT VOTE

The future of the Coalition's hold on power is at risk with the Federal Government becoming the first to lose a vote on its own legislation in almost 80 years.

The majority of the crossbench and Labor joined forces in the House of Representatives to pass amendments to give doctors a greater say on refugee medical evacuations.



Practical Application ...

But Prime Minister Scott Morrison has so far refused to buckle to calls for an early election and insists the Coalition retains the ability to govern.

The amendments that passed the House were agreed to by the Senate late last year, after Labor and the crossbench forced a series of measures into a government migration bill. Labor secured the support of most of the crossbench to win the Lower House vote 75 to 74 on the first sitting day for 2019.

Attorney-General Christian Porter presented legal advice from solicitor-general Stephen Donaghue at the last minute, suggesting the amendments agreed to by the Senate would be unconstitutional.

Manager of Opposition business Tony Burke would not rule out moving a vote of no confidence in the Government, to force an early election.

Source: Brett Worthington, 'Prime Minister Scott Morrison talks down threat to coalition after loss in parliament vote', *ABC News* (Online, 12 February 2019) <abc.net.au/news/2019-02-12/federal-government-loses-a-historic-parliamentary-vote/10804770>.

1. Explain the nature of the amendments passed by the Senate. [C]
2. Identify which political groups or individuals were behind these amendments. Were these groups part of the government? [C]

Source 3

CONSTITUTIONAL PRECEDENTS ARE NOT 'BUBBLE NONSENSE'

'I am not going to be distracted by all the frankly – I know you don't like the phrase – but the bubble nonsense of people going on about all sorts of precedents, all the rest of it.'

But those precedents, and the constitutional conventions that they illustrate, are essential to the very existence of governments and our parliamentary system of responsible government. This is not 'bubble nonsense' – it is fundamental to the right to govern.

There are no express words in the constitution to say it, but our constitutional system operates on the basis that the government must hold the confidence of the lower house of the Parliament. Critical to confidence and the ability to govern are control over the budget and the ability to secure supply. That is why, in 1941, the Fadden government resigned after its budget was reduced by a symbolic amount of £1. It wasn't the loss of £1 that counted – it was the symbolic loss of control.

It is also why the government's attempt to characterise the Senate's medivac amendments as turning the bill into a money bill was a high-risk manoeuvre. If the bill had passed in that form, there would have been a serious argument that the government had lost control over the budget, threatening its right to continue governing. The amendment moved by Labor to remove the money aspect of the bill rescued the government from that fate.

Labor made a strategic move to avoid turning the bill into a test of confidence in the government, withdrawing part of the medical transfer scheme that required funding to pay for medical experts to review transfers.

Practical Application ...

The move cut short a furious debate over whether the vote in the lower house could be seen as a vote on a money bill and was therefore a vote of no confidence in the government itself.

Source: Anne Twomey, 'Constitutional precedents are not 'bubble nonsense'', *The Sydney Morning Herald* (Online, 13 February 2019) <smh.com.au/politics/federal/constitutional-precedents-are-not-bubble-nonsense-20190213-p50xgs.html>.

1. Explain the event that occurred in 1941. What was the impact of this event and how does it demonstrate the concept of responsible government in action? [C]
2. What strengths and weaknesses does this situation expose about the reality of responsible government? [A]
3. Decide whether you believe the Morrison Government lost the ability to govern. Justify your response. [E]

Research Task

1. Locate the *Commonwealth of Australia Constitution Act 1901* (Cth) s57. What occurs if the Senate and House of Representatives disagree? [C] [S]
2. Select a secondary source of information to find out what a 'no confidence' motion is and its implications for a government. Could the opposition move a motion of no confidence in this case? [S] [A]

4.4 Governor-General

Key Terms

Double dissolution: When the Governor-General, on the advice of the prime minister, dissolves both the Senate and House of Representatives for an election. The process of a double dissolution is outlined in *Commonwealth of Australia Constitution Act 1901* (Cth) s57.

Joint sitting: A joint sitting involves all members and senators voting together on a proposed law that the two houses have been unable to agree on previously.

Who is the Governor-General?

Commonwealth of Australia Constitution Act 1901 (Cth)

2 Governor-General

A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.



Australia is a constitutional monarchy. This means our Head of State is King Charles III. He is also the head of the Commonwealth of Nations (or Commonwealth). As the Commonwealth comprises many nations, he chooses a person to represent him in Australia, the Governor-General (s2). This appointment is made on the recommendation of the prime minister.

Practical Application

NEW GOVERNOR-GENERAL SAM MOSTYN AND THE BATTLE FOR RELEVANCE

The appointment is a testament not just to her own credentials but also to the need to modernise the office of the governor-general, experts say.

...

'The office is well past the point of needing modernisation ... the governor-general [role] sits uneasily with conceptions of what it means to be a modern democracy,' UNSW Scientia Professor and constitutional law expert George Williams says.

Mostyn is 'an innovative and different appointment', he says, after the prime minister rewarded a more modern form of public service (business and community work). Governor-generals tend to have military, judicial or political backgrounds.

Though there's still a long way to go on modernising the role, Williams says Mostyn's appointment has 'got people interested' at a time when engagement is trending ever lower.

Source: Hannah Wooton and Sally Patten, 'New governor-general Sam Mostyn and the battle for relevance', *Australian Financial Review* (Online, 5 April 2024) <afr.com/politics/federal/sam-mostyn-a-more-modern-governor-general-20240404-p5fhjl>.

1. Who was appointed Australia's Governor-General in 2024? [C]
2. Identify the usual career background our past Governor-Generals have tended to hold prior to their appointment. [C]
3. UNSW Scientia Professor and constitutional law expert George Williams says, the '[role] sits uneasily with conceptions of what it means to be a modern democracy'. Do you agree or disagree with his viewpoint? Explain your decision. [E]

The role and powers of the Governor-General

The Governor-General's role and duties are contained within:

...the Constitution, some by the Letters Patent and his [or her] Commission. Others are placed on him [or her] by Acts of the Commonwealth Parliament. Others come to him [or her] by conventions established in past centuries in Great Britain or by practices and customs that have developed in Australia.

Sir Paul Hasluck, *The office of Governor-General* (Melbourne University Press, 1979) 10.

These documents reveal that the Governor-General has:

- constitutional duties, such as giving Royal Assent to bills passed by parliament, and
- ceremonial duties, such as representing the King at remembrance ceremonies.

They also travel extensively throughout Australia to visit towns and cities to attend celebrations of important events and anniversaries.

Although the Governor-General is a critical person in both the legislative and executive arms of government, he or she acts on the prime minister's and ministers' advice. You saw an example of this earlier in the chapter when Governor-General David Hurley appointed Scott Morrison to ministerial positions already held by others in his cabinet.

However, **the Governor-General also possesses distinct powers that grant them the ability to act autonomously when necessary. These reserve powers empower them to make decisions without the need for ministerial advice.** Such powers can encompass the authority to:

- appoint the times for the holding of sessions of parliament (s5)
- dissolve or refuse to dissolve the House of Representatives (s5)
- issue writs for general elections of the House (s32)
- dissolve parliament or convene a joint sitting of both Houses (s57)
- assent to bills, withhold the assent of a bill or reserve bills for the Queen's (or her successors) assent (s58)
- appoint or dismiss ministers (s64).

These powers can form an essential feature in upholding responsible government. But, under what circumstances might a Governor-General not take the prime minister's or minister's advice? Constitutional experts cannot provide a clear answer. Still, the analysis of an event that occurred in 1975 may help you further understand how the legal concept of responsible government works in practice and the role of the Governor-General in this situation.

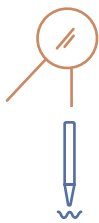
Inquiry Focus

What can a Governor-General do if the government loses the confidence of the parliament?

What powers does the Governor-General possess?

As you learned previously, the Governor-General has a range of powers. Some of these powers are regularly used, such as providing Royal Assent to a bill so it can become a law, appointing a minister or issuing a writ for an election. All these decisions are usually made on the advice of the prime minister or a minister. But, our *Constitution* also allows the Governor-General to act without advice—such as when a government loses confidence or becomes untenable. Under these circumstances the Governor-General can dismiss a prime minister if he or she loses support of the House of Representatives, resigns after losing a vote of no confidence, or if there is no clear majority, after an election is held. He or she can also dissolve the House of Representatives or both Houses.

To understand what a Governor-General can lawfully do if the government loses the confidence of the parliament we will analyse a legal situation that occurred in 1975. In that year, the Governor-General dismissed a prime minister (and the government he led) despite the fact the prime minister had the support and confidence of parliament and had been democratically elected.



Practical Application

Source 1

Gough Whitlam's public reaction to the dismissal of his government:

'Ladies and gentlemen, well may we say 'God Save the Queen', because nothing will save the Governor-General. The proclamation you have just heard was countersigned Malcolm Fraser, who will go down in history as Kerr's cur.'

Gough Whitlam, November 11, 1975

Source 2

A summary of the 1975 dismissal

In 1974 Prime Minister Gough Whitlam requested the Governor-General to dissolve both houses of Parliament (s57) as the Senate had refused to pass six Bills on two occasions. Whitlam won the election, but the Senate again rejected the Bills that had caused the election to be called. Consequently, the Governor-General called for a joint sitting of the Senate and House of Representatives. This is the only time the Australian Parliament has held a joint sitting of both houses. As the Whitlam government held the majority of all the combined votes, the Bills were passed.

In November 1975 the Governor-General, Sir John Kerr, sacked the sitting Prime Minister Gough Whitlam. He made this decision after the Senate deferred the passage of a bill needed to finance the government. The Senate was dominated by the Liberal and Country (now National) parties, who had formed an alliance. The Democratic Labor Party (DLP), who had five members, often voted with them. A double dissolution election was held and the Whitlam Government was defeated.

This was a significant political event as it was the first time a Governor-General had:

- firstly, removed a Prime Minister of Australia, and
- secondly, a prime minister was removed who held the support and confidence of the House of Representatives.

It remains the only example in Australian history where a prime minister was sacked from office. Although at the time many Australians called for the system to be changed, the Governor-General retains this power, and it can be used today if required.

Source 3

AUSTRALIAN POLITICS EXPLAINER: GOUGH WHITLAM'S DISMISSAL AS PRIME MINISTER

What was its impact?

The reaction was relief for some, and outrage for others. The public and the media, being unfamiliar with constitutional history and the role and powers of vice-regal representatives, saw the Dismissal as unprecedented and shocking.

Practical Application ...

Many people were influenced by the events of 1975 to support a republic, due to their objection to an unelected representative of the Queen dismissing an elected government that had majority support in the lower house.

Others saw 1975 as revealing the importance of the Senate's power to block supply, and the need for the reserve powers of the governor-general to resolve a crisis.

Source: Professor Anne Twomey, 'Australian Politics Explainer: Gough Whitlam's Dismissal as Prime Minister', *The Conversation* (Online, 19 April 2017) <theconversation.com/australian-politics-explainer-gough-whitlams-dismissal-as-prime-minister-74148>.

Source 4

JENNY HOCKING: THE AUSTRALIAN HISTORIAN WHO TOOK ON THE PALACE AND WON

On Tuesday morning, at home under virus lockdown in Melbourne, historian Jenny Hocking finally laid eyes on the secret letters she had fought for years to see. The scans on her screen were 45-year-old correspondence between the Queen and her representative in Australia, Governor-General Sir John Kerr, during a time of political tumult.

The letters revealed on Tuesday showed the Queen was not told in advance by Sir John of his decision to sack the prime minister. This was expected by most observers, who said the governor-general would have sought to protect the Crown.

However, the letters reveal discussion over the political power held by Sir John. They indicate too his decision to withhold information from the prime minister, whose advice he was bound to accept.

'In the starkest possible fashion, the letters reveal how Australia's constitutional independence was fatally compromised,' says Prof Mark McKenna, a leading Australian historian. He told the BBC the letters showed that, in the middle of a huge constitutional crisis, the Queen and her private secretary knew more about Sir John's intentions than Australia's elected prime minister.

'The fate of an elected government was being determined to a large extent by an unelected governor-general and his voluminous, almost obsessive correspondence with the Palace,' he said.

Source: Frances Mao, 'Jenny Hocking: The Australian historian who took on the Palace and won', *BBC* (Online, 14 July 2020) <[bbc.com/news/world-australia-53399094](https://www.bbc.com/news/world-australia-53399094)>.

1. Explain what is meant by the term 'joint sitting of parliament'. [C]
2. Identify who was the prime minister in 1975. [C]
3. What did the Senate do and what impact do you think it would have on Australia? [C] [A]
4. What decision did Governor-General Sir John Kerr make? How was the decision viewed by Jenny Hocking and Professor Mark McKenna? [C]
5. Why was this event significant? [C]
6. Do you think an unelected representative should have the power to sack an elected prime minister who leads a majority government? Why or why not? [E]

Further reading

If you are interested in finding out more about 'the dismissal', you might like to read or listen to one of the sources below:

- Alex Mann and ABC, *The Eleventh* (Podcast), <abc.net.au/listen/programs/the-eleventh>
- *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19
- Jenny Hocking, *The Palace Letters* (Scribe Publications, 2020)
- Museum of Australian Democracy, *Dismissed!* <dismissed.moadoph.gov.au/index.html>
- National Archives of Australia, *The Dismissal, 1975*, <naa.gov.au/help-your-research/fact-sheets/dismissal-1975>
- National Museum of Australia, *The first [and only] government...dismissed*, <digital-classroom.nma.gov.au/defining-moments/whitlam-dismissal>

4.5 Other mechanisms of accountability in parliament

Open government

Secrecy, being an instrument of conspiracy, ought never to be the system of a regular government.

Jeremy Bentham (1839)

One of the principles of the rule of law is that the parliament makes law openly and transparently. This means you can:

- visit parliament and observe a law being made
- have your say on a bill by making a submission
- attend an open government inquiry in person
- lodge a petition (a request for action)
- join a lawful protest.

In Australia, the media is also free to praise, criticise, or condemn the government, a law, a policy, or the actions of a minister or member of parliament.

Tip

Parliamentary committees investigate specific issues affecting the community. They can be a useful source of information you may wish to search when researching your next inquiry topic.

Tip ...

- Parliament of Australia—aph.gov.au/Parliamentary_Business/Committees/Current_Inquiries
- Queensland Parliament—parliament.qld.gov.au/work-of-committees/inquiries

The opposition

The government [has] used the term 'Team Australia' a lot. I'm worried about the emergence of 'Team Idiot'.

Mr Bill Shorten, Leader of the Opposition, 25 September 2014

The opposition is the largest political party (or coalition) that does not hold the most seats in the House of Representatives. This group of members (as well as any minor parties or independents) play an essential role in keeping the government accountable and transparent—even an *Inquiry into the Salaries and Allowances of Members of the Commonwealth Parliament* (1959–60) noted that '[a]n effective Opposition is essential for the proper functioning of a democracy.' The opposition:

- scrutinises the government's decisions,
- criticises and questions the government's actions,
- examines the expenditure of the government,
- debates bills,
- provides Australians with alternative policies, and
- sits on committees that review legislation.

One method of scrutiny involving the opposition you can see operating is when the parliament of Australia sits is question time.

Research Task

The *House of Representatives Practice* (7th edition, 2018) states, '[t]he accountability of the Government is demonstrated most clearly and publicly at Question Time when, for a period (usually well over an hour) on each sitting day, questions without notice are put to Ministers.'

1. Locate the latest House of Representatives Hansard (aph.gov.au/Parliamentary_Business/Hansard) [S]
2. Select two questions without notice that demonstrate a member of parliament criticising or scrutinising the government's actions. [S]
3. Justify how an effective opposition is important to maintain accountability and transparency. [E]



Review

Comprehend

1. **Define** the key terms:

Responsible government

Majority government

Minority government

Double majority

[C]

2. **Identify** and **explain** a principle of the rule of law that assists to hold the government accountable for its actions. [C]
3. **Explain** what maintaining 'confidence' means in relation to the concept of responsible government. [C]
4. **Explain** the implications of minority and majority governments for making law, using examples to support your response. [C]

Analyse

SCOTT MORRISON: EX-AUSTRALIA PM UNDERMINED GOVERNMENT PRINCIPLES, ADVICE SAYS

Australia's previous prime minister 'fundamentally undermined' responsible government by secretly appointing himself to additional ministries, the country's solicitor-general has found.

Solicitor-General Stephen Donaghue was asked to investigate Mr Morrison's appointment to that ministry and whether his intervention was legal. Mr Donaghue concluded it was not illegal, but said: 'Neither the people nor the parliament can hold a minister accountable... if they are not aware that the minister has those powers.'

Source: Tiffanie Turnbull, 'Scott Morrison: Ex-Australia PM undermined government principles, advice says', *BBC* (Online, 23 August 2022) <[bbc.com/news/world-australia-62641328](https://www.bbc.com/news/world-australia-62641328)>.

Examine the viewpoint of Solicitor-General Stephen Donaghue, and its consequences. Do you agree or disagree with his viewpoint that Scott Morrison's actions undermined the concept of responsible government. [A]

Evaluate

Decide how effectively the concept of 'responsible government' operates in Australia today. Justify your position by using the following legal criteria:

- Does it achieve its objective, that is, to hold the government accountable?
- Are the principles of the rule of law present, sometimes present or absent?
- How fair, just and ethical is our system of government?

[E]

Governance in Australia

Chapter 5: Making law in parliament

5.1 The legislative process

5.2 Analysing the legislative process

5.3 Delegated legislation

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend the function of parliament as a law-making body, including the legislative process.
- analyse the strengths and weaknesses of parliament as a law-making body.

5.1 The legislative process

Functions of parliament as a law maker

The legislative power held by our parliaments can result in:

- the creation of a new Act or section
- changing (or making an amendment) to an existing law
- repealing (or removing) an existing law.

An example of each of these circumstances is found below.

	A new law	<i>Online Safety Act 2021 (Cth)</i>	The <i>Online Safety Act 2021 (Cth)</i> created a new framework for online safety for Australians. Section 36 of this Act created a new complaints-based, removal notice scheme for cyber-abuse being perpetrated against an Australian adult.
	An amendment to an existing law	<i>Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006 (Cth)</i>	This Act amended the <i>Prohibition of Human Cloning Act 2002 (Cth)</i> and <i>Research Involving Human Embryos Act 2002 (Cth)</i>. Section 3 of the Act updated the definition of a human embryo.
	Repealing a law	<i>Clean Energy Legislation (Carbon Tax Repeal) Act 2013 (Cth)</i>	One of the outcomes of the <i>Clean Energy Legislation (Carbon Tax Repeal) Act 2013 (Cth)</i> was that the carbon tax was repealed. This meant the carbon pricing mechanism no longer existed.

All three actions **follow the same legislative process**.

Tip

When completing an inquiry, you are often asked to present legal alternatives and make a recommendation. This could involve you:

- proposing a new law,
- amending an existing law to address a legal issue or consequence raised by a viewpoint, or
- repealing a current law because it is not effective or no longer reflects society's needs or values.

It is important to remember that the law should reflect some (or most) features of an effective law. These features include that the law is:

- known and understood by the community
- certain and clear
- acceptable in the community
- able to be enforced
- stable
- applied consistently and equally
- capable of being changed to reflect changing values, morals, ethics, and technological advancement, as well as to respond quickly to significant events and address emerging issues or correct deficiencies
- aids the resolution of disputes, ensures society functions smoothly, and protects the collective safety of society.

The legislative process

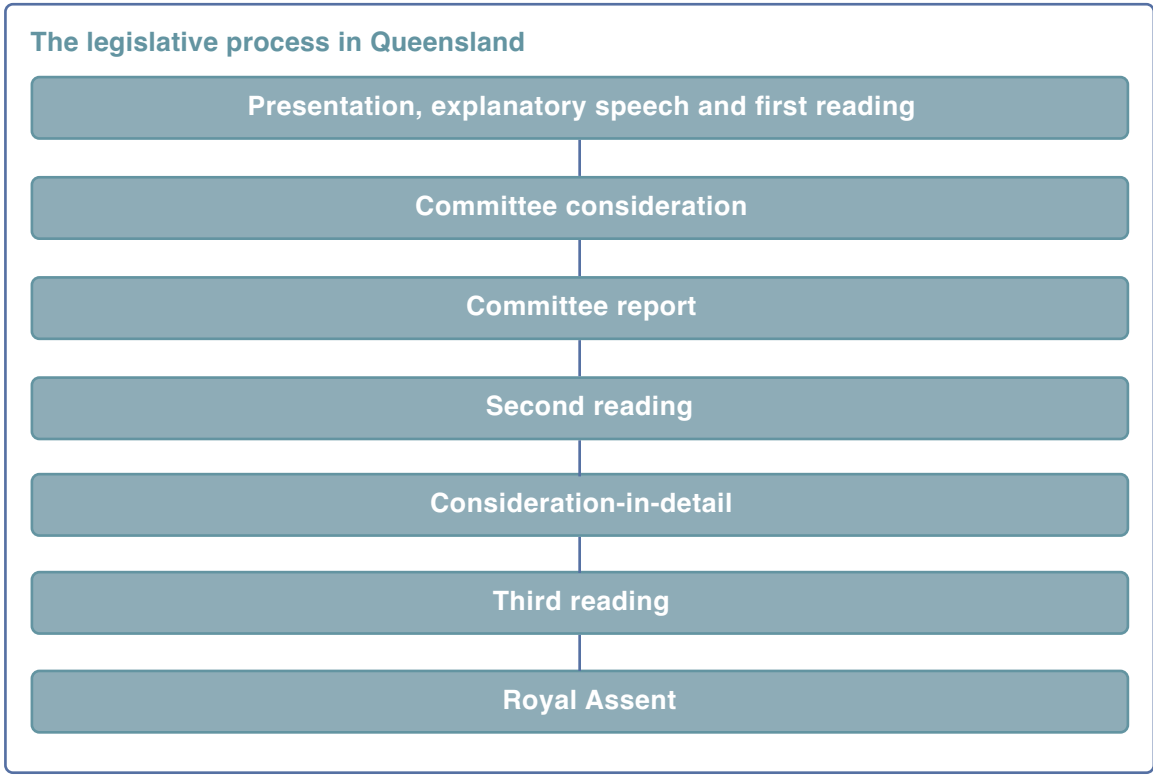
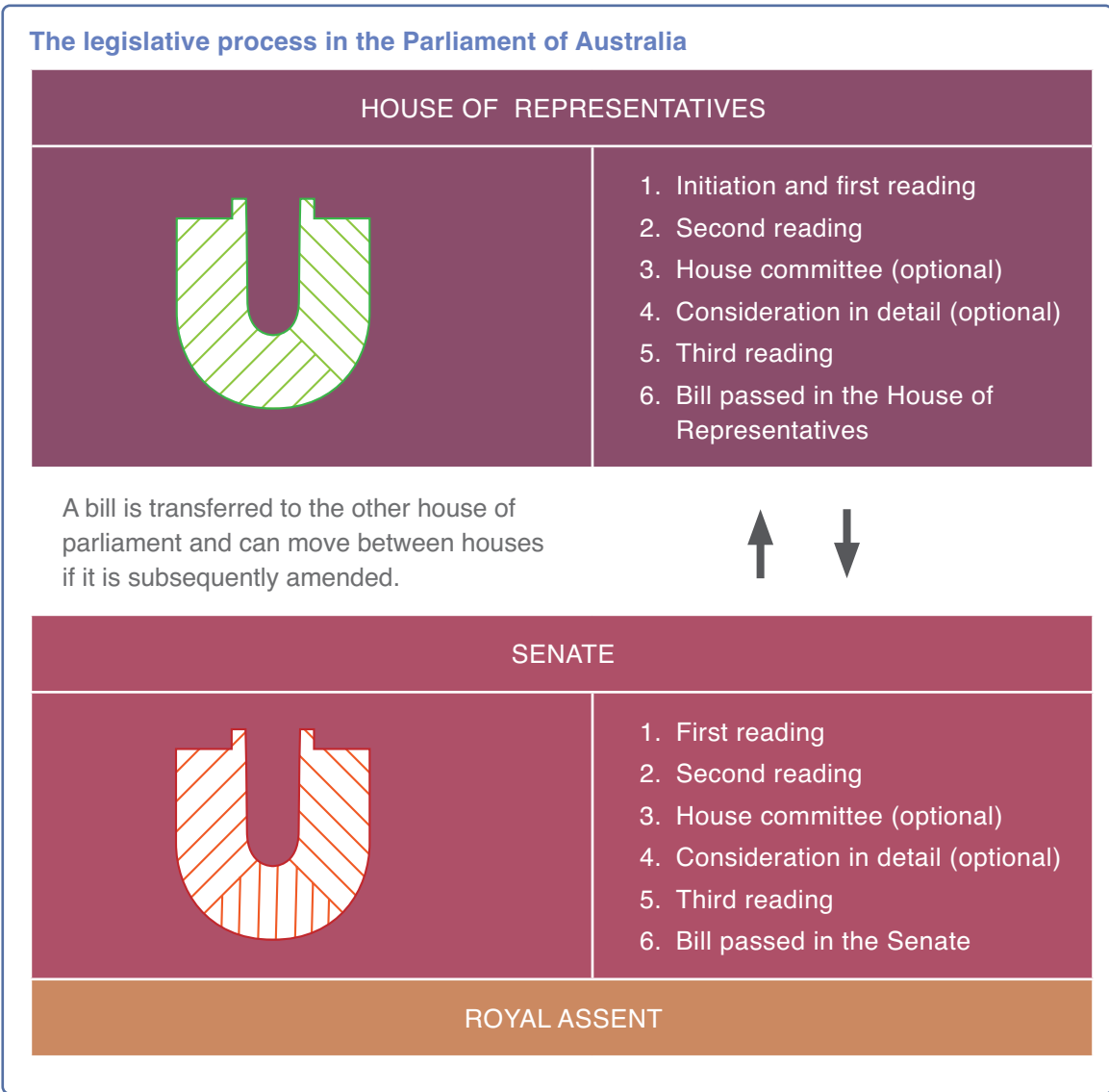
The idea for a proposed law (or a bill) can come from various sources, such as:

- an election promise
- a policy
- in response to an event or an emergency
- a suggestion from a member or senator
- an inquiry or royal commission
- pressure from a specific group of people, such as the media, an interest group or a lobby group.

In the context of our national law-making body, according to *House of Representative Practice* (7th ed.):

- around 200 bills are introduced in the Parliament of Australia each year
- 95% of bills are introduced in the House of Representatives
- 70% of all bills become an Act.

In Queensland, the Office of the Queensland Parliamentary Counsel's *Annual Report 2022-23* shared that they had produced 38 government bills, and 6 private members bills in that year.



We will now explain the legislative process in detail using different examples. While reading each stage, think about the advantages and disadvantages of our law-making process.

Initiation, introduction or presentation and first reading

Whatever the reason behind a new law, the cabinet (made up of the prime minister or premier and other important ministers) has a huge say in what ideas are drafted into bills. This body approves what ideas will be drafted into bills by the Office of Parliamentary Counsel (Australia) or Office of the Queensland Parliamentary Counsel (Queensland).

Practical Application

SHARING INTIMATE IMAGES WITHOUT CONSENT TO BECOME ILLEGAL IN QUEENSLAND IN BATTLE AGAINST REVENGE PORN

It will soon be illegal in Queensland to share or threaten to expose intimate images of someone without their consent – whether or not those images exist – under tough new revenge porn laws to go before the Palaszczuk Cabinet today.

Cabinet will be asked to sign off on new laws to outlaw revenge porn in Queensland in a Bill to be introduced in State Parliament as early as this week.

The new laws will include changes to the Criminal Code to make it a criminal offence not only to share, but to threaten to share, an intimate image without consent.

Premier Anastacia Palaszczuk made a commitment during last November's election campaign to introduce stronger protection for victims, including a new offence to include even the threat of exposing images without consent.

Source: Sarah Vogler, 'Sharing intimate images without consent to become illegal in Queensland in battle against revenge porn', *Courier Mail* (Online, 20 August 2018) <couriermail.com.au/news/queensland/sharing-intimate-images-without-consent-to-become-illegal-in-queensland-in-battle-against-revenge-porn/news-story/dd5541f5a7ad6b8d7de8b7463d0f8e1b>.

1. Describe what new criminal offence the new law will create. [C]
2. Explain where the idea for the new law originated. [C]
3. Identify the body that will sign off on the new law. [C]
4. The cabinet has a lot of say in what laws are introduced. Is this a strength or weakness of the legislative process? Analyse your viewpoint. [A]

Explanatory materials

Each bill is accompanied by an explanatory memorandum (Parliament of Australia) or an Explanatory Note and a Human Rights Statement of Compatibility (Queensland Parliament).

The explanatory memorandum lays out the legislative intent of the bill, as well as providing:

- information on the financial impact of a bill
- a Statement of Compatibility with Human Rights, which is prepared in accordance with *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
- notes on the clauses, amendments or schedules.



In Queensland, a bill is accompanied by an Explanatory Note and a Human Rights Statement of Compatibility. The Explanatory Note includes information on:

- the policy objectives of the bill and the reasons for them
- any alternative ways the policy objective could be achieved
- the estimated cost to implement the bill
- whether the bill is consistent with fundamental legislative principles
- who was consulted when the bill was being drafted
- whether the bill is consistent with legislation in other jurisdictions
- notes on a bill's provisions.

The *Human Rights Act 2019* (Qld) s38 requires all bills to consider how an individual's human rights are impacted.



Practical Application

'ABSOLUTE DOG ACT': QUEENSLAND LABOR CRITICISED FOR SHOCK MOVE TO OVERRIDE STATE'S HUMAN RIGHTS ACT

The Queensland government has introduced legislation to allow it to imprison children in police watch houses for adults 'even if it would not be compatible with human rights'. The police minister, Mark Ryan, introduced the amendment as part of a swathe of changes to an unrelated bill in state parliament on Wednesday afternoon. It will require a suspension of the state's *Human Rights Act*.

In the bill's explanatory note, Ryan said the change – which will expire in December 2026 – was necessary to ensure that 'immediate capacity issues' in the state's detention system could be addressed.

'It is not intended to make acceptable the long-term use of watchhouse or corrective services facilities for young people.'

Earlier this month, a Cairns-based youth organisation took the government to court arguing the detention of children in watch houses for extended periods was illegal.

Source: Andrew Messenger and Eden Gillespie, 'Absolute dog act': Queensland Labor criticised for shock move to override state's Human Rights Act', *The Guardian* (Online, 23 August 2023) <theguardian.com/australia-news/2023/aug/23/absolute-dog-act-queensland-labor-pilloried-for-shock-move-to-override-states-human-rights-act>.

1. Explain the purpose of the amendment. [C]
2. Explain the relationship between the amendment and the state's *Human Rights Act*. [C]
3. Describe the process the Hon Mark Ryan followed to introduce the amendment. [C]
4. The process the Hon Mark Ryan followed is allowed. Do you think this process is good or bad? Examine your viewpoint, and its implications on making fair, just and effective law. [A]
5. Decide whether you believe this is a good law. Justify your decision with legal criteria. [E]



What do you think?

The proposed law above (which was subsequently passed) breaches young people's human rights.

Should a proposed law be able to become an Act if it is shown to limit or remove an individuals' human rights? Support your point of view by discussing the possible implications arising from your decision. [A]

Many bills are introduced by a government minister. However, it's important to note that any member of parliament or senator can propose a bill. This is what we call a Private Members Bill, which is introduced by a non-government member of parliament or senator.

When a bill is ready, the member or senator gives written notice to the Clerk of his or her intention to introduce a bill. The bill is then listed on the Notice Paper (think of this as an agenda for parliament) so all members know that a new law is being proposed.

The first reading, a formal stage in the legislative process, is brief. **It is when the bill is introduced to the parliament.** When the Attorney-General of Australia, the Hon Mark Dreyfus KC MP introduced the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, the Hansard (the official record of parliamentary proceedings), simply stated that he presented the bill and explanatory memorandum, without any debate or discussion. It is at this time that all members receive a copy of the bill and its explanatory memorandum.

First Reading

Bill and explanatory memorandum presented by **Mr Dreyfus**

Bill read a first time.

The first reading ends with the Clerk reading the long title of the bill. **The long title of the bill sets out the subject, scope and purpose of the proposed law.** The long title of the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 was, '*A Bill for an Act to amend the Criminal Code Act 1995, and for related purposes*'.

When a bill is presented to the Legislative Assembly for the first time, the person presenting the bill (usually a minister) tables a copy of the bill alongside an Explanatory Note and a Statement of Compatibility of Human Rights, before making a speech on the proposed law. He or she also nominates a parliamentary committee to scrutinise (or examine) the bill.

For example, in May 2024, the Progressive Coal Royalties Protection (Keep Them in the Bank) Bill 2024 was introduced by the Hon Cameron Dick, Deputy Premier, Treasurer and Minister for Trade and Investment. He said:

I present a bill for an act to amend the Mineral Resources Act 1989 for a particular purpose. I table the bill, the explanatory notes and a statement of compatibility with human rights. I nominate the Cost of Living and Economics Committee to consider the bill.

...

We do not want those royalties taken to the banks of the coal companies. We want to keep them in the hands of the people of Queensland.

...

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Practical Application

Source 1

KAP INTRODUCE CASTLE LAW IN QUEENSLAND

Katter's Australian Party (KAP) has introduced a Bill to Queensland Parliament which would establish Castle Doctrine in the state, essentially allowing a property's resident(s) to use whatever force is appropriate to repel or defend against intruders.

While the right to defend oneself and one's property is already in the state Criminal Code, it is subject to provisions including that the force used is 'necessary'. Under the Criminal Code (Defence of Dwellings and Other Premises—Castle Law) Amendment Bill 2024, the fact someone is illegally in another person's home is enough to make the use of force 'necessary' should the homeowner have to use it.



Source: The Shooters Union Australia, 'KAP Introduce Castle Law in Queensland' (Website, May 2024) <shootersunion.com.au/kap-introduce-castle-law-in-queensland/>.

Source 2

CRIMINAL CODE (DEFENCE OF DWELLINGS AND OTHER PREMISES—CASTLE LAW) AMENDMENT BILL

Introduced by: Member for Hinchinbrook (Mr N Dametto)

Date introduced: 1 May 2024 (page 1407)

Status: Referred to Community Safety and Legal Affairs Committee (to report by 4 November 2024, in accordance with Standing Order 136(1)).

Source: Legislative Assembly of Queensland, 'Notice Paper for Tuesday 11 June 2024' *Queensland Parliament* (Website, 11 June 2024) <documents.parliament.qld.gov.au/events/np/2024/240611_NP2.pdf>.



Practical Application ...

Source 3

CRIMINAL CODE (DEFENCE OF DWELLINGS AND OTHER PREMISES —CASTLE LAW) AMENDMENT BILL 2024 EXPLANATORY NOTES

Short title

The short title of the bill is the Criminal Code (Defence of Dwellings and Other Premises—Castle Law) Amendment Bill 2024.

Policy objectives and the reasons for them

The objective of the Bill is to amend s267 of the Queensland *Criminal Code* (the Code) and provide clearer guidance and legal protection for individuals who use force to defend themselves or others within their homes. This amendment is commonly referred to as the 'castle doctrine'.

Section 267 of the Queensland *Criminal Code* governs the use of force in situations where a homeowner or occupier defends their property, however an increase in home invasions due to unbridled youth crime and crime in general across Queensland have called into question the clarity and applicability of this provision...

Source: Explanatory Notes, Criminal Code (Defence of Dwellings and Other Premises—Castle Law) Amendment Bill 2024 (Qld) 1.

1. Identify the short title (the formal name by which legislation is cited) of the Bill. [C]
2. Explain the objective of this proposed law as expressed in Source 3. [C]
3. Identify which member introduced the Bill, and to which political party they belong. [C]
4. Identify whether this Bill is a government bill or a Private Members Bill. Explain how you made this decision. [C]
5. Identify the committee the Bill was referred to. [C]
6. There was an election in Queensland on 26 October 2024, with the parliament being dissolved prior to the election. Identify the due date of the committee report. Hypothesise how this might impact this proposed law. Do you think this is fair or unfair? Explain. [A]
7. Applying what you know about how government is formed, how likely is it that this law will be passed? Explain your point of view. [A]
8. Justify whether you believe this law is a good law using legal criteria. [E]

Second reading

During this stage the members debate and ultimately vote on the main idea of the bill, with the member or senator who introduced the bill making the first and final speech. How does this look in reality? Let's look at some extracts of the Second Reading of the Paid Parental Leave Amendment (More Support of Working Families) Bill 2023.



What do you think?

Ms RISHWORTH (Kingston—Minister for Social Services):

I move:

That this bill be now read a second time.

This bill...gives more families access to the government payment, provides parents more flexibility in how they take leave, and encourages them to share care to support gender equality.

This bill is good for parents, good for children, good for employers and good for the economy.

I commend the bill to the House.

Ms STEGGALL (Warringah):

...This bill before us today takes a step in that direction, but it's only a step. More needs to be done. I urge the government to do more so that we can empower Australian women, make smart investments in our future and try to achieve genuine economic equality in the years ahead.

Ms TINK (North Sydney):

...Australia can and should go further in adopting international best practice, including the payment of superannuation, unpaid parental leave, ensuring 26 weeks is the minimum leave entitlement for a family, and furthering the 'use it or lose it' provisions to encourage greater shared care.

Ms MASCARENHAS (Swan):

When I found out about the Paid Parental Leave Amendment (More Support for Working Families) Bill 2023 I was very excited to put my hand up and say: 'Yes. This is something I wholeheartedly agree with and support.' This is an example of the way that governments can tangibly help families.

1. Most bills are passed with the support of everyone in the parliament. Is this evidence of 'good governance'? Similarly, does heated debate or the rejection of a bill, embody 'good governance'? Examine your viewpoint, considering the implications of your decision. [A]



Practical Application

Source 1

'ERRORS' PROMPT SWIFT PAROLE BOARD LEGISLATIVE CHANGES

An administrative error that could potentially invalidate parole board decisions has prompted 'urgent' legislation changes by the Queensland government.

The government stepped in after concerns were raised that some people on the parole board had not been properly appointed.

It soon identified some errors had been made in approving acting professional positions on the board.

As a result, amendments to the state's parole board laws were pushed through parliament late on Wednesday.

'I have been advised that the board did not follow appropriate processes in making some appointments,' she [the Hon Nikki Boyd] told parliament.

'As I have said publicly, this has not and will not result in the automatic release of anyone who has been denied parole...However, out of an abundance of caution, the government has brought forward these urgent amendments to rectify the situation.'

Source: AAP Newswire, 'Errors' prompt swift parole board legislative changes', *Shepperton News* (Online, 13 June 2024) <sheppnews.com.au/national/errors-prompt-swift-parole-board-legislative-changes/>.

Source 2

RESOURCES SAFETY AND HEALTH LEGISLATION AMENDMENT BILL; MINERAL AND ENERGY RESOURCES AND OTHER LEGISLATION AMENDMENT BILL

Second Reading (Cognate Debate)

Hon. SJ STEWART (Townsville—ALP) (Minister for Resources and Critical Minerals)
(11.22 am):

I move—

That the bills be now read a second time.

During consideration in detail, I will also be tabling amendments to the Corrective Services Act 2006 that relate to the operation of the Parole Board Queensland. Last week errors in the appointment of temporary professional board members to the Parole Board were confirmed. These errors in appointment may have the effect of invalidating parole decisions that the acting professional board members took part in. This government is acting swiftly with amendments to ensure these decisions remain enforceable and risk can continue to be effectively managed.

Source: Queensland, *Parliamentary Debates*, Legislative Assembly, 12 June 2024, 2068 (SJ Stewart, Minister for Resources and Critical Minerals).

Source 3

MINERAL AND ENERGY RESOURCES AND OTHER LEGISLATION AMENDMENT BILL 2024

Explanatory Notes for Amendments during consideration in detail to be moved by the Honourable Scott Stewart MP



Practical Application ...

Validating appointments of acting professional parole board members

The CS [Corrective Services] Act provides for acting Parole Board members to be engaged, to ensure that the Parole Board can continue to perform its functions, including where there is a vacancy, absence or another reason impacting operations...In recent years, several individuals were approved by the Governor in Council as appropriate persons to act as professional board members. However, it has been identified that there were errors in the subsequent engagement of these approved individuals to act for different periods.

These appointment errors may have the effect of invalidating parole decisions that the acting professional board members took part in. Amendments to the CS Act to be included in the Bill will promote the continued safety of the community by ensuring that impacted parole decisions remain enforceable and the parole system in Queensland is properly administered.

Source: Explanatory Note, Mineral and Energy Resources and Other Legislation Amendment Bill 2024 (Qld), Amendments during consideration in detail to be moved by the Honourable Scott Stewart MP, 2.

1. Describe the amendment being proposed and the reason behind its introduction. Why was it considered 'urgent'? [C]
2. Identify the Minister that introduced the amendment. Do you think their portfolio includes parole? [C]
3. Locate the definition of a 'cognate' and its relationship to the law-making process. [C] [S]
4. Use Source 2 and your prior knowledge to identify what stage of the legislative process the amendment was being introduced. What stages has the bill moved through? [C]
5. Applying the key concepts you have identified in Question 4, do you feel the amendment would have received enough scrutiny? Analyse your viewpoint and its implications on the law-making process and the concept of 'good governance'. [A]
6. Imagine this amendment created an unfair or unjust law. Do you feel the current legislative process could prevent this from occurring? Justify your decision. [E]

Tip

Locating the second reading speech of a bill gives you access to many viewpoints that either support or disagree with the main idea of a bill.

These speeches are recorded in Hansard.

- Parliament of Australia Hansard <aph.gov.au/Parliamentary_Business/Hansard>
- Queensland Parliament Record of Proceedings (Hansard) <parliament.qld.gov.au/Work-of-the-Assembly/Record-of-Proceedings>.

Committee and committee report

This stage is optional for bills originating in the Parliament of Australia. A bill can be referred to a committee, which will conduct a public inquiry and report back to the House. For instance, in June 2024 the Export Control Amendment (Ending Live Sheep Exports by Sea) Bill 2024 was referred to the Standing Committee on Agriculture. **This committee sought submissions**

(opinions on the proposed law) and held public hearings to seek feedback from experts and key stakeholders. At the end of this stage the committee will write a report and provide this to the House.

Practical Application



ENDING LIVE SHEEP EXPORT BILL: REPORT RELEASED

The Australian Parliament's Agriculture Committee has presented its advisory report for its inquiry into the Export Control Amendment (Ending Live Sheep Exports by Sea) Bill 2024, which will end the live sheep export trade by sea by 1 May 2028.

Committee Chair, Ms Meryl Swanson MP, said: 'The bill fulfils the Albanese Government's election promise to end the live export of sheep by sea while providing time and money for the orderly transition of industry to new avenues of production and trade.'

While acknowledging the strong opposition of sections of industry and local WA communities, Ms Swanson said that: 'This matter has been extensively canvassed by governments and communities. The time has come to transition away from this trade. Like all transitions, it will not be without pain, but the outcome will provide industry with long-term certainty in line with community expectations.'

The Committee held two public hearings in Canberra and Muresk, Western Australia, which took important evidence from a range of stakeholders representing industry, government, local communities and animal welfare groups. It received over 13,000 contributions from people supporting and opposing the bill and offering feedback on its contents.

Source: Department of House of Representatives, 'Ending live sheep export bill: report released', *Media Release* (Online, 21 June 2024) <aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/Media_Releases/Ending_Live_Sheep_Export_Bill_-_Report_Released>.

1. Explain the outcome of the Export Control Amendment (Ending Live Sheep Exports by Sea) Bill 2024. [C]
2. Identify the committee that was tasked with examining the Bill. [C]
3. Identify the different stakeholders that were consulted about this proposed law. [C]
4. Was this proposed law universally supported? Do you believe that for a law to be considered fair, just and effective, it must be supported by most stakeholders consulted in the committee process? Explain. [C] [A]
5. Identify how the community provided feedback on the Bill. Decide whether this demonstrates good governance and supports the creation of fair and just laws using the legal criteria of inclusivity, transparency and accountability. [C]

Tip

When a committee is reviewing a bill, it calls for the public to make submissions, allowing anyone to express their opinions on it. This can be a good source of viewpoints for an assessment task or learning activity.

- Parliament of Australia <aph.gov.au/Parliamentary_Business/Committees>
- Queensland Parliament <parliament.qld.gov.au/work-of-committees/committees>.

In Queensland, all bills are examined by a committee.

Each committee, which oversees a particular area, is comprised of both government and non-government members. A member of the government is the committee chair. For example, in the 57th Parliament (in which the Labor Party of Queensland formed a majority government) the Housing, Big Build and Manufacturing Committee had six members:

- Chair: Chris Whiting MP, Member for Bancroft (Labor Party of Queensland)
- Deputy Chair: Jim McDonald MP, Member for Lockyer (Liberal National Party of Queensland)
- Don Brown MP, Member for Capalaba (Labor Party of Queensland)
- Michael Hart MP, Member for Burleigh (Liberal National Party of Queensland)
- Robbie Katter MP, Member for Traeger (Katter's Australia Party)
- Tom Smith MP, Member for Bundaberg (Labor Party of Queensland)

When a committee is referred a bill, they inquire into the bill and its consequences. They ask members of the community to make a submission on the bill, undertake research, and conduct public hearings that allow members of the committee to hear from experts, stakeholders and community members. The committee synthesises all this information to write a report. The report can recommend:

- the proposed law be passed
- the proposed law be passed, but suggest changes
- the proposed law is not passed.

As part of the committee's process, **members have the option to express their disagreement with the committee's findings through a statement of reservation or a dissenting report.** This ensures that all perspectives, even those in disagreement, are considered and contributes significantly to the transparency and robustness of the process.



Practical Application

A BIPARTISAN COMMITTEE SET OUT TO END QUEENSLAND'S POLITICISATION OF YOUTH CRIME. IT FAILED SPECTACULARLY

Queensland's only independent state MP, Sandy Bolton, had high hopes last October when she was made chair of a parliamentary committee tasked with coming up with solutions on youth crime.

It was the first parliamentary committee to be independently chaired in more than two decades, and Bolton hoped it would stymie the politicisation of the issue by taking 'a collaborative and bipartisan approach' that would lead to 'constructive solutions'.

But after 26 meetings, 13 public hearings and hundreds of submissions, the youth justice reform select committee still could not come to an agreement. And on Wednesday night,



Practical Application ...

it finally collapsed. The committee's interim report was finally tabled on Thursday after the Labor government compelled its release while claiming the LNP had attempted to block it from being published after three LNP members of the committee refused to sign off on it.

Queensland's human rights commissioner, Scott McDougall, said it was 'disappointing' a 'bipartisan, evidence-based approach' had been lost at the 'expense' of the rights of children and the safety of the community. 'It's a real blow to Queensland's prospects of meaningfully addressing the underlying causes of youth offending.'

The chief executive of the Youth Advocacy Centre, Katherine Hayes, said her organisation was 'very disappointed that the select committee has degenerated into a squabble'.

Source: Eden Gillespie, 'A bipartisan committee set out to end Queensland's politicisation of youth crime. It failed spectacularly', *The Guardian* (Online, 18 April 2024) <theguardian.com/australia-news/2024/apr/18/queensland-youth-crime-bipartisan-committee-failure>.

1. Identify the chair of the Youth Justice Reform Select Committee. To which political party does she belong (if any)? [C]
2. State how many meetings, public hearings and submissions were made to the Youth Justice Reform Select Committee. [C]
3. Explain what happened to the Youth Justice Reform Select Committee. [C]
4. Select and examine two viewpoints raised in the article and their consequences about the effectiveness of the Youth Justice Reform Select Committee in achieving its objective. [S] [A]
5. Decide whether Queensland's committee system enhances the democratic process, justifying your decision using legal criteria. [E]

Consideration in detail

At this stage, a thorough examination of each clause of a bill takes place. It is an optional stage in the Parliament of Australia (as sometimes the members or senators may agree a bill doesn't need to be examined in detail) but it occurs with every bill in Queensland. This meticulous process helps ensure that each clause's meaning is clear and unambiguous, instilling confidence in the legislative process and the law.

Clauses are examined in numerical order. Clauses:

- may be grouped together and agreed to as a block i.e. *That clauses 1 to 5 be agreed to.*
- can be examined clause by clause i.e. *That clause 1 be agreed to.*
- or considered as a whole.

Any member or senator can propose changes to a clause and may speak briefly about why a change should be made. A vote will then be taken on the proposed change.

Third Reading

This stage is usually a formality, as any issues or concerns have been covered in previous stages. **The Clerk of the House reads the bill's long title, and it is voted on for a final time.** An example of this occurring in the House of Representatives involving the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 is found below.

Mr. SHORTEN (Maribyrnong—Minister for the National Disability Insurance Scheme and Minister for Government Services) (12:42): by leave—I move:

That this bill be now read a third time.

Question agreed to.

Bill read a third time.

If a majority of the members present in the House vote in favour of the bill, it is passed onto the Senate (if it originated in the House of Representatives) or the House of Representatives (if it originated in the Senate).

In Queensland, the third reading involves the Clerk reading the short title, before the long title is agreed to. An example below involving the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 has been included to show you how this occurs.

Question put—That the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill, as amended, be now read a third time.

Motion agreed to.

Bill read a third time.

...

Question put—That the long title of the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill be agreed to. Motion agreed to.

Transfer to the other House

As the Parliament of Australia has two houses (the House of Representatives and the Senate) the legislative process is then **repeated in the other house**. If there is a disagreement between the Houses, messages pass between the two Houses. This is because agreement on the bill's final form must occur.

If the two Houses cannot agree, a bill can be 'laid aside'. Sometimes this may result in a dissolution of both Houses by the Governor-General and an election being held. A double dissolution election has only been held seven times—1914, 1951, 1974, 1975, 1983, 1987 and 2016.

In Queensland, a bill is not transferred to another House, as we have a unicameral (one chamber) parliament. Queensland abolished its upper house, called the Legislative Council, over 100 years ago.

Practical Application

FEDERAL GOVERNMENT A STEP CLOSER TO EARLY ELECTION TRIGGER AS SENATE REJECTS HOUSING BILL

The federal government has suffered its first major defeat in the Senate, with the Greens and Coalition uniting to reject Labor's centrepiece housing policy.

The vote means the government must wait three months before it can bring back the Housing Australia Future Fund bill, which seeks to establish a \$10 billion fund to build social and affordable housing.

The loss also sets up a high-stakes stand-off between Labor and the Greens that may give the government the power to dissolve the parliament and head to an early election.

The constitution outlines the conditions that allow for a double-dissolution election to be called. Among them, is if the Senate rejects or fails to pass a bill with a gap of at least three months.

At a typical election, only half the Senate is up for election, but a double dissolution means all seats in the chamber are up for election.

Source: Brett Worthington, 'Federal government a step closer to early election trigger as Senate rejects housing bill,' *ABC News* (Online, 19 June 2023) <[abc.net.au/news/2023-06-19/housing-future-fund-labor-greens-early-election/102495932](https://www.abc.net.au/news/2023-06-19/housing-future-fund-labor-greens-early-election/102495932)>.

1. Identify the political parties that united to reject a government bill. [C]
2. Explain the implications of the actions of the Senate as outlined in the article. [C]
3. Explain what a 'double dissolution' election is. [C]
4. What does this situation demonstrate about a bicameral parliament exercising its law-making power? Do you believe it illustrates a strength or weakness of the system? Analyse the implications of your viewpoint. [A]
5. In your opinion, did the law-making process produce a good outcome? Justify your point of view using legal criteria. [E]

Royal Assent

The final stage of the legislative process involves the Governor-General (Australia) or Governor (Queensland) signing the bill. **Once signed, the bill becomes an Act of Parliament.**

Within an Act, **a crucial section often delineates a date it will come into force.** This can be from:

- the date of Royal Assent, or
- another specified date.



In rare instances, **Acts have been enforced from a past date, a legal concept known as retrospectivity**. The implications of this, especially if the period of retrospectivity is substantial, can be far-reaching and is often perceived as inequitable.

5.2 Analysing the legislative process

Making law is an essential function of parliament, not only in Queensland and Australia, but around the world. While the legislative process followed in Australia and Queensland has many strengths, it also harbors weaknesses. Some of these are listed below.

Understanding these complexities is crucial for examining and evaluating the effectiveness and integrity of our system of government.

Advantages of the legislative process

- The legislative process is stable and consistent as it provides a method of orderly decision-making, with checks and balances to point out any deficiencies.
- Once a law is introduced to the floor of parliament, our legislative process is open and transparent, as it allows for public participation through parliamentary inquiries, and the community can view or read all stages of the law-making process.
- Generally, because the government is formed by the political party that holds a majority of members in the lower house of parliament, many policies have been presented at an election, and the laws they introduce are usually well supported by the community.
- Parliament has the resources to investigate and scrutinise any proposed laws, including any issues raised in the community.
- Once the legislative process has started in parliament, it involves a lot of debate and discussion, both within the parliament itself and in the community, in the media, and among the different groups interested in the outcome of laws being passed.
- There is a diversity of views in parliament. This means that during debate and discussion, as a bill progresses through the parliament it is scrutinised thoroughly meaning there is a low chance of an unjust law resulting.
- The legislative process allows for law to be made, amended, or repealed as needed, enabling the legal framework to evolve in response to societal changes and emerging issues.

Limitations of the legislative process

- The legislative process is typically transparent, allowing people to observe parliament in person or online, as well as access records of proceedings. However, certain decisions are made without sufficient public consultation.
- There may be instances where specific interest or lobby groups wield influence over proposed laws.
- Parliament may not be able to respond to an issue in a timely way, as it may not be sitting, it can take time to draft a comprehensive and clear law and it must pass through many stages.

- Despite efforts to ensure diversity in those that sit in parliament and the inclusion of the community in the law-making process during the committee stage, the legislative process may still struggle to fully represent the interests and perspectives of all segments of the Australian community, particularly marginalised, remote or underrepresented groups.
- Legislation is often intricate and difficult for many Australians to comprehend.
- Partisan politics or 'voting on party lines' can hinder the legislative process, with members sometimes prioritising a political party's ideology over seeking solutions that are bipartisan, evidence-based or offering long term benefit.

Inquiry Focus

How effectively does the legislative process in Queensland and/or Australia foster the attributes of good governance?

Practical Application

Throughout this chapter you have read about many different proposed laws that have demonstrated the legislative process in action.

1. Decide whether you wish to analyse the legislative process in Australia or Queensland. [C]
2. Re-read the description and examples of the legislative process provided in this chapter for the jurisdiction you have chosen in Question 1. Use the PMI (Plus, Minus, Interesting) graphic organiser to explain, comprehend and analyse the main features of the legislative process from the viewpoint of the government and opposition. [C] [A]

Viewpoint	Plus	Minus	Interesting
Government			
Opposition			

What do you think?

The PMI (Plus Minus Interesting) graphic organiser allowed you to begin to think about how well our legislative process works in Queensland or Australia.

1. Select a specific Bill highlighted in this chapter. You may like to do some further research into this Bill. To help you do this, we have included some useful starting points. [S]



What do you think?

Jurisdiction	Website	Contents
Queensland	Office of the Queensland Parliamentary Counsel, <i>Bills</i> <legislation.qld.gov.au/browse/bills>	• Bill (Introduction and 3rd Reading) • Explanatory Note • Human Rights Statement of Compatibility • Act
	Queensland Parliament, <i>Bills and Legislation</i> <parliament.qld.gov.au/Work-of-the-Assembly/Bills-and-Legislation>	• Bill • Explanatory Note • Human Rights Statement of Compatibility • Explanatory Speech • Committee • Consideration in detail • Act
	Queensland Parliament, <i>Record of proceedings</i> <parliament.qld.gov.au/Work-of-the-Assembly/Record-of-Proceedings>	• 2nd Reading
Australia	Parliament of Australia, <i>Bills and legislation</i> <aph.gov.au/Parliamentary Business/Bills Legislation>	• Bill • Explanatory memoranda • Transcript of speeches
	Parliament of Australia, <i>Bills and legislation</i> <aph.gov.au/Parliamentary Business/Bills Legislation>	• Speeches

2. Recommend whether the legislative process was effective and created a just and fair law, justifying your recommendation using legal criteria that reflects the attributes of good governance. Your criteria should draw on the following questions that reflect the rule of law and just and/or equitable outcomes, including:

- Did the legislative process **include elected representatives** with diverse voices?
- Was the law-making process **accountable and transparent**?
- Did law makers **allow the community to participate** in the legislative process?
- Did the government's and opposition's actions foster **trust and confidence** in the community?
- Was the **outcome (the Act) fair and just**?
- Did the legislative process seek to **balance** individual rights with the protection of society (or the greater good of society)?

5.3 Delegated legislation

You have learnt that **our Federal and State or Territory parliaments make laws that address different areas of responsibility**. For example, the *Commonwealth of Australia Constitution Act 1901* (Cth) s51(xxvii) gave the Federal Parliament the power to introduce the *Migration Act 1958* (Cth), which governs the movement of non-citizens into Australia.

Sometimes our parliaments delegate their lawmaking power to other entities, such as government agencies, local councils or courts. **Laws made under this delegated power are called delegated (or subordinate or subsidiary) legislation.**

There are many types of delegated legislation including:

- regulation
- rule
- legislative instruments
- ordinance
- by-law
- directions (which will we now examine).

Practical Application

THE GOVERNMENT WILL REPLACE ITS CONTROVERSIAL IMMIGRATION DIRECTIVE. HERE'S WHAT'S CHANGING

Immigration Minister Andrew Giles has issued a new direction making community safety the top priority when reviewing visa applications.

Giles introduced Direction 110 on Friday morning, following a week of pressure over the failure to deport migrants convicted of violent crimes under Direction 99.

'The new revised direction will make crystal clear that the Australian government expects community protection to be given greater weight when it comes to visa decisions,' he told reporters.

'It makes it clear that the safety of the Australian community is the Albanese government's highest priority and includes this as a key principle of the decision-making framework.'

Direction 99 requires decision-makers, including the Administrative Appeals Tribunal, to make the 'strength, duration and nature' of a person's ties to Australia a 'primary consideration' when reviewing visa cancellations...the direction came under scrutiny when it was revealed that individuals previously convicted of crimes had their visas reinstated by the AAT.

Source: Ewa Staszewska, 'The government will replace its controversial immigration directive. Here's what's changing', *SBS News* (Online, 7 June 2024) <[sbs.com.au/news/article/the-government-will-replace-its-controversial-immigration-directive-heres-whats-changing/vjvgyunrv](https://www.sbs.com.au/news/article/the-government-will-replace-its-controversial-immigration-directive-heres-whats-changing/vjvgyunrv)>.





Practical Application ...

1. Based on the contents of the article, explain what a 'direction' is. [C]
2. Identify who issued Direction 99 and Direction 110. [C]
3. Describe the legal consequence of Direction 99 and Direction 110. [C]
4. Explain what caused the direction to be changed, and the legal process undertaken to create the new direction. What does this example reveal about the positive and negative implications of delegated legislation? [C] [A]



What do you think?

Although delegated legislation can support efficient law-making, there are some criticisms of delegated power.

Professor Suri Ratnapala and Professor Jonathan Crowe wrote:

When officials can legislate, interpret and execute their legislation, they have the potential to place themselves above the law—for the law becomes, in effect, whatever they say is the law in the particular case.

Source: Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 124.

Professor Denise Meyerson wrote:

...if we allow the unlimited transfer of legislative power to the executive, we run the risk of subverting [try to destroy or damage] the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.

Source: Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 52.

Do you agree or disagree with the view of either academic that delegated legislation can pose a danger to the principle(s) of the rule of law? Justify your own point of view using legal criteria. You may decide to include one of the quotes above in your response. [E]

Review

Comprehend

1. **Define** the following terms:

a. Bill	d. Notice paper (in the context of parliament)	g. Submission (in the context of a committee)
b. Delegated legislation	e. Private Members Bill	
c. Long title	f. Short title	

[C]

2. Read each of the statements below, deciding whether it is **true** or **false**. If a statement is false, re-write it to be true.
- A bill introduced in the Queensland Parliament can only be proposed by members of the government.
 - The Australian Parliament consists of two houses: the House of Representatives and the Senate, both of which play a role in the law-making process.
 - In Queensland, if a bill passes through all stages in the Legislative Assembly but is rejected by the Legislative Council, it can still become law.
 - The 'first reading' of a bill in Australia involves a detailed examination and debate of the purpose of the bill.
 - Queensland has a unicameral legislature, meaning it has only one house where bills are debated and passed.
 - The 'second reading' of a bill in the Australian Parliament involves a detailed examination and debate of its content, purpose, and potential impact before a vote is taken.
 - In Queensland, a bill must pass through three readings in the Legislative Assembly before it can become law.
 - The Senate in Australia has the power to propose amendments to bills originating in the House of Representatives, which must then be approved by the lower house.
 - Once a bill is passed by both houses of the Australian Parliament, it must receive Royal Assent from the Governor-General before it becomes law.
- [C]
3. **Identify** three potential sources from which an idea for a new law can originate, using examples to further illustrate your understanding. [C]
4. **Explain** two differences that exist between the legislative process in Queensland and Australia. [C]

Select, analyse and evaluate

Research Task

1. **Locate, select** and read the following legal information on the Export Control Amendment (Ending Live Sheep Exports by Sea) Bill 2024. [S]

Jurisdiction	Information required	Suggested website
Australia	- Explanatory Memorandum - Committee Report (if ordered) - Second Reading speeches	Parliament of Australia (aph.gov.au)—use search box on the main website





Research Task

2. **Analyse** the legislative process that led to the closing down of the live sheep trade by **applying** the features of good governance (transparency, inclusion and accountability). Do you agree that the legislative outcome was an effective law, or was the law unfair? **Justify** your decision with legal criteria. [A] [E]

Tip

- When using the search field, use the advanced search prompts if these exist (as these can often help you find the information you need faster).
- Search an exact phrase or use “quotation marks” when you need to locate a specific piece of information i.e. “*Export Control Amendment (Ending Live Sheep Exports by Sea) Bill 2024*”.
- If you are having difficulty understanding the Bill, it may be good to locate secondary sources, like news articles to assist you.

Governance in Australia

Chapter 6: Governance in action – the judicial system

6.1 The independence of judicial power

6.2 The relationship between legislation and case law

6.3 Landmark decisions, legal change and law reform

6.4 Specialist courts and tribunals

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
 - the relationship between legislation and case law
 - the role of specialist courts and tribunals within State and Federal jurisdictions
 - the role of landmark court decisions in influencing legal change or law reform.
- analyse and evaluate
 - the role of the courts in law making through the interpretation of statutes
 - the development of legal principles through the application of the doctrine of precedent.

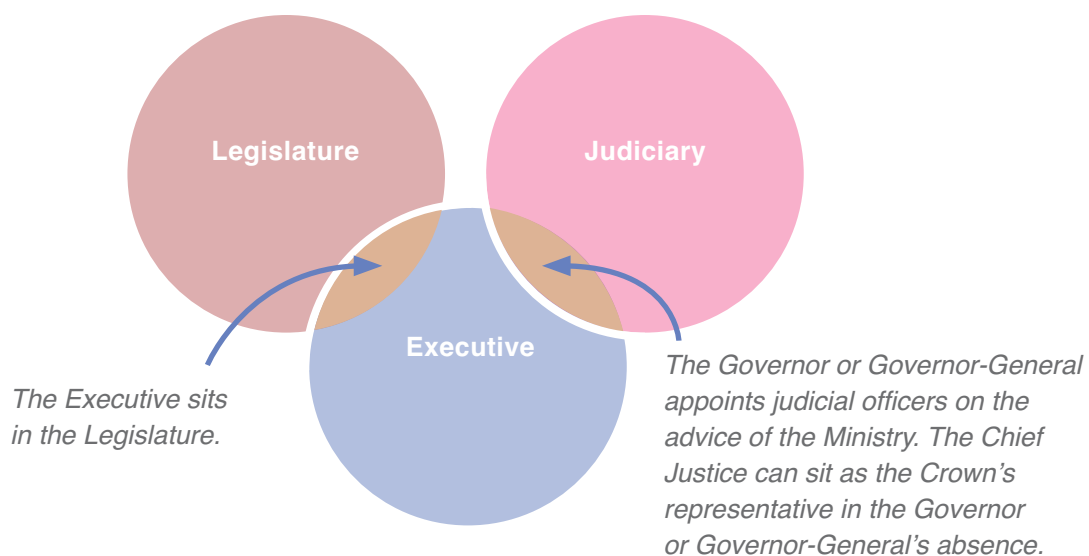
The judicial system plays an important role in holding the Parliament and Executive to account – **it acts as a check against unlawful use of power**. The rule of law, a fundamental principle in our legal system, means that any citizen can file a case against the government – as it must also follow the law and is not above it. Throughout this chapter we will examine the role of specialist courts, the importance of judicial independence, the impact of landmark cases and explore how legislation and case law interact to create catalysts for change and reform.



6.1 The independence of judicial power

Judicial independence

We have previously referred to the separation of power doctrine in earlier chapters but our focus will now shift to the role of judicial officers in governance in Australia. As was noted previously in the discussion about the separation of powers there is not a complete separation between the Parliament (Legislature) and the Executive (consisting of the Governor-General and the ministers). It was pointed out that the appointment of judges is carried out by the Executive. **Given that judges are appointed by the Executive there is no complete separation of powers between the Executive and the Judiciary.**



This does not mean that the judiciary is not independent. The appointment of judges by the Executive however can give rise to the accusation that the appointment was a political appointment and not an appointment on merit. In the UK there is a Judicial Appointments Commission (JAC) that selects candidates for judicial office on merit. It was established in 2006. JAC consists of members drawn from the judiciary, legal professional, non-legally qualified judicial officers and the public (apart from three selections usually made by the judge's commission). Decisions of judges are often criticised by various stakeholders, particularly politicians, when they do not uphold a government's policy. We have already seen in the Tasmanian dam case how a High Court of Australia decision frustrated the policies of the Tasmanian Government in 1983. Another prominent example involves First Nations peoples' land rights, which are set out later in this chapter.

Notwithstanding the way judges are appointed, **it is imperative that judicial independence is maintained.** The key way in which such **independence is maintained is through job security.** Judges are appointed until they reach a mandatory age of retirement. **It is extremely difficult to remove a judge from office before retirement.** The reason it should be difficult is that **a judge should be free from any improper influence arising from an unjustified threat of removal by the Executive or Legislature.**

Prior to the adoption of the *Australian Constitution* there had been a series of conflicts between the government and judges appointed from England. Some of these conflicts resulted in the removal from office of the judicial officer. One example is:

(a) Judge Jeffery Hart Bent (also known as Geoffrey Hart Bent)

Judge Bent was the first judge in the colony of New South Wales and the first Australian judge to be removed from office. From the outset of his arrival in New South Wales disagreement occurred between himself and the Governor of New South Wales – Governor Macquarie. He refused to disembark from his ship until the Governor arranged for a proper battery of guns to salute him. He had refused to pay the road toll levied on users of Sydney's main road by referring to it as an illegal tax. He called the gate keeper "a scoundrel" and threatened to put him in jail. As a result he was charged with toll evasion, convicted by a magistrate, and fined. Further, he refused to allow any person who had been transported to Australia to be allowed to practice as a lawyer. The view of Governor Macquarie at that time was that convicts had to be given the opportunity to rehabilitate themselves in the professions which they had practised in the United Kingdom. Subsequently there was an application by 3 ex-convict lawyers for admission to practice in New South Wales. The Judge refused the application and he stated that he would never preside in a court where ex-convicts were admitted to practice. Governor Macquarie petitioned to England for his removal. He was recalled to England in 1817.

In the above instance the judicial officer was removed by the government. It was a direct affront to the proposition of the independence of judicial officers. However, there must be some point at which judicial officers can be removed from office if their behaviour warrants it.

It was against this background of colonial removal and discipline of judges by the government that such actions were seen as striking down judicial independence. When the *Australian Constitution* was adopted a federal system of government was established. In that system there was a provision made in Chapter 3 of the *Constitution* for the judiciary. In that Chapter, s72 of the *Constitution* dealt with this issue, enshrining their independence.

Commonwealth of Australia Constitution Act 1901 (Cth)

s72 The Justices of the High Court and of the other courts created by the parliament –

- (i) shall be appointed by the Governor-General in Council.*
- (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.*
- (iii) shall receive such remuneration as the parliament may fix but the remuneration shall not be diminished during their continuance in office.*

There has never been a judge removed pursuant to s72 of the *Constitution*. The closest judge to being removed was the Hon Justice Murphy, a judge of the High Court of Australia. In July 1985 he was convicted of attempting to pervert the course of justice in relation to charges against a Sydney solicitor which he knew, Mr Morgan Ryan. This conviction, however, was quashed on appeal. Justice Murphy was found not guilty at a later trial.

The Commonwealth Parliament then passed legislation to establish a Parliamentary Commission of Inquiry to enquire into allegations concerning the conduct of Justice Murphy. In particular, the enquiry was into whether Justice Murphy had conducted himself in a way that constituted proved misbehaviour. However, Justice Murphy was diagnosed with a terminal illness and died shortly after. The Commission of Inquiry ceased.

In Queensland, the Hon Justice Vasta, a Supreme Court of Queensland judge, was removed from office by the Queensland Parliament in 1989 on the recommendation of a Commission of Inquiry, established by the Queensland Parliament consisting of three judges headed by Sir Harry Gibbs, the former Chief Justice of the High Court of Australia.

The Commission of Inquiry found that Mr Vasta:

- (a) Gave false evidence during a defamation hearing.
- (b) Made and maintained allegations that the then Chief Justice, the Attorney-General and Mr Fitzgerald QC had conspired to injure him.
- (c) Falsely stated to the accountant who was preparing the income tax returns of a company that the costs of the company's plant was \$14 million and knowing that the company had been deceiving authorities with regard to the cost of the plant, taking no steps to end the deception.
- (d) Arranged sham transactions to gain economic tax advantage.
- (e) Made false claims for taxation deductions in respect of the lease of the library.

After the Commission's report was received, the judge was permitted to address the Queensland Legislative Assembly. After a lengthy and detailed address by the judge, the Parliament debated a motion requesting the Governor to remove the judge from office on the grounds of alleged misconduct in his private dealings. The motion was passed by the Legislative Assembly and the judge was removed from office. It has been the only time since Federation that an Australian Parliament had removed a judge from office.

It is extremely important that judges not be able to be removed easily from office. **The most important feature of the judiciary is its independence. The judiciary should be able to make decisions for or against ministers of the government, arms of government and more generally politicians without fear or favour.**

Finally, you should be aware that in pre-constitution days in Australia one other method of the executive exercising control over judges and in fact removing judges, was to reduce the judge's salary so severely he simply could not continue to act as a judge. This is also cured now by s72(iii) referred to above. This provision was included in the constitution for that very reason.

It is extremely important that the Executive along with the legislature not do anything to weaken the public confidence in the judiciary. That is a fundamental principle of independence of the judiciary and thus the separation of powers. The judiciary have powers in the event that this occurs, as illustrated in the case below.



Case Study

DPP (Cth) v Besim; DPP (Cth) v MHK (No 2) [2017] VSCA 165

Facts: Besim and MHK had received sentences for terrorism offences in the Supreme Court of Victoria. The Commonwealth Director of Prosecutions appealed both sentences on the grounds that each sentence was manifestly inadequate. Before the Victorian Court of Appeal delivered its judgment on the appeal, *The Australian* published comments made by three Ministers of the Commonwealth Government, the Honourable Greg Hunt MP, the Honourable Michael Sukkar MP and the Honourable Alan Tudge MP. The comments included describing judges as 'hard-left activists', 'divorced from reality', and that they were conducting an 'ideological experiment'. The Victorian Court of Appeal convened a mention after the comments came to their attention. At the commencement of that hearing the court stated that the statements on their face:



- a. failed to respect the doctrine of separation of powers;
- b. breached the principle of *sub judice*;
- c. reflected a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government.

The court told the parties at the mention that it was gravely concerned that there was a *prima facie* case that the Ministers and *The Australian* had committed contempt of court. The court explained to the parties the following:

There are important principles of law that arise when anyone speaks about a court's decision or its conduct during a hearing, before the decision is delivered. We would add, in the strongest terms, the legal notions of contempt of court do not exist to protect judges or their personal reputations. These laws exist to protect the independence of the judiciary in making decisions that bind governments and citizens alike. These laws further exist to protect public confidence in the judiciary.

The legal representative of the Ministers read a joint statement prepared by the Ministers for the court that stated:

While we intended to make legitimate comment on that particular issue, we did not intend our remarks to undermine public confidence in the judiciary. Nor did we intend to suggest or imply that the court would not apply the law in disposing of the matters before it. In retrospect, we regret using language that was capable of conveying that meaning when no such meaning was intended. Nor did we intend that our statements would pressure this court in relation to the manner in which it disposed of the appeal concerning Mr Besim. Nor had we ever believed that it would be possible that our statements could influence this court.

After that statement was read out, the court repeatedly noted that there was no apology or retraction by the three Ministers – who were former lawyers. Also present at the mention in court was the legal representatives for both respondents, Mr Besim and MHK. They made short submissions expressing their concern about the contempt that had been perpetrated by the article and the risk and fears of their respective clients. The court then reserved its decision. On the 20 June 2017 the Court Registrar received a letter from the legal representatives of the Ministers informing the court:



Case Study ...

Having reflected further on the matters raised during that mention, the Ministers wish to offer an apology to the court. They would be grateful if the matter could either be relisted for that purpose or, if it would be more convenient to the Court, if they could be given leave to submit a written statement to the court containing that apology.

Legal Issue: Should the three Ministers and *The Australian* be prosecuted by the Court of Appeal in Victoria for contempt of court.

Decision: The court formed the view that there was a strong *prima facie* case with respect to the Ministers and that the publication and their statements involved a serious breach of the *sub judice* rule. The *sub judice* rule is designed to protect litigants' right to have their cases decided on their merits without external intervention, influence and commentary. It was of significant concern to the court that three Ministers would make the statements that they did. The legal representative of the Ministers appeared before the court making a full and unqualified apology for the statements and retracted the statements in their entirety. The court said the apology and retraction was not made at an early opportunity. Such admission and retraction only came after a stern discussion between the bench and the legal representatives of the Ministers. The delay by the Ministers was regrettable and aggravated the contempt. However, the court accepted that the Ministers had sufficiently acknowledged and accepted their contempt of the court and sufficiently purged their contempt.

In relation to *The Australian*, they had made a full apology and retraction at an early opportunity. But, the court did not accept the position adopted by the newspaper that they were merely 'the messenger' for the Ministers' statements. The court considered that the publication by *The Australian* was very serious and the court was satisfied that there was *prima facie* breach of the *sub judice* rule. However, the court accepted their apology. The court made the following statement:

The court states in the strongest terms that it is expected there will be no repetition of this type of appalling behaviour. It was fundamentally wrong. It would be a grave matter for the administration of justice if it were to reoccur. This court will not hesitate to uphold the rights of citizens who are protected by the sub judice rule.

On 23 June 2017 the Victorian Court of Appeal increased the sentences of Besim and MHK.

1. At the mention of this case before the Victorian Court of Appeal what was the court gravely concerned about? [C]
2. What did the Ministers (through their legal representatives) refuse to do at the mention of the case? [C]
3. Is it an important fact in the consideration of whether the Ministers should be prosecuted for contempt or not, that the Victorian Court of Appeal had not yet delivered their decision by the time the comments were made by the Ministers to *The Australian*? Why? [C] [A]
4. The Ministers said in their statement to the court that they did not intend their remarks to undermine public confidence in the judiciary. What were the remarks published in *The Australian*? Is this more or less credible in light of the fact that each of the Ministers were lawyers? [C] [A]
5. Do you think the statements made by the Ministers could undermine the public confidence in the judiciary? Why or why not? [E]
6. How finally did the Ministers acknowledge and accept their contempt and sufficiently purge their contempt in the eyes of the Victorian Court of Appeal? [C]

There have been recent instances in Queensland where ministers have criticised the penalties being imposed by judicial officers as being inadequate. When such criticism occurs it is usually followed by the assertion that such criticism lessens a citizen's confidence in the administration of justice. It lessens the citizens' confidence in the administration of justice when it occurs. In April 2024 a similar controversy arose in Western Australia where, Mr Paul Papalia, Minister for Corrective Services, was highly critical of the sentence handed down to a teenager who had assaulted staff inside a juvenile detention facility.

Practical Application

LAWYERS BLAST CORRECTIONS MINISTER PAUL PAPALIA OVER HIS CRITICISM OF CHILDREN'S COURT JUDGE

Lawyers have fired back at Corrective Services Minister Paul Papalia for his criticism of a judge's sentencing of a teenager, saying he's undermining a core democratic principle.

Judge Wendy Hughes last week told a 17-year old who pleaded guilty to 3 counts of assaulting staff while in detention, he had been *"well and truly failed"* by a system that had not addressed his mental impairments.

He can't be legally identified, but the ABC is calling him Toby.

Toby was given a 12 month sentence for more than 2 dozen offences but no specific penalty for the assaults, which included him spitting and biting some custodial officers and hitting another guard with a metal plate. Mr Papalia was critical of that outcome.

"There was some failures with that particular incident, and it was the officer who was assaulted by a juvenile detainee and there was no consequence" he said on Tuesday.

It prompted WA's Law Society and Criminal Lawyers Association (CLA) to make the rare move of publicly condemning the minister's comments.

Law Society Vice President Gary Mack said:

"It's not the role of a member of the executive to undermine the decision of a judicial officer ..."

"It undermines the administration of justice and the public confidence of the justice system ..."

The CLA took a similar tone, questioning whether Mr Papalia would *"apologise to Judge Hughes for his unwarranted attack on her"* and pointing out that *"political personal attacks on individual judges and courts are also unfair because judges cannot answer back"*.

"Sentencing in a case like this is very complex because the young person in question was facing a number of challenges, and it's very difficult to synthesise a sentence in circumstances where you have so many competing considerations", he said.

"The minister seems to have focused on one very small piece of this equation and had no regard at all for the fact that the lengthy term of detention was imposed in circumstances."

Mr Elliott said there were other options (for Mr Papalia):

"If he thinks that the legislation is not operating correctly as a parliamentarian he can raise the matter in parliament where the laws are made", he said.

Source: K Burke 'Lawyers Blast Corrections Minister Paul Papalia over his criticism of Children's Court judge', *ABC News*, (Online, 15 February 2024) <abc.net.au>.





Practical Application ...

1. What branch of government does Mr Papalia belong to? [C]
2. Do you agree with Mr Mack that Mr Papalia is encouraging a real risk of eroding public confidence in the judiciary and in the rule of law? Justify your answer. [E]
3. Why does Mr Elliott conclude that it is difficult to synthesise a sentence for any individual? [A]
4. In what way does Mr Elliott's comments about the remedy available for Mr Papalia of raising the matter in parliament, support the principle of the separation of powers? [A]

It is also critical for judges to not engage in political matters and themselves maintain the independence of the judiciary and the separation of powers.

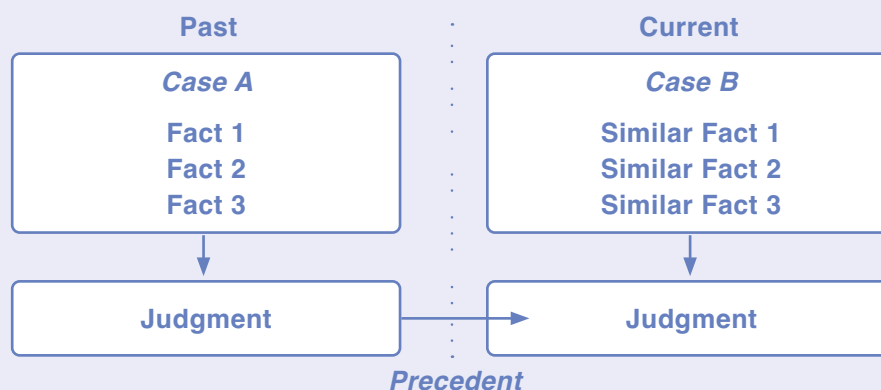
6.2 The relationship between legislation and case law

Statutory interpretation and the doctrine of precedent: a recap

Judicial precedent: a formalised and enforced system, whereby judges are obliged to follow the decision of earlier cases in higher courts when the **factual circumstances are essentially the same**. Two important questions that need to be asked to determine whether a judge must follow (is legally bound by) the decision made by a court in an earlier case dealing with similar legal principles are as follows:

1. Is the earlier court case of an **equal or a higher rank in the same court hierarchy** as the later case?
2. Are the **facts** in the case **substantially (materially) the same as those** in the earlier court case?

If both of these questions are answered with a 'yes' (in the affirmative), the *ratio decidendi* (Latin for 'reason for deciding') of the earlier court decision is a precedent or case authority that is legally binding on the court deciding the later case.



Statutory interpretation: A process by which a judge decides **the meaning of statute law as it applies to the case in dispute in court**. The fundamental rule is that judges are required to interpret the statute by **determining what parliament would have intended at the time the law was passed**.

If the explanations above appear familiar that is because you have seen them before. This topic was covered extensively in Year 11, so the summary above is simply a reminder about how judges make law and its impact on future cases. Whether it involves the application or interpretation of legislation, judge made law, like legislation, can influence legal change or law reform. To understand the relationship between legislation and case law, we will employ an inquiry approach.

Inquiry Focus

What is the relationship between legislation and case law and how does it contribute to law reform?

Relationship between legislation and case law

Many decisions a judge makes involve the application or interpretation of legislation; therefore, legislation and case law share a close relationship. Sometimes a judge will be required to interpret a specific section of an Act as its wording may be vague or ambiguous. Other cases simply involve a judge applying the law to a specific scenario – as it is impossible for the legislation to cover every circumstance that may arise. However, it is important to remember that an Act of Parliament is the superior source of law, as it can overrule any decision made by a judge. The relationship between case law and legislation, as well as good governance is perhaps best illustrated by the case below. This case also highlights how a decision can contribute to an area of law reform.



Case Study

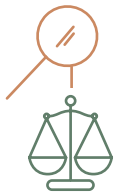
The Attorney-General for the Commonwealth v 'Kevin and Jennifer' & Human Rights and Equal Opportunity Commission (2003) 172 FLR 300; [2003] FamCA 94

Facts: Kevin had been born female, but had identified as a male since childhood. Kevin had undergone several medical procedures to become a male, including hormone treatment, a total hysterectomy and breast reduction surgery. Kevin had not undergone phalloplastic surgery (where a penis is constructed). Kevin had changed his gender on his birth certificate to be a male. He was perceived as a male at work, socially and in his family. When Kevin and his wife sought to legally clarify their marriage was valid, the Attorney-General declared that their marriage was not valid, as they had both been born female. The *Marriage Act 1961* (Cth) did not define the terms 'man' or 'woman' that was central to the definition of marriage. The Attorney-General cited the English case *Corbett v Corbett* [1971] P 83 to support the decision, which had determined that gender was decided biologically at birth by a person's genital, gonadal and chromosomal characteristics.

The case was first heard by a single judge in the Family Court of Australia. At trial Justice Chisholm ruled that Kevin was a man. Justice Chisholm held that biology alone was an insufficient measure of gender, as it ignored social and psychological factors. The Attorney-General for the Commonwealth of Australia appealed this decision.

Legal Issue: How should 'man' be defined for the purpose of marriage law?





Case Study ...

Decision: The Full Court of Family Court of Australia held that Kevin was a man within the ordinary contemporary meaning of the word. The court further decided that whether a person is man or a woman for the purpose of the marriage law of Australia should be determined on the date of the marriage. The judgment set out a broad and undefined range of both biological and cultural characteristics that can be used to decide a person's common law sex, moving beyond the biological factors used in the *Corbett* decision. The judgment of the trial judge was upheld.

1. Which court heard the case in the first instance? What court did the Attorney-General seek leave to appeal to? [C]
2. What precedent did the Attorney-General cite to support his argument? Is the case considered binding or persuasive? [C] [A]
3. What was the decision of the Full Court of the Family Court of Australia and did it depart from the precedent relied on by the Attorney General? [C]
4. Why was a court required to make a decision about how gender should be defined? Could this decision be overruled by Federal Parliament – if so, how? [A]
5. Do you agree or disagree with this decision? Why or why not? Consider the implications of your decision. [E]

Precedent

The case of *Re Kevin* shows how judges make law in the absence of clear legislative provisions. But, how does this decision lead to law reform and impact other parties in a similar situation?

Precedent refers to a principle or rule made in a previous decision that is either binding or persuasive on other courts deciding matters which are factually the same or similar. If you walk into any courtroom around Australia you will see legal counsel referring to other cases to support their submissions – precedent is fundamental to our legal system. In this case, the Full Court of the Family Court of Australia was binding on courts situated below it – only the High Court of Australia had the power to overrule its decision. The decision *Re: Kevin* had a legal impact beyond Australia and was cited in cases in England and America. It set a legal precedent that gender should be defined in a modern and contemporary way. It gave people hope that transgender persons could receive equal civil rights in a number of areas.

6.3 Landmark decisions, legal change and law reform

Quite often the courts make decisions which are progressive, in the sense that the decision reflects a more modern and up-to-date view of what the community expects. Having done so, it waits for Parliament to either agree with its decision or not. Sometimes the political system finds it too difficult to change the law and it may take some time before Parliament is able to do so.

Two examples are abortion law, which changed in Queensland in October 2018 and same-sex marriage, which became legal in Australia in 2018.

To explore how legislation and case law interact to create catalysts for change and reform we will investigate the legal area of native title.



Inquiry Focus

How do landmark decisions contribute to legal change and law reform?

While reading about native title law you should also continue to consider the relationship between legislation and case law and how it contributes to law reform.

Case Study

Mabo v Queensland (Mabo No. 2) (1992) 107 ALR 1; 175 CLR 1

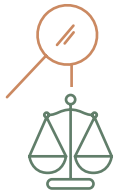
Facts: Eddie Mabo, a member of the Meriam people, lived on Murray Island (Mer) in the Torres Strait. The islands were annexed by Queensland in 1879, becoming part of the colony of Queensland. Eddie Mabo and four other plaintiffs claimed that Mer should be the subject of native title. The plaintiff's could not show any grant by the Queensland or Australian Governments of any title to the land but proved they had continuously inhabited Mer and had lived in permanent communities with their own social and political organisations.

Legal Issue: Did native title exist in Australia at the time of British settlement and does it still exist, especially in relation to Mer? If it did exist, had native title been extinguished on Mer?

Decision: The seven judges of the High Court of Australia held (six to one) that:

- the doctrine of *terra nullius* did not apply and that Aboriginal and Torres Strait Islander peoples did have native title of their traditional lands. The court accepted that Australia was not 'practically unoccupied' or vacant, but was occupied by Aboriginal and Torres Strait Islander peoples who had their own traditions and customs and, more importantly, their own relationship with the land.
- the earlier Australian view of Indigenous society as being of less worth than the introduced British society was essentially racist.
- given that native title existed, Aboriginal and Torres Strait Islander peoples retained their native title, unless the Crown took action inconsistent with the continuation of such native title. This could include when freehold land had been granted or when certain leasehold interests in land had been granted. Where the Crown had taken action in the past granting such interests, then native title was extinguished and no compensatory damages were to be paid.
- native title did exist in Mer and the Meriam people were entitled to the possession, occupation, use and enjoyment of the land. It had not been extinguished.
- any attempt by the States to extinguish native title was subject to overriding Commonwealth legislation – the *Racial Discrimination Act 1975* (Cth).



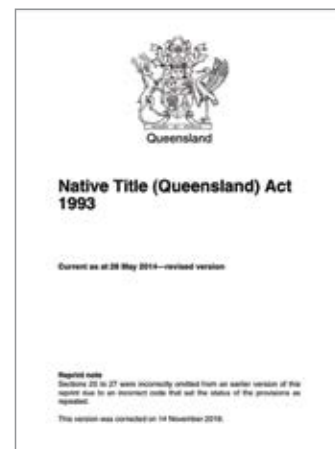


Case Study ...

1. What impact did the application of *terra nullius* have on Aboriginal and Torres Strait Islander peoples? [C]
2. Who was Eddie Mabo? [C]
3. What did the court decide with regard to native title on Mer? [C]
4. The decision held that States could not extinguish native title through legislation contrary to the *Racial Discrimination Act 1975* (Cth). Conduct research to find out what Queensland did in 1985 in anticipation to the *Mabo* decision. [S]
5. The *Mabo* case is considered to be a landmark legal decision. Why do you think this decision was significant for all Australians? [E]

After the *Mabo* decision the Australian Government took steps to resolve some outstanding issues. Some of these issues involved establishing a process by which native title claims could be decided and a system of compensation adopted. Mining and pastoral lease holders were two groups in Australia in particular that were concerned about the impact of the *Mabo* decision on their rights.

The *Native Title Act 1993* (Cth) came into effect on 1 January 1994.



Practical Application

Native Title Act 1993 (Cth)

Preamble (Extract)

This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race....

The High Court has:

- (a) *rejected the doctrine that Australia was terra nullius (land belonging to no one) at the time of European settlement; and*

Practical Application ...

(b) *held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and*

(c) *held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.*

The people of Australia intend:

(a) *to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and*

(b) *to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire....*

Section 3 Objects

Main objects

The main objects of this Act are:

(a) *to provide for the recognition and protection of native title; and*

(b) *to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and*

(c) *to establish a mechanism for determining claims to native title; and*

(d) *to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title*

1. Describe the broad objective of the *Native Title Act 1993* (Cth) in one sentence. [C]
2. Is there anything contained in the Preamble that surprised you? Why or why not? [E]
3. How does the *Mabo* decision demonstrate how case law contributed to legal change? [E]

Native title law is constantly evolving as new issues arise and the provisions within the legislation require further interpretation. The courts have been required to make other decisions in the area of native title that have continued to contribute to further law reform. The *Mabo* decision did not deal in any way with pastoral leases as there were not any in the Torres Strait Islands. The question of whether pastoral leases extinguished native title was addressed by the High Court of Australia in the following case.



Case Study



Wik Peoples v State of Queensland (1996) 187 CLR 1; [1996] HCA 40

Facts: Two pastoral leases existed on Cape York Peninsula in Queensland. The first of these was 1119 square miles in area. It was granted in 1945 and extended in 1975 until the year 2004. It was not permanently occupied or fenced. The lease contained provisions requiring the lessees to improve some of the land, sow a seed production area and fence some of the land.

The second of these was 535 square miles. An initial lease was granted in 1915 but the lessees never took possession and it was forfeited in 1918 for non-payment of rent. Another lease was granted in 1919 and forfeited again in 1921. In 1922, the area became an Aboriginal reserve. Aboriginal people were in continuous occupation of the area.

In December 1993, the Wik peoples made a claim for native title in the Federal Court of Australia. The Thayorre peoples joined the action also claiming native title rights to an area which partly overlapped the Wik peoples' claim. Both the Wik peoples' and Thayorre peoples' claims included land covered by the two areas of pastoral leases.

The case was initially heard in the Federal Court of Australia which held that the grant of pastoral leases under Queensland law had extinguished the native title rights. An appeal was made to the High Court of Australia.

Legal Issue: Did the granting of two pastoral leases extinguish native title?

Decision: In a majority decision four to three, the High Court of Australia held that pastoral leases did not extinguish native title, as the Queensland Parliament did not clearly intend to extinguish native title when granting the Wik pastoral lease. It re-affirmed the *Mabo* view that native title can only be extinguished by a written law or an Act of the Government which shows the clear intention to extinguish native title.

However, the High Court of Australia also stated that if there is a conflict in the exercise of the right by the pastoralist with the exercise of the native title right then the native title right would yield to a pastoralist's right.

1. Which court heard the original case? What did the court decide? [C]
2. If there was a conflict between the pastoralist's rights and the exercise of native title rights, which right prevails? [C]
3. How was the issue in this case different to the *Mabo* decision? [A]
4. Why is this case considered to be also legally significant? [E]

The fact is that the Wik decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre.

Source: Prime Minister John Howard, Press Release – ‘Amended Wik 10 Point Plan’, 8 May 1997.

After the *Wik* decision, the Howard led Coalition Government amended the *Native Title Act 1993* (Cth) to incorporate a ‘10 Point Plan’ that placed some restrictions on native title claims. The plan included the introduction of a registration test imposed on all claimants, time limits being placed on claims and additional protections given to government, mining and pastoral leases. The *Native Title Amendment Act 1998* (Cth) is the longest debated bill in Australian Parliament to date (it was debated for 105 hours and 56 minutes) and was only passed when Independent Senator Brian Harradine supported its passage.

The area of native title law continues to involve both case law and legislation. These two types of law continually interact with each other as judges are required to interpret provisions of the *Native Title Act 1993* (Cth) in relation to new native title claims and compensation for extinguishment by the *Native Title Act* that involved previously unresolved issues. This can be seen below in a case that was decided by the High Court of Australia in 2019, which was the first occasion the High Court of Australia was required to determine a claim for compensation by a Native Title holder.

The test case – described as one of the biggest since *Mabo* – brought the High Court of Australia to the Northern Territory for the first time in its history. It was the first time the High Court of Australia had examined the *Native Title Act’s* compensation provisions.

Case Study

Northern Territory and Mr A. Griffiths (deceased) & Lorraine Jones on behalf of the Ngaliwurru & Nungali Peoples [2019] HCA 7 (13 March 2019)

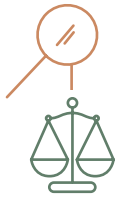
Facts: Timber Creek is a tributary of the Victoria River situated in the north-western corner of the Northern Territory. A number of pastoral leases were granted in the district including over some of the land subject to native title. The Ngaliwurru and Nungali Peoples (the Claimants) had some native title rights and interests that allowed the claimants to use the land in accordance with their traditional laws and customs, such as the right to hunt, fish and forage on the land and the right to engage in cultural activities and conduct ceremonies on the land. But, these rights were non-exclusive – for instance, the Claimants had no power to prevent other persons entering or using the land. The Northern Territory Government had also done acts which impaired or extinguished native title rights such as granting of a Crown lease or constructing public works.

The Claimants sought compensation for the loss and impairment of their native title rights over land in the area. The compensation payable to the Claimants under the *Native Title Act 1993* (Cth) was to be paid in two parts to them, including:

- i. Compensation for economic loss (including interest from the date of extinguishment of the Native Title); and
- ii. Compensation for non-economic loss.

In the original trial the judge determined that the compensation for economic loss should be set at 80% of the freehold value of the affected land and determined that the non-economic





Case Study ...

loss compensation should be payable in the amount of \$1.3 million. On appeal to the Full Court of the Federal Court it held that the assessment of economic loss should be set at 65% of the freehold value of the affected land. The Full Court also held that the compensation of non-economic loss should remain at \$1.3 million.

Legal Issue: How should the compensation for economic loss be assessed and what should the non-economic loss be that was payable to the Claimants.

Decision: The High Court of Australia decided that the compensation for economic loss should be \$320,250.00 (50% of the freehold value of the land) plus interest. It was held also that the compensation payable for the cultural loss (non-economic loss) should remain \$1.3 million. The compensation for cultural loss was to be paid on top of the compensation for economic loss.

Further discussion:

The compensation for the non-economic loss – best described as the cultural loss – exceeded the compensation for the economic loss. To be able to understand the depth of the cultural or spiritual loss to the Claimants you need to look at evidence given to the trial judge in this case. The trial judge referenced an expert anthropologists' report by Kingsley Palmer and Wendy Asche on the rights and duties of the Claimant under Ngaliwurru and Nungali law and custom to look after and speak for the country in the initial judgment.

Among other things, the report explained sites of significance in and around the claim area and very importantly the travels of major Dreamings through that area. The anthropologists explained the effect harming their country had on Aboriginal peoples under their traditional laws and customs. They did that by reference to events that had occurred in Timber Creek. Their report referred to one of the compensable acts of building a swimming pool on land with one site of significance and how such acts interfered with the Dingo Dreaming track Wirip (Dingo Dreaming). The Claimants gave evidence of the effect of this action. It made them feel bad. Simply, they did not want the rock under the water. They wanted it on the water. One Claimant gave evidence that the concrete causeway built to create the pool at that site:

Blocked the tunnel and cut the life out of the Dreaming. It is still there, but you can't see it anymore. That Wirip Dreaming is very important to us. We use that Dreaming story when we have initiation for the young fellas. Now it's damaged for good and we can't tell the young fellas the full story. If they can't see the Dreaming it's hard for us older fellas to tell them the full Dreaming story they need to learn to grow up.

Each group has to look after its bit of the Dreaming. If something goes wrong with our part, others feel we are no good. That's what happened when all of these things have been built in the town. Other Aboriginal people complain about it and say we are letting them down.

It hurts my feelings when Gardia (white men) do these things. They go ahead without talking to the old fella or me. When I see the Dreaming being damaged, I feel for my old people. I feel ashamed, like I've done the wrong thing myself in not looking after the country, the sites and the Dreaming.....

After this evidence was received the trial judge concluded that the Aboriginal peoples had not only a duty, but also a concern to look after the country and that they had a genuinely held deep connection to the country. He found that the evidence supported by the report of the anthropologists was that the loss of, and damage to country, caused an emotional, gut-wrenching pain and deep or primary emotions accompanied by anxiety. The judge concluded that the consequence of the compensable acts affected the Aboriginals perception of, and engagement with the Dreamings. The Dreamings are not site specific but run through a large

Case Study ...

area of the land, and that a person's connection with country, came with it, an obligation to care for it. There is a resulting sense of failed responsibility when it's damaged or affected in a way which cuts through the Dreamings. The spiritual or cultural effect on the Claimants was devastating.

1. What were the actions of the Northern Territory Government and what impact did this have on the Ngaliwurru and Nungali peoples' rights? [C]
2. What did the Federal Court of Australia award the Ngaliwurru and Nungali peoples' in compensation? How did this change on appeal before the High Court of Australia? [C]
3. Why do you think this case may be significant from a law reform perspective? [E]
4. A formula to decide the value of compensation was not specially addressed in the *Native Title Act 1993* (Cth). Do you think the Government should address compensation more directly in the Act? Why or why not? [E]

The above case is often described as being the most important native title case since *Mabo*. It remains the only judicial consideration of principles relating to the calculation of native title compensation. As this text is being written there are active native title compensation claims throughout Australia which no doubt will be of interest as they are each determined. There are some decisions that bring legal change and challenges to the Parliament. There was a recent High Court decision which did exactly that.

Before we move to the recent decision you should be aware of an earlier High Court case.

Case Study

Al-Kateb v Godwin [2004] HCA 37:

Facts: Mr Al-Kateb (the plaintiff) was a Palestinian man born in Kuwait who arrived in Australia by boat in December 2000. He was placed in immigration detention. He then made an application to be granted a temporary protection visa. His application was unsuccessful. Despite being born in Kuwait, he did not obtain citizenship of that country and had no citizenship arising from his Palestinian parents. He was therefore a person in Australia who could not obtain a visa to remain in Australia and was in fact a stateless person. This meant he held no citizenship in any country. He was therefore placed in detention and remained in detention.

The plaintiff made application to be released from detention. His matter proceeded to the High Court of Australia.

It was argued on behalf of the plaintiff (Mr Al-Kateb) before the High Court of Australia that if his prospects of removal to another country were remote or impracticable, that is, extremely unlikely to occur, then he should be released from detention. The purpose of detention was to facilitate the removal of non-citizens from Australia. If the plaintiff's prospects of removal were remote or impracticable, the argument was that detention could not be considered to be for the purpose of removal. Furthermore, it was argued by the plaintiff that if the detention wasn't connected to the immigration purpose of removal of the plaintiff from Australia then his detention was purely punitive and could not be ordered by any person other than a Court. Chapter III of the *Constitution* had established a judiciary and it was only the judicial officers that could place people in detention.





Case Study ...

Legal Issues: The two main issues were:

1. Did the *Immigration Act 1958* (Cth) permit a person in the situation of the plaintiff to be detained indefinitely?
2. If so was such detention permissible under the *Australian Constitution*?

Decision: The majority of the High Court of Australia decided:

- indefinite detention was lawful under the *Immigration Act*.
- a person in the plaintiff's position could be detained permanently in Australia if he could not be deported or removed to another country and this detention did not breach Chapter III of the *Constitution of Australia*.

The decision made in *Al-Kateb* was then considered by the High Court of Australia again in November 2023 in the following case study.



Case Study

NZYQ v Minister for Immigration Citizenship & Multicultural Affairs [2023] HCA 37

Facts: The plaintiff is a Rohingya Muslim born in Myanmar. He arrived by boat into Australia in 2012 and was taken into detention under s189 of the *Immigration Act 1958* (Cth). He was granted a bridging visa in 2014. In 2016 he pleaded guilty to a sexual offence against a child and was sentenced to jail for 5 years with a non-parole period of 3 years and 4 months. He was released from custody on parole in 2018 and then was taken into immigration detention under s189(1) of the *Immigration Act 1958* (Cth). Whilst in custody he applied for a protection visa. The delegate of the minister concluded that he had a well-founded fear of persecution in Myanmar. Thus the delegate found that the plaintiff was a refugee to whom Australia had protection obligations. However, because of his conviction the delegate also found that there were reasonable grounds for considering him a person who was a danger to the Australian community. Thus, the delegate found that he should not have a protection visa as set out in s36(1)(c) of the *Migration Act*. After appeals failed to the Administrative Appeals Tribunal and the Federal Court of Australia, the Department then had an obligation to remove him from Australia as soon as reasonably practicable. He did not have a right of entry to Myanmar. No other country in the world would take a convicted sex offender. Thus, he was remanded in detention. He then started proceedings against the Minister asserting that his continuing detention was unlawful.

Legal Issues:

The two main issues were:

1. Was the detention of *NZYQ* unlawful?
2. Was the detention of *NZYQ* in breach of the Australian Constitution?

Decision:

The seven judges of the High Court of Australia held:

1. That the detention of *NZYQ* was unlawful and he should be released from detention. The High Court of Australia came to the conclusion that if there was no real prospect of the removal of *NZYQ* from the country then indefinite immigration detention became unlawful. In the evidence before the court there was no real prospect that any country

Case Study ...

would accept *NZYQ*. In its decision the High Court of Australia set out that the Executive government's power to detain came to an end *"when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future."*

2. Indefinite detention, where there is no real prospect of removal from Australia, cannot be seen as being legitimately connected to the immigration purpose set out in the *Immigration Act*, of removal from Australia. The detention is therefore purely punitive and cannot be ordered by anyone other than a Court established under Chapter III of the *Constitution*. Indefinite detention in these circumstances was beyond the power of the minister and executive arm of the government.

Questions

1. When does the Immigration Department have a power to detain unlawful immigrants? [C]
2. When does the Department of Immigration power to detain come to an end? [C]
3. Describe in your own words the constitutional power in this case arising from the separation of powers doctrine. [A]

The decision of the High Court of Australia in *NZYQ* was a challenge to the Federal Government. The clear lawful position for almost 20 years arising from a precedent set by the High Court of Australia was that the government could continue to keep people who arrived unlawfully in Australia in indefinite detention on the basis that one day they may well be able to find a country to send them to. The High Court of Australia in *NZYQ* said that unless there was a reasonable prospect of that occurring then the detention is unlawful. This is a clear example of the ability of the High Court of Australia to overrule itself and in fact it did overrule its own decision in *Al-Kateb*.

Practical Application

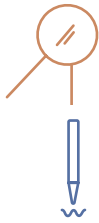
NON-CITIZEN ANDREW GILES WANTED TO BE 'RID OF' CANNOT BE DEPORTED, COURT RULES

A non-citizen convicted of offences related to alleged drink-spiking who Andrew Giles said he wanted to be "rid of" has had a major win in court, with the Commonwealth conceding he cannot be deported. On Tuesday the Federal Circuit Court made declarations that *"there was no real prospect of removal"* of businessman Faswat Abdel-Hady, and his detention was not authorised by the *Migration Act* for the 18 months (from 28 July 2022 to 13 February 2024).

The findings open the way for Abdel-Hady to pursue damages for false imprisonment in that period, which includes 3 months after the High Court ruled on 8 November 2023 in the *NZYQ* case, that indefinite immigration detention is unlawful where there is no prospect of removal.

Abdel-Hady is a citizen of Austria born in the Gaza Strip who came to Australia in 1997. In 2009 Abdel-Hady was convicted of unlawfully causing two people to take a stupefying drug with intent to commit an act of indecency against one of them. The convictions were quashed on appeal. At a re-trial in November 2012 Abdel-Hady pleaded guilty to lesser charges of using poison to endanger life or inflict grievous bodily harm. He was sentenced to 2 years and 8 months in prison but released on the basis of time already served. On 31 March 2017, then Immigration Minister Peter Dutton, cancelled Abdel-Hady's visa. He was detained in Villawood from 22 August 2017. Despite the Home Affairs Department





Practical Application ...

submission to Giles warning that if he did not release Abdel-Hady then he was likely to be released because of the High Court decision, Giles claimed that Abdel-Hady was “not part of the *NZYQ cohort*”. Guardian Australia understands that was because the government had believed it could arrange a special charter flight to deport him despite his complex medical needs.

Abdel-Hady’s lawyers have said he is “*medically unfit to fly by airplane and cannot be removed from Australia to Austria*” due to heart disease, nerve damage, deep vein thrombosis and diabetes ...

On Tuesday the Federal Circuit Court Judge Douglas Humphreys declared by consent that “*there is currently not a real prospect of the removal of the applicant from Australia to Austria becoming practicable in the reasonably foreseeable future by any means aside from commercial airliner*” and he was “*not currently fit for travel*” by that means.

The judge declared that “*throughout the period 28 July 2022 to 13 February 2024 there was no real prospect of removal of the applicant from Australia becoming practicable in the reasonably foreseeable future*”, which was a test for indefinite immigration detention being unlawful stated by the High Court in the *NZYQ* ruling, “*on that basis the Applicant’s detention during that period was not authorised*” ... Humphreys noted that Abdel-Hady may make “*a claim for damages for false imprisonment in either these proceedings ... or in any new proceedings*”. He said the Commonwealth could defend the claim “*except to the extent that such a defence would be inconsistent with the terms of the declaration*”.

Source: Paul Karp, ‘Non-Citizen Andrew Giles wanted to be ‘rid-of’ cannot be deported, Court Rules’, *The Guardian*, (Online, 9 June 2024), <theguardian.com>.

1. Why was there no prospect of removal of Mr Abdel-Hady from Australia? [C]
2. Why did the Minister Giles conclude that Mr Abdel-Hady was not “part of the *NZYQ*” cohort? [C]
3. Do you think it is fair that Mr Abdel-Hady may be in a position to make a claim against the Federal government for damages arising from false imprisonment? Justify your view using legal criteria. [E]

6.4 Specialist courts and tribunals

When Queensland was established in 1859 it only had two courts, the Supreme Court of Queensland and the Court of Petty Sessions. Over time many new courts have been established for various reasons. We will examine the following courts:

Childrens Court

In Queensland criminal matters involving children are dealt with in the Childrens Court of Queensland (CCQ) which is constituted by:

- An appointed Childrens Court judge or other District Court of Queensland judge if a Childrens Court judge is unavailable.
- An appointed Childrens Court Magistrate or other Magistrate if a Childrens Court Magistrate is unavailable.

As for all criminal matters almost all prosecutions against children commence in the Magistrates Court convened as a Childrens Court. These proceedings are heard in a closed court and only people directly involved in the case may be present and no information identifying a juvenile defender can be published. Once a person turns 18 years of age he or she is considered to be an adult under the *Youth Justice Act 1992* (Qld). However, if the offence was committed before the person turned 18 then such person may be dealt with as a child in the Childrens Court. Childrens Court cases can be sent to a higher court, usually to the Childrens Court of Queensland with a judge appointed from the District Court of Queensland. This court operates usually as an open court but the judge may order that it be closed. No information identifying a juvenile defendant can be published.

Matters involving children are largely governed by the *Youth Justice Act 1992* (Qld). The court is required to check that a child has had access to legal representation.

The Childrens Court of Queensland also has jurisdiction to deal with the following matters:

1. Appeals against child protection orders made by a magistrate

Under the *Child Protection Act 1999* (Qld) magistrates have the powers to make orders for the protection of children who are at risk of harm and who are in need of protection. If the child does not have a parent who is able or willing to protect the child then the Queensland Government becomes responsible for protecting that child. Child protection orders that can be made can include removing children from biological parents and providing alternative care for that child.

2. Proceedings under the *Surrogacy Act 2010* (Qld)

This Act regulates surrogacy arrangements between individuals. Surrogacy is an arrangement between a woman (the surrogate) who agrees to carry and then give birth to a child on behalf of another person or couple (the intended parent/s). Such arrangements are governed by the *Surrogacy Act 2010* (Qld). The Act allows for the transferring of the parentage of a child born under a surrogacy agreement from the birth mother to the intended parents. The sanction of the court is sought and agreed to under specific circumstances to allow this to happen. These proceedings are conducted in the Childrens Court as if they were proceedings in the District Court of Queensland.

3. Proceedings under the *Meriba Omaskr Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld)

The Queensland Government introduced legislation to allow for the legal recognition of Torres Strait Islander families' continued use of traditional child rearing practices. This Act allows for a permanent transfer of parentage from biological parents to cultural parents. This is achieved by making an application for a Cultural Recognition Order, (CRO) which if granted will allow cultural parents to make ordinary parental decisions about their cultural children. Thus a child's legal identity aligns with his or her cultural identity. The applications for a CRO are received and decided by a commissioner. However certain decisions can only be made by the Childrens Court of Queensland. Applications are required to be made to the Childrens Court on a range of matters. These matters include applications to dispense with parental consent (s52), applications to discharge dispensation of parental consent (s55) and applications to discharge cultural recognition orders (s77).

Murri Court

The Murri Courts are located in the Magistrates and Childrens Court in Brisbane and throughout many centres in Queensland. The procedures in the Murri Court are less formal than the procedures in the ordinary court system. The Murri Court involves the application of

customary law to the hearing or sentencing of an Indigenous defendant. It is a specialist court situated in the Magistrates Court of Queensland with a magistrate presiding over the Court. The Murri Court only deals with criminal offences that can be dealt with in the Magistrates or Childrens Court of Queensland. It is not available for serious indictable offences. The magistrate is assisted by Elders or Respected Persons from the community that assist him or her to understand a defendant's social and cultural circumstances. It links Aboriginal and Torres Strait Islander defendants to a number of cultural and support services, to help them to address the underlying reasons for their offending behaviour. It is only after the defendant accesses and utilises the support services that the magistrate will sentence a defendant. Such sentencing takes into account the changes that the defendant has made in his or her behaviour as a result of this intervention.

Queensland Civil and Administrative Tribunal (QCAT)

QCAT is an independent Tribunal that resolves disputes on a range of matters. The purpose of QCAT is to provide a fast and inexpensive means to resolve disputes between citizens. People represent themselves in QCAT and if they wish a lawyer to represent them they need to apply for permission from the Tribunal which may or may not approve a party being represented by a lawyer. Because there are no legal costs then it is a cost effective means of resolving disputes. There is a very wide range of disputes that QCAT now deals with.



Research Task

Individually or in groups of two select two from the list below and describe how the item in the list relates to disputes that QCAT is able to resolve.

1. Blue Card.
2. Manufactured home.
3. Retirement villages.
4. Motor vehicles.
5. Professional discipline.
6. Enduring Power of Attorney.

Where there are several disputes arising from each of the items listed above, set out at least two of such disputes [C] [S]

The Administrative Review Tribunal (ART)

The Administrative Appeals Tribunal (AAT) has now been abolished. The Australian Government has introduced legislation to establish a new Federal administrative review body, known as the Administrative Review Tribunal (ART) and this new Tribunal is to commence operation before the end of 2024. The AAT was established in 1975. The purpose of the AAT was to allow citizens to seek a review of administrative decisions made by persons of authority under Commonwealth Laws. A person could and will be able to apply for a review of decisions made by Australian government ministers, government departments and government agencies. This right to review will continue under the ART. It is the Commonwealth Act of Parliament that gives rise to a right to seek a review. These reviews are available in many areas including immigration, taxation, social security and bankruptcy. The AAT once and the ART now have no power to enquire of government decisions generally, unless a right to review is set out in a Federal Act of parliament. The review process involves the Tribunal considering whether

the proper or correct decision was made by a minister or government department or a public servant with the required delegated authority. If the Tribunal came to the conclusion that the decision was not properly made, it refers the decision back to the decision maker requiring the decision maker to make the decision again. Once the ART commences operation it will take over the matters which have been and still are being conducted by the AAT and all such matters before the AAT will transition to the ART.

Federal Circuit and Family Court of Australia

The Federal Circuit and Family Court of Australia have jurisdiction to deal with matters of:

1. Family law.
2. Migration law.
3. General federal law.

Family Law

The majority of the work of the Court is family law. The courts family law jurisdiction includes applications for divorce, applications for the adjustment of property interests between spouses, applications for parenting orders, applications for spousal maintenance, applications for the determination of parentage and other related applications. The most common applications in family law are applications for parenting orders and applications for adjustment of property interests. Parenting matters can be extremely complex. Parenting orders are made by judicial officers in the court. The orders primarily made are orders where a child should live (that is with which parent usually) and orders as to how much time should be spent by the child with the parent with whom the child is not living. The court has to decide these issues by reference to the best interests of a child.

Applications for the adjustment of property interests are essentially applications for the division of property between spouses after their marriage or when de facto relationship ends. A further application is an application for divorce. In that application all that a person is required to show is that they have lived separately and apart from their former spouse for a period of 12 months and that proper arrangements are in place for the care of the children of the marriage. After 12 months of separation a party desiring a divorce simply files an application, pays a filing fee, serves the application on the other party, and the Court grants the divorce very commonly without the parties being present. Applications for the determination of parentage is where a Court is asked to decide that a person is or is not the father or mother of a child. The vast majority of these applications are now dealt with by the court ordering a DNA typing test to ascertain the likelihood of a putative parent being the father or mother of a child. Once the test is taken the results of the DNA test are definitive.

General Federal Law

The Federal Circuit and Family Court of Australia has jurisdiction to deal with general federal law matters including bankruptcy, consumer law, intellectual property law, industrial matters, admiralty law, administrative law, and the law relating to privacy. The Court shares this jurisdiction with the Federal Court of Australia.

Migration Law

The Federal Circuit Court can review some decisions made under the *Migration Act 1958* (Cth). It is a minor jurisdiction of the court. The Court can only review a decision in order to determine if a 'jurisdictional error has been made'.

Review

Comprehend

1. **Describe** and **explain** each of the following terms:

- a. Judicial independence.
- b. Statutory interpretation.
- c. Judicial precedent.
- d. The main features of the Murri Court.
- e. Surrogacy.

[C]

2. In one sentence explain why each of the following cases are regarded as landmark cases.

- a. *Mabo v Queensland (Mabo No. 2)* (1992) 107 ALR 1; 175 CLR 1.
- b. *Northern Territory and Mr A Griffiths (deceased) & Lorraine Jones on behalf of the Ngaliwurru & Nungnungali Peoples* [2019] HCA 7 (13 March 2019).
- c. *NZYQ v Minister for Immigration Citizenship & Multicultural Affairs* [2023] QCA 30.

[C]

Analyse and evaluate

1. When does the Immigration Department have power to detain unlawful immigrants and when does that power to detain come to an end? In your answer refer to the decision in the *NZYQ* case. Do you agree with the decision reached in the *NZYQ* case by the High Court of Australia? In your answer refer to the perspective of both the detained immigrant and citizens of Australia. [A] [E]
2. Is the system of the selection of judges used in the United Kingdom better than the system used to select judges in Australia? [E]

Governance in Australia

Chapter 7: Governance in action— accountability

7.1 Understanding accountability

7.2 Internal mechanisms of accountability

7.3 Inquiries and commissions

7.4 Whistleblowers

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
 - concerns about corruption in Australia are growing governments should be held accountable for their decisions and actions
 - parliaments have internal mechanisms to hold the government to account, including the use of estimate hearings and parliamentary committees
 - a government can order an inquiry into an issue of great importance
 - the *Fitzgerald Inquiry* was one of the most significant royal commissions into corruption undertaken in Australia
 - independent commissions, such as the Crime and Corruption Commission in Queensland, have been developed to investigate misconduct and corruption
 - whistleblowers can play an important role in uncovering misconduct or corruption, although some disclosures involving matters concerning Australia's national security are against the law.
- analyse and evaluate
 - the accountability of Australian governments
 - accountability in the Australian democratic system of government.

7.1 Understanding accountability

Persons and organisations are **accountable** if they have to answer for the consequences of a matter. Persons and organisations are **responsible** if they have been asked to do something or have promised to do something.

In Australia, all governments are elected by the people they represent, and they are accountable to those people. Governments make promises to do things during elections. They are responsible for the delivery of these promises, sometimes referred to as their policies. Sometimes they fail to deliver on these policies. As citizens we can hold the parliament or the executive to account by exercising our right to vote – we either vote for a member of parliament to retain their seat or for the other candidate.

Accountability and elections

At federal elections, Australians choose members of parliament to represent their views and interests, in the House of Representatives and the Senate. In this way, federal Parliament serves Australians and is accountable to them.

Parliamentary Education Office, 2018, *Federal Elections* <peo.gov.au/learning>.

In Chapter 3 we discussed the concept of representative government and the right to vote. When the government calls an election, citizens are asked to **judge the actions and decisions of the government**. When we cast our vote at an election we will either vote for the sitting member or another candidate based on our belief about how well they represent us.



Practical Application

IT'S TIME TO VOTE OUT ACCIDENTAL SENATOR FRASER ANNING

QUEENSLAND voters never chose Fraser Anning to represent them.

He is our accidental Senator, called up off One Nation's electoral bench when former senator Malcolm Roberts fell foul of the Constitution during the dual-citizenship crisis.

Senator Anning's handful of speeches in the chamber representing the needs and views of Queensland farmers have been far too few. He would rather focus on fighting an ideological war instead.

A war that, while it may appeal to some sections of society, does not further the interests of his constituents.

A war that, more often than not, has disgraced his home state. A state that relies heavily on tourism and international trade.

It is time for Queensland voters to choose someone who will spend more time fighting for them in Canberra, rather than someone more focused on fighting to build their personal brand by whatever means possible in order to save their political skin.

Source: Sarah Vogler, 'It's time to vote out accidental senator Fraser Anning', *The Sunday Mail*, 17 March 2019.

Practical Application ...

1. Which state does Fraser Anning represent? [C]
2. How was Fraser Anning elected? [C]
3. What reasons does the article provide to explain why the current member should not be reelected at the next election? [C]
4. Do you believe a member of parliament has the responsibility to represent the views of their electorate even if it conflicts with their personal beliefs? Why or why not? Analyse the viewpoint of an elector and its consequences. [A] [E]

What do you think?

Fraser Anning lost his seat in the 2019 federal election. Does the decision of the electorate to reject Senator Anning in the election support the view that he was accountable for the way in which he represented the State of Queensland while elected? Give your reasons. [E]

What is 'accountability'?

Accountability is fundamental to good government. It is one of the cornerstone values of a modern, open society. At its simplest, accountability involves being called to account to some authority for one's actions.

Australian Public Service Commission, 2018, *Delivering Performance and Accountability*, <apsc.gov.au/delivering-performance-and-accountability>

Accountability is the foundation concept of this chapter. Accountability is difficult to define in a precise way, but we have all experienced it in one way or another. Being held accountable for your actions (or being held responsible) is something your parents or teachers may talk to you about when they hand down a consequence for doing something wrong. It helps us make good decisions.



We continue to be held accountable as we become adults – for instance, if we are caught driving under the influence of an illegal drug, we will lose our driver's license for a period of time. It is the same for members of parliament. We expect our representatives to show integrity, acknowledge conflicts of interest, act lawfully and to represent us effectively.

What do you think?

In 2022, Transparency International (a global non-government organisation) ranked Australia as the 14th least corrupt nation. The score is based on peoples' perceptions of the level of corruption in a particular country.



What do you think?

Most transparent nations according to the Transparency International survey

1. Denmark	6. Sweden and Switzerland	11. Ireland
2. Finland	8. Netherland	12. Canada and Estonia
3. New Zealand	9. Canada and Luxembourg	14. Australia
4. Norway		
5. Singapore		

Source: Transparency International, *Corruption Perceptions Index* (Web Page, 2022) <transparency.org/en/cpi/2022>.

1. What may have been the reasons behind our score? What is causing some people to believe Australia is more corrupt than these nations? [A]
2. Do you feel Australia is becoming more corrupt? Analyse your viewpoint. [A]



Keeping Australian governments accountable

Our system of government in Australia has many checks and balances to ensure no arm of government has too much power. However, voting is not the only way we make sure parliament and the government is operating lawfully, ethically, efficiently and in the best interests of its citizens. There are a number of mechanisms that can hold the government to account, including:

- **parliamentary committees** to examine unethical behaviour
- **estimates hearings** to scrutinise ministerial decisions or money spent
- calling an **inquiry** or **royal commission** into a specific issue
- the creation of **independent anti-corruption statutory bodies** that investigate allegations of corruption and misconduct
- the legal protections provided to **whistleblowers** to encourage the reporting of lawful actions and decisions
- the importance of encouraging a **free press**, as the media make the public aware of questionable behaviour

These mechanisms often work together to maintain an open and transparent government. Some have a legislative basis, but others are based on long established customs, parliamentary rules and conventions. It is important to remember that this chapter does not provide an exhaustive list of the methods used to hold governments to account. As you come across other mechanisms of accountability it is important you continue to inquire and investigate how they contribute to good governance, as well as understand their limitations.

7.2 Internal mechanisms of accountability

Parliamentary committees

A parliamentary committee is a group of Members or Senators (or both in the case of joint committees) appointed by one or both Houses of Parliament to undertake certain specified tasks.



Parliament of Australia, *Infosheet 4 - Committees* (Web Page, 2018) <aph.gov.au/infosheets/4>.

An important part of maintaining the confidence of parliament (the foundation of responsible government) involves the integrity of the ministry. Holding ministers responsible for their actions, policy decisions and the departments they oversee is how we see responsible government in action. It is important that ministers tell the truth, act honestly and follow any rules or laws.

Throughout history many ministers have not made the right decisions. **Parliaments have developed internal ways of dealing with complaints against particular members. Complaints are investigated by a committee made up of a cross section of different members of parliament from different political parties**-an attempt to address any perceived bias and promote impartiality. For example, the Senate Standing Committee of Privileges (which we'll see in action later) investigates conduct which allegedly obstructs the work of the Senate. It was established by Standing Order 18 (standing orders are rules used in parliament that guide the way the houses operate) and applies legislation, specifically the *Parliamentary Privileges Act 1987* (Cth). In Queensland the *Parliament of Queensland Act 2001* (Qld) s102 establishes the Ethics Committee, which deals with similar types of complaints as well as dealing with the ethical conduct of particular members.

These complaints might be about the violation of the code of conduct, question the ethical conduct of a minister or involve a breach of parliamentary privilege (this provides legal immunity to a member of parliament under certain circumstances). How does this process work in practice? Let's look at two examples.

Practical Application

MP ROS BATES REFERRED TO ETHICS COMMITTEE AFTER ACCUSING HEALTH MINISTER SHANNON FENTIMAN OF INCITING VIOLENCE AGAINST HER

In short:

- Shadow Health Minister Ros Bates has been referred to the Queensland's ethics committee after refusing to withdraw an accusation that Shannon Fentiman incited violence against her.
- Ms Bates claimed, that by posting a short clip of her saying "cross your legs" to social media, Ms Fentiman opened her up to "vile messages and threats of violence".
- What's next? There has been mixed reaction from fellow MPs, with some backing a side and one party leader calling for an end to political "squabbling".





Practical Application ...

A senior Queensland opposition MP has been referred to a powerful parliamentary ethics committee after refusing to withdraw an accusation a minister had incited violence against her.

Shadow Health Minister Ros Bates on Thursday morning told parliament a video posted on social media yesterday by Health Minister Shannon Fentiman had 'unleashed a wave of cyberbullying'.

'I have received vile messages and threats of violence on my phone, my email, my social media, and to my office ... these threats have been terrifying,' she said.

'I now ask that the incitement of these threats stop ...to take down her misleading and deceitful videos.'

Ms Fentiman rejected the allegation she had incited threats of violence.'... I will ask her to withdraw,' she said.

When asked by House Speaker Curtis Pitt if she would withdraw the comment, under parliamentary convention, Ms Bates refused.

Mr Pitt later told parliament he had no choice but to refer Ms Bates to the State Ethics Committee.

'... In terms of the office that I hold, I cannot allow directions by me under standing orders to be simply denied.

"It is an extremely serious matter. It undermines the authority of the speaker and it risks the order of the house..

If found guilty, Ms Bates faces reprimand or fines.

Source: Alex Brewster, 'MP Roz Bates referred to ethics committee after accusing health Minister Shannon Fentiman of inciting violence against her following 'cross your legs' comment' *ABC News* (Online, 23 May 2024), <abc.net.au/news/2024-05-23/cross-your-legs-ros-bates-referred-to-ethics-committee/103884620>.

1. What did Ros Bates allege in Parliament that the Health Minister Shannon Fentiman had done? What was the response of the Health Minister? [C]
2. What did the Speaker the Hon Curtis Pitt decide to do in his role as Speaker? [C]
3. Why is it important for members of parliament to respect the authority of the Speaker when decisions are made about their behaviour in the House? Do you agree with the decision of the Speaker in this instance? Justify your reasons with legal criteria. [A] [E]

Estimates committees

Another type of parliamentary committee that exists in both State and Commonwealth Parliament oversees estimates hearings. As we discussed in the previous section parliamentary committees (of which estimates committees are one type) are established by both legislation, such as the *Parliament of Queensland Act 2001* (Qld) s88 and standing orders. Estimates hearings allow members of parliament to scrutinise (or closely examine) how Executive government is spending taxpayers' money and the decisions they make. It can also allow for scrutiny of government agencies and authorities, such as the Australian Public Service Commission (APSC), the Australian Broadcasting Commission (ABC), Murray-Darling Basin Authority (MDBA)

or the Great Barrier Reef Marine Park Authority (GBRMPA). They are open for the public to attend and transcripts can be downloaded online – an important feature of open government. Like ethics committees, estimates hearings are made up of members of the government, the opposition and members of a minor party or an independent. Both ministers and public servants can be called to answer questions.

So how do estimates hearings exactly maintain accountability? This process is another example of responsible government in action—it checks how the government plans to collect and spend money so it can maintain the confidence of parliament. The questions can uncover practices previously unknown to the public and may prompt the government to change a policy or improve the way a department is run.

Practical Application



... KEY TAKEAWAYS FROM APSC's SENATE ESTIMATES

... key moments that emerged from the Australian Public Service Commission's (APSC)... senate estimates hearing on Tuesday.

Two dozen code-of-conduct inquiries underway

APS commissioner Gordon De Brouwer... said there were currently “two dozen” code-of-conduct inquiries underway, including into the 16 from the robodebt royal commission and the conduct of Home Affairs secretary Mike Pezzullo.

“The inquiries underway reflect the expectation of the Australian people, the government, and indeed the public service itself.”

Transparency to drive down consultancy use

Greens senator Barbara Pocock questioned de Brouwer about consequences for secretaries who fail to meet targets to reduce consultancy use, which is part of the newly released APS Commission Framework.

The APS commissioner said accountability and transparency were the “first line of defence”. “Transparency about what the plans are, and delivery against those plans is really important,” de Brouwer said “That’s a key driver, that’ll drive behaviour and change over time.”

The reduction targets are required to be in agencies’ 2024-25 corporate plans, and for annual reports to report on progress.

Source: Anna MacDonald, ‘Seven key takeaways from APCS Senate estimates’ *The Mandarin*, (Online, 25 October 2023) <themandarin.com.au/233129-seven-key-takeaways-from-apscs-senate-estimates>.

1. Who was questioned in the estimates hearing? By whom? [C]
2. What actions or decisions is she attempting to scrutinise? [C]
3. What is the purpose of estimates hearings? [C]
4. Do you think it is important that members of parliament have the ability to question public servants about the implementation of government policy other than questioning the minister responsible on the floor of parliament? Why or why not? Analyse your viewpoint and its consequences. [A] [E]

7.3 Inquiries and commissions

Royal Commissions

The *Royal Commissions Act 1902* (Cth), s1A states commissions are:

...connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.

Over the last few years there have been a number of royal commissions - the *Royal Commission into Institutional Responses to Child Sexual Abuse*, the *Royal Commission into National Natural Disaster Arrangements*, and the *Royal Commission into the Robodebt Scheme* are some examples that you may have seen on the news. But, what exactly is a royal commission?



A royal commission is a **formal public inquiry into an issue of great importance**. It is issued by the Governor-General (but, in reality it is the Prime Minister). The commissioner (who leads the inquiry and is usually a judge or barrister) has many powers, including the power to collect evidence – either oral or written, and offer protection to people who co-operate. Witnesses can face criminal penalties if they fail to attend or answer questions. However, it is not free to investigate any area – a commission’s inquiry is defined by specific **terms of reference**.

We will now examine a contemporary and historical example to understand how royal commissions contribute to good governance, transparency and accountability. Both were prompted by some good investigative reporting – perhaps illustrating the important contribution the media can make in holding governments to account.

Practical Application ...

YOUTH DETENTION ROYAL COMMISSION: NT’S DON DALE CENTRE SHOULD BE CLOSED, REPORT RECOMMENDS

The high security unit of Darwin’s Don Dale youth detention centre should be shut immediately and there should be a plan for closing the entire centre within three months, an inquiry has recommended.

The *Royal Commission into the Protection and Detention of Children in the Northern Territory* also called for the age of criminal responsibility to be raised from 10 to 12.

The \$54 million inquiry, which was prompted by ABC’s Four Corners report on the Don Dale Youth Detention Centre, investigated conditions in the [Northern Territory’s] NT’s detention centres.

NT Chief Minister Michael Gunner apologised for the failings of successive NT governments, calling it ‘a stain on the NT’s reputation’ and announced a comprehensive overhaul of the youth justice and child protection systems.

They said their investigation had found ‘shocking and systemic failures occurred over many years and were known and ignored at the highest levels’.

Practical Application ...



'Children and young people were subjected to regular, repeated and distressing mistreatment in detention and there was a failure to follow the procedures and requirements of the law in many instances,' they added.

Children were also dared or bribed to carry out degrading and humiliating acts, or to commit acts of violence on one other.

Source: Neda Vanovac, 'Youth detention Royal Commission: NT's Don Dale Centre should be closed, report recommends, *ABC News*, (Online, 17 November 2017) <abc.net.au/news/2017-11-17/nt-royal-commission-calls-closure-of-don-dale-systemic-changes/9160460>.

1. What was the name of the Royal Commission and what did it investigate? [C]
2. What prompted former Prime Minister Malcolm Turnbull to call the Royal Commission? [C]
3. What were some of the recommendations made by the Royal Commission? [C]
4. What criticisms did the Royal Commission make of the actions of the government and its departments? Did the criticisms appear justified? [C] [A]
5. The Royal Commission did not call for anyone to face criminal prosecution for their actions. Based on the information in the article should they have? Why or why not? [E]

Practical Application



FIVE YEARS SINCE THE NT ROYAL COMMISSION INTO YOUTH DETENTION AND CHILD PROTECTION, THERE IS HOPE, DISAPPOINTMENT AND FEAR

Every Friday, a crowd of protesters gather on the side of the road outside the now-infamous Don Dale youth detention centre on the industrial outskirts of Darwin.

Some have children or grandchildren held inside the facility, an old adult jail condemned years ago as fit "only for a bulldozer".

More children and young people are now held in the still-operating centre than when a royal commission recommended its closure five years ago today.

Documents leaked to the ABC show the number of young people entering Don Dale and its Alice Springs counterpart had increased 94 per cent towards the end of last year.

The spike was the intended result of 'tougher than ever' changes to youth bail laws made by a Labor government elected on promises to reform the Northern Territory's "broken" youth justice system.

Other Australian states were put on notice of "wider implications for all jurisdictions"..

(the National Children's Commissioner) Anne Hollonds, said there was a youth justice crisis across the country that was not making communities safer.

'Australian kids as young as 10 are still locked up. Bail laws are tougher so new children's prisons are being built to meet the demand,' she wrote on Twitter.

'I fear we have lost our way.'

Source: Jacqueline Breen and Alex Barwick, 'Five years since the NT Royal Commission into Youth Detention and Child Protection, there is hope, disappointment and fear', *ABC News*, (Online, 17 November 2022) <abc.net.au/news/2022-11-17/nt-don-dale-royal-commission-youth-detention-five-years/101655822>.



Practical Application ...

1. Why did the Royal Commission recommend closure of the Don Dale Youth Detention Centre? [C]
2. Why was the recommendation not acted on? Do you think it should be acted on immediately? Examine your viewpoint and its consequences. [A]
3. Should governments which respond to community demands to lock-up youth offenders for safety reasons, make the community responsible for providing fit for purpose detention centres for youth detention? Justify your recommendations using legal criteria. [E]
4. Does this story expose any limitations of the Royal Commission process? Justify your decision using legal criteria. [E]

The Fitzgerald Inquiry

Many Australian States have also created an independent anti-corruption body (separate from the government) that investigate complaints made against the public service or a member of parliament, but this didn't always exist. In Queensland, this body was born out of a period of great political and legal upheaval. It was created by a recommendation of one of the most significant and far-reaching inquiries into corruption, *The Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (more commonly known as the *Fitzgerald Inquiry*). To learn about the history behind this body, how it works today and what form a national commission might take, we will use an inquiry approach.

Inquiry Focus

How do independent, external inquiries and commissions combat corruption and uphold the rule of law?

We have already unpacked the key concepts of accountability and transparency that are central to this inquiry. To begin, we need to understand what the *Fitzgerald Inquiry* was and the ramifications it had on our political system.

Practical Application

Source 1: A brief summary of the *Fitzgerald Inquiry*

In late 1986 *Courier Mail* journalist Phillip Dickie wrote a series of articles about a number of illegal brothels that the Queensland police were allowing to operate. This was followed by an investigation by the *ABC Four Corners* program 'The Moonlight State', which also reported that the police had ignored illegal gambling, organised prostitution and drug trafficking. In response, acting Queensland Premier Bill Gunn ordered a commission of inquiry into possible police corruption. It would be headed by Mr Gerald Edward 'Tony' Fitzgerald QC. The inquiry, known as the *Fitzgerald Inquiry*, would spend two years uncovering significant and systemic corruption involving the police and politicians. What made the inquiry effective were its powers and broad terms of reference (this refers to what areas it could investigate). The inquiry used tools such as indemnity from prosecution – which was relatively innovative for its time and influenced how other inquiries operated. The *Fitzgerald Inquiry* made over 100 recommendations, led to four ministers being jailed

Practical Application ...

and many police officers, including former Police Commissioner Sir Terence Lewis, being convicted of numerous offences. Even former Premier Sir Joh Bjelke-Petersen was charged with perjury – although this ended in a hung jury.

Source 2: A quote from Jack Herbert, a former Queensland police officer

“We believed no-one could touch us.”

Herbert, known as ‘the Bagman’, collected protection money from illegal gambling and prostitution businesses. He would later become the *Fitzgerald Inquiry*’s key witness. He received immunity from prosecution.

Source 3: Tony Fitzgerald QC handing over the bound copy of the Fitzgerald Report on corruption in Queensland on 7 July 1989, to the Queensland Premier Mike Ahern.



Source 4: ABC reporter Chris Masters reflects on “The Moonlight State”

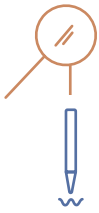
CHRIS CONTINUES TO MASTER INFAMOUS TIME IN QUEENSLAND HISTORY

Reflecting on the 30th anniversary of The Moonlight State and *Fitzgerald Inquiry*, one of Australia’s best investigative journalists says it’s an apt time to celebrate what journalism can achieve.

He says the ramifications of the *Fitzgerald Inquiry* were still being felt not only in Queensland, but throughout the country.

‘I’ve done lots of programs as a reporter, for Four Corners I did probably over 100, and most of them are forgotten,’ Mr Masters said.

‘This one is not forgotten, and that kind of surprises me a little bit. I often stop and wonder why’.



Practical Application ...

'But I guess it's because the Fitzgerald era was pivotal. It was a landmark inquiry and it did bring about the opportunity for significant reform that occurred not only in Queensland but around Australia.'

'I think journalism is about good citizenship, and when you look at the various people who stood up, some of them working at the very fringe of society in ugly trades like prostitution, they proved to demonstrate good citizenship too,' he said.

Source: Nance Haxton, 'Chris continues to master infamous time in Queensland history', *Griffith News*, (Online, 4 July 2018) <news.griffith.edu.au/author/nance-haxton/>.

1. Use the Cornell Note-Taking System (the structure has been provided to you below) to answer the following questions:

Questions	Notes
When did the Fitzgerald Inquiry occur? [C]	
Why was the Fitzgerald Inquiry called? [C]	
What were the consequences of the Fitzgerald Inquiry? [C]	

2. Do you think the inquiry was necessary? Why or why not? [A]
3. What does Chris Masters mean when he states that 'journalism is about good citizenship? Examine this viewpoint and its consequences. [A]

Queensland: Crime and Corruption Commission (CCC)

Our Purpose: The CCC is an independent agency combating major crime and reducing corruption for the benefit of the Queensland community.

CCC, 2018-2020 Strategic Plan, (Web Page, 2019) <ccc.qld.gov.au/publications/ccc-strategic-plan>.

The CCC began as the *Criminal Justice Commission*, which was established after the *Fitzgerald Inquiry* recommended setting up a body to fight organised crime and corruption. It is governed by the *Crime and Corruption Act 2001* (Qld) and the *Police Powers and Responsibilities Act 2000* (Qld). The CCC has coercive powers, meaning witnesses have no right to silence – they must attend hearings and give evidence (*Crime and Corruption Act 2001* (Qld) s82). The CCC also has the power to compel people and agencies to produce records or other items if asked (*Crime and Corruption Act 2001* (Qld) s72). Its hearings can be open or closed (*Crime and Corruption Act 2001* (Qld) s177).

What do you think?

Do you agree or disagree that the right to silence should be denied to a witness as part of a CCC inquiry? Justify your answer using legal criteria. [E]

In its *2022-2023 Annual Report*, the CCC reported the following key facts and figures:

- **117** days of hearings with **103** witnesses examined relating to major crime and intelligence investigations
- **221** law-enforcement crime intelligence disclosures
- **15** confiscation matters concluded with **\$4.296** million proceeds of crime appropriated to the State of Queensland
- **3686** complaints of suspected corruption assessed
- **1** person charged with **2** criminal offences relating to corruption investigations
- **9** days of hearings with **14** witnesses examined relating to corruption investigations
- **7** recommendations for disciplinary action relating to **3** people following corruption investigations
- **35** corruption prevention recommendations made.

Practical Application

20 YEARS AFTER HISTORIC FITZGERALD INQUIRY, DARK FORCES RETURN TO QUEENSLAND

QUEENSLAND'S police service was rocked yesterday by revelations that 25 officers were involved in illegal and improper dealings with prisoners, including a convicted double murderer, provoking a warning from the state's top corruption fighter that the lessons of the Fitzgerald inquiry had been forgotten.

The report by the *Crime and Misconduct Commission*, released on the heels of the 20th anniversary of the landmark report by commissioner Tony Fitzgerald QC and coming only a week after the jailing of former state government minister Gordon Nuttall for taking bribes, sparked a political row over whether Queensland was sliding back into its notorious era of political and police corruption.

But while Mr Needham said the corruption was 'nowhere' near that of the 1970s and 80s, the lessons learned from the Fitzgerald report were fading among Queensland police.

Instead, the report showed a type of 'noble corruption', where police were willing to break the law to solve crimes.

In its report, the CMC defended the absence of charges against many of the officers, saying it had become apparent early in the investigation that it would be difficult to prosecute, despite evidence of criminal behaviour.



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The CMC said this was because the star witnesses in many cases against police were criminals, often having been previously convicted of dishonesty offences.

It also said evidence taken from the CMC's 'star chamber' examinations - where witnesses give evidence under oath or face jail - was inadmissible in court.

Source: Michael McKenna and Sarah Elks, '20 years after historic Fitzgerald inquiry, dark forces return to Queensland', *News.com.au* (Online, 17 August 2009), <news.com.au>.

1. Which government service behaved in a corrupt way? What did they do? [C]
2. The article also mentions the imprisonment of a former government minister. Who was he? Outline the facts behind the case and explain how his actions reflected corruption. You will need to locate a secondary source of information to do this. [S] [C]
3. How does the imprisonment of the former government minister reflect the application of the rule of law? [A]
4. The report showed a type of 'noble corruption'. Do you believe corruption can be justified? Explain your perspective. In addition, describe and explain an opposing viewpoint. [A]
5. Should evidence taken from 'star chamber' examinations be inadmissible in court? Why or why not? Justify your decision with legal criteria. [E]



Practical Application

NATIONAL ANTI-CORRUPTION COMMISSION (NACC)

The Australian Government Attorney General's Department describes the NACC as

an independent Australian Government agency that detects, investigates and reports on serious or systemic corrupt conduct in the Australian Government public sector. The NACC also educates the public service and the public about corruption risks and prevention.

The NACC commenced operations on 1 July 2023 pursuant to *The National Anti-Corruption Commission Act 2022* (Cth).

Why do we need the National Anti-Corruption Commission?

Research shows that the Australian public's trust in their government and public institutions has declined over recent years.

The potential for corruption within government contributes to the decline in trust. Corruption can involve the misuse of government resources, which means there is less available to provide the services Australians need...

The NACC seeks to prevent corruption in the Commonwealth government by:

- investigating it thoroughly and telling the public about what is discovered, and
- educating the public sector (and the public) on how to prevent it in the future.

Practical Application ...



How will the NACC work?

The NACC will have a range of investigative powers, including to:

- enter Commonwealth premises and require Commonwealth information without a warrant
- make people and organisations give the NACC documents and items and allow the NACC to search their property
- conduct private hearings and, if it is in the public interest and exceptional circumstances justify doing so, conduct public hearings
- access a range of covert investigative capabilities, such as intercepting telecommunications.

The NACC is not required or able to investigate every corruption issue. If the NACC decides not to investigate a corruption issue, or believes a corruption issue is not serious or systemic, they may deal with it by referring it to another agency.

The NACC will work to prevent corruption in the Commonwealth public sector

The NACC will work with Commonwealth agencies to help prevent corruption.

It will do this by:

- raising awareness and providing training to people who work in the Australian Government public sector about preventing, detecting and reporting corruption
- providing corruption prevention and education products based on research and analysis of corruption risks and trends, and
- making recommendations to prevent corruption (including identifying risks and vulnerabilities) based on issues it finds during its investigations.

The NACC will also be able to conduct public inquiries into corruption risks, vulnerabilities and prevention activities in government agencies.

Who can the NACC investigate?

The NACC will investigate alleged corrupt conduct involving Australian Government public officials. *Public officials* under the NACC Act include:

- Members and senators of the Commonwealth Parliament including ministers, and their staff
- employees and contractors of Commonwealth agencies and Commonwealth companies
- holders of Commonwealth statutory offices.

However, the NACC will also be able to investigate any person, even if they are not a public official, who does something that causes or could cause a public official to carry out their official duties in a dishonest or biased way.

The NACC will not be able to investigate concerns about state, territory or local government officials, judges, the Governor-General and Royal Commissioners.

Source: Department of Attorney General, *National Anti-Corruption Commission*, (Web Page, 23 June 2024) <ag.gov.au/integrity/national-anti-corruption-commission>.



Practical Application ...

1. What is the NACC? [C]
2. What can the NACC investigate public officials about? [C]
3. Describe the investigate powers of the NACC. [C]
4. How will the NACC work to prevent corruption in the Commonwealth public sector? [C]

7.4 Whistleblowers

Whistleblowers are people **who disclose information about suspected wrongdoing or corruption that they have witnessed**. They can play an important role in uncovering misconduct and corruption despite the personal, social and economic costs associated with revealing the truth. This means that whistleblowing is an important part of the fabric of mechanisms which ensure good governance. It helps ensure transparency and accountability. Australia's first whistleblowing laws were introduced in the State of Queensland, recommended by the *Fitzgerald Inquiry*. In Queensland public sector employees are now protected by the *Public Interest Disclosure Act 2010 (Qld)*. This Act recognises that whistleblowers need to be protected from retribution or reprisal and be compensated for their actions (s40,s41,s42).



Practical Application

Public Interest Disclosure Act 2010 (Qld)

3 Main objects of the Act

The main objects of this Act are—

- (a) to promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector; and*
- (b) to ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with; and*
- (c) to ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure; and*
- (d) to afford protection from reprisals to persons making public interest disclosures.*

1. To which sector does this Act apply? Should there be a similar legislation applied to private organisations? [C] [A]
2. Why would it be necessary to make a provision in the Act to protect both the persons making disclosures and the persons about whom the disclosures are made? Justify your decision using legal criteria. [E]

In Queensland, whistleblower Dr Kirsty Wright made disclosures about the methodology of DNA testing at the Queensland forensics lab in 2020, which led to the Queensland Government establishing an inquiry into its operation by Walter Sofronof KC. Sofronof's report found that the lab used a fundamentally flawed method of testing for DNA which may have resulted in offenders escaping conviction over a period of nine years.

Practical Application



QUEENSLAND'S FORENSIC LAB HAS REVIEWED LESS THAN 2% OF CASES SINCE INQUIRY

- In short: An update on the progress of reviews of the cases at Queensland's forensics lab shows less than two per cent of reviews have been completed.
- After failings in the methodology of DNA testing at the state-run lab were exposed, more than 40,000 cases were set to be reviewed.
- What's next? The Queensland government has rejected calls from a whistleblower and the opposition to shut down the lab.

Close to a quarter of the first 440 cases caught up in Queensland's state forensic lab scandal have yielded evidence that was not detected during the 15-year-long error. Until last year, the lab used an automated method which did not harvest the maximum amount of DNA from samples.

The issue, which has been the subject of two inquiries, brought into question the validity of DNA findings in 41,000 major crime cases dating back to 2007.

Health Minister Shannon Fentiman told parliament this week the lab had completed retesting of just 445 cases since January last year (less than 2 per cent of the backlog), and 23 per cent of cases returned new evidence not identified.

This week, the lab has faced calls from whistleblower Dr Kirsty Wright and the Queensland opposition to be shut down, and the testing outsourced.

"This is how the lab got into the situation in the first place, dealing with backlogs and missed court dates. That was the environment that led to the mistakes.

But the government shut down the calls... Minister de Brennie said "It doesn't make any sense to take the core laboratory and shut it down..."

Today the lab's new chief, Adjunct Professor Linzi Wilson-Wilde, defended its progress, saying the 440 backlog tests were among 9,500 tests done by the lab last year which included 'business-as-usual' cases.

Source: Jemima Burt, 'Queensland's forensic lab has reviewed less than 2% of cases since inquiry', *ABC News*, (Online, 20 April 2020) <[abc.net.au/news/2024-04-20/queensland-dna-lab-review-forensics-inquiry-crime/103748990](https://www.abc.net.au/news/2024-04-20/queensland-dna-lab-review-forensics-inquiry-crime/103748990)>.

1. What disclosures did whistleblower Dr Kirsty Wright make about the state DNA forensic laboratory? [C]
2. What was the response of the State Government to her disclosures? [C]
3. What did the Commission of Inquiry conclude about the validity of DNA findings at the laboratory? [C]
4. Do you agree with the State Government's decision taken in response to the Inquiry? Give your reasons. [A]

Commonwealth law

Amendments to the *Corporations Act 2001* (Cth) and the *Taxation Administration Act 1953* (Cth) which provided for an expanded corporate whistleblowing scheme and a new taxation whistleblowing scheme commenced on 1 July 2019. These amended laws apply to disclosures even if the disclosed conduct occurred before 1 July 2019. The effect of these laws has been that most businesses in Australia have been required to upgrade their whistleblowing policies to comply with the changes.

Whistleblowers are also entitled to the protection of the *Public Interest Disclosure Act 2013* (Cth) if it applies. At the moment, the law in this area is complicated and discourages whistleblowers. There was a suggestion that during the term of the current government (the 47th Parliament) that the Commonwealth would pass a new whistleblower's act to clarify and improve the law in this area. To date this has not happened.



Practical Application

PROSECUTION OF ATO WHISTLEBLOWER RICHARD BOYLE IS 'INSANITY', SAYS TAXPAYER HE HELPED

One of the taxpayers helped by Australian Taxation Office (ATO) whistleblower Richard Boyle has spoken out for the first time, describing the pursuit of the person who gave him a lifeline as 'insanity'.

Key points:

- Richard Boyle helped Dirk Fielding after the ATO used heavy-handed debt collection tactics that would have closed his publishing business
- The prosecution of Mr Boyle will be a test of legal protections for whistleblowers
- Mr Boyle's wife Louise Beaston has written to Attorney-General Mark Dreyfus, urging him to drop the case against her husband

Dirk Fielding told 7.30 his Melbourne-based family magazine publishing business would have collapsed without Mr Boyle's help.

Mr Boyle became an internal whistleblower in October 2017 but when his complaints were ignored, he went public and told Four Corners about a disturbing culture at the ATO which included his area being instructed to use more heavy-handed tactics on taxpayers who owed the tax office money.

Boyle was charged with offences including taping private conversations without consent and taking photos of taxpayer information.

Mr Fielding's world collided with Mr Boyle's when he sent a distressing fax to the ATO in May 2017, begging for help. Mr Fielding's publishing business of 35 years was in serious trouble.

He was recovering from a ruptured aneurysm in his brain which had left him needing to learn to walk and swallow again. After his wife Kaye took over the running of the business, they discovered an employee was systematically defrauding them.

The tax office came after them in pursuit of an outstanding tax debt using a garnishee notice, a debt-collection tool that allows the ATO to order a bank to hand over money from a taxpayer's account without their consent.

Mr Boyle decided to help him out by lifting the garnishee and setting up a repayment plan.

Practical Application ...



Source: Adele Ferguson and Hannah Meagher, 'Prosecution of ATO whistleblower Richard Boyle is 'insanity', says taxpayer he helped', *ABC Investigations*, (Online, 18 September 2023) <abc.net.au/news/2023-09-18/ato-whistleblower-richard-boyle-prosecution- to-test-protections/102860814>.

1. What happened to Mr Fielding and his publishing business? What did the ATO do to Mr Fielding's business? [C]
2. How did Mr Boyle help Mr Fielding? [C]
3. What did Mr Boyle share about his experiences as an employee? [C]
4. Why did Mr Boyle go to *Four Corners*? What disclosures did he make? What was the outcome of these disclosures? [C]
5. Do you think Mr Boyle's behaviour as a whistleblower was reasonable in the circumstances? Justify your opinion using legal criteria. [E]

Case Study



Boyle v Commonwealth Director of Public Prosecutions [2023] SADC 27

Facts: Criminal proceedings were instituted against Boyle (the Applicant) in the District Court of South Australia by the Respondent. Mr Boyle is charged with committing 24 offences between 19 April 2017 and 3 March 2018 when he was employed as a taxation officer at the Australian Taxation Office (ATO).

The Applicant made a claim that, pursuant to s10(1)(a) of the *Public Interest Disclosure Act 2013* (Cth) (PID Act), he is not subject to any criminal liability on all counts because he made public interest disclosures in relation to them.

Decision: As the alleged criminal conduct did not occur at the same time as the disclosures made by the applicant, the court held that his conduct did not reasonably form part of the process of the making of the said disclosures. Therefore, Boyle was not protected from criminal liability as a consequence of his alleged conduct under the PID Act. The application was dismissed meaning the criminal proceedings could go ahead.

Secrecy laws

Some disclosures can be against the law. These disclosures usually involve matters concerning Australia's national security. For example, the *Border Force Act 2015* (Cth) s42 makes it an offence for an Australian Border Force employee to disclose 'protected information'. However, it is worth noting that there may be a defence of public interest under the *Public Interest Disclosure Act 2013* (Cth) or that other Acts may protect them. As well, there are exceptions that provide protection from prosecution – for example, the law allows someone to disclose concerns under the direction of a court. These protections don't dispel the concerns people have about the lack of protection for persons blowing the whistle on corrupt or unlawful behaviour in areas such as defense or immigration. How do secrecy laws operate in the real world?



Practical Application



DARK DAY FOR DEMOCRACY AS MILITARY WHISTLEBLOWER DAVID MCBRIDE IMPRISONED

Civil society groups have expressed grave concern and alarm after military whistleblower David McBride was sentenced to almost six years' imprisonment in the ACT Supreme Court on Tuesday.

McBride leaked documents to the ABC that formed the basis for the broadcaster's landmark Afghan Files reporting, which showed credible evidence of war crimes committed by Australian forces in Afghanistan. The reporting was subsequently confirmed by the Brereton Inquiry.

McBride had argued he was immune from prosecution under federal whistleblowing law, but withdrew that defence in 2022. He then argued that the offences he was charged under contained a public interest element; after that was rejected by the trial judge, he pleaded guilty in November 2023. McBride was given a sentence of five years and eight months, with a non-parole period of two years and three months.

McBride is the first whistleblower to be imprisoned in recent memory in Australia. Witness K, who exposed Australia's spying against Timor-Leste, was given a suspended sentence; the prosecution of his lawyer, Bernard Collaery, was dropped by the Attorney-General, Mark Dreyfus KC, after the Albanese Government took office. Tax office whistleblower Richard Boyle will face trial in September.

Whistleblowers play a vital democratic role by exposing government wrongdoing and corporate misdeeds. The civil society groups expressed concern that future whistleblowers will stay silent if they are worried about being prosecuted, and wrongdoing will stay hidden as a result.

Source: Thomas Feng, 'Dark day for democracy as military whistleblower David McBride imprisoned', *Human Rights Law Centre Media*, (Online, 14 May 2024) <hrlc.org.au/news/2024/05/14/mcbride-prosecuted>.

1. What documents were leaked by Mr McBride to the ABC? [C]
2. Do you think the information contained in the documents leaked contained a 'public interest' element? As a citizen, examine your viewpoint and its consequences. [A]
3. Assuming Mr McBride exposed war crimes committed by Australian forces in Afghanistan, is it appropriate for him to receive a jail sentence? [E]

Review

Comprehend

1. **Define** the term 'accountability'. [C]
2. What evidence supports the belief that the Australian peoples' concerns about corruption are growing? [C]
3. **Describe** how our election process holds the government to account. [C]
4. What is an ethics committee and what does it investigate? [C]
5. What was the *Fitzgerald Inquiry*? [C]

Analyse and evaluate

1. How does an estimates hearing support a parliament's confidence in a government? [A]
2. **Analyse** the impact the *Fitzgerald Inquiry* had on Queensland? [A]
3. What are the advantages and concerns raised about processes independent bodies such as the *Crime and Corruption Commission* use to investigate complaints? [A]
4. **Analyse** an argument for and against protecting disclosures made by whistleblowers? [A]
5. What is the most effective way to maintain our system of government's accountability and integrity – internal, external and independent processes or a combination of them? **Justify** your position using legal criteria. Is there anything further we could do? [A] [E]

Topic 2

Law reform within a dynamic society

Topic 2 explores the impetuses for legal change and reform in Australian society, in response to current and emerging legal issues.

Chapter 8: Why do laws change?

Chapter 9: Legal institutions and law reform

Chapter 10: Coronial inquests and investigations

Chapter 11: Current and emerging legal issues

Law reform within a dynamic society

Chapter 8: Why do laws change?

- 8.1 Australian society and legal change
- 8.2 Lobby, advocacy groups and the media
- 8.3 Patterns of crimes and civil offences
- 8.4 Law reform and technology
- 8.5 Transnational and organised crime

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend that laws and related processes require change because of a range of impetuses
- analyse the challenges to law reform.

8.1 Australian society and legal change

Key term

Law reform: the modernisation of the law by bringing it into accord with current conditions; the elimination of defects in the law; the simplification of the law; and the adoption of new or more effective methods for the administration of the law and the dispensation of justice.

Source: Damien Macrae, *Encyclopaedic Australian Legal Dictionary*, (Butterworths, 2002).

The Australian society's changing values, needs, morality and ethics, advances in technology and significant events have acted and continue to act as an impetus for legal change and reform. Most legal changes are carried out by passing or amending an Act of Parliament. Legal change therefore occurs when political parties propose change prior to an election. It also happens during the term of a government because there is a need for a new law.

The Federal Opposition Leader, Peter Dutton, recently announced his party's policy of building nuclear reactors in Australia to generate electricity. 'The opposition' proposes to take this policy to the next federal election.

Practical Application

CURRENT PROHIBITIONS ON NUCLEAR ACTIVITIES IN AUSTRALIA: A QUICK GUIDE

This quick guide provides an overview of current prohibitions on nuclear activities under Commonwealth, state and territory laws. If a domestic nuclear energy industry were to progress, it is expected that a comprehensive framework for the safety, security and safeguarding of the related nuclear material would need to be legislated to accommodate such an industry.



At the Commonwealth level, nuclear activities are regulated under the *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) (ARPANS Act) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

The ARPANS Act establishes a licensing framework for *controlled persons* (including a Commonwealth entity or a Commonwealth contractor) in relation to *controlled facilities* (a nuclear installation, a prescribed radiation facility, or a prescribed legacy site). A nuclear installation includes a nuclear reactor for research or the production of radioactive materials for industrial or medical use, and a radioactive waste storage or disposal facility with an activity that is greater than the activity level prescribed by the *Australian Radiation Protection and Nuclear Safety Regulations 2018*.

However, ss10(2) of the Act expressly prohibits the CEO from granting a licence for the construction or operation of any of the following nuclear installations: **a nuclear fuel fabrication plant; a nuclear power plant; an enrichment plant; or a reprocessing facility.**

States and territories generally regulate nuclear and radiation activities through either the health or the environmental protection portfolios. The relevant legislation provides for the protection

Practical Application ...

of health and safety of people, and the protection of property and the environment, from the harmful effects of radiation by establishing licensing regimes to regulate the possession, use, and transportation of radiation sources and substances. Mining of radioactive materials is regulated through the resources portfolio.

Source: Dr Emily Gibson, 'Current prohibitions on nuclear activities in Australia: A quick guide', *Science, Technology, Environment and Resources; Law and Bills Digest Sections*, (Online 30 May 2024) <aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/rp/rp2324/Quick_Guides/NuclearActivitiesProhibitions>

1. What nuclear activities are currently allowed under Commonwealth law? [C]
2. What nuclear installations are prohibited under ss10(2)? [C]
3. If the nuclear installations currently prohibited became permitted under the legislation, do you think the EPBC Act should be responsible for the assessment and approval of these nuclear installations? Justify your answer, using legal criteria. [A] [E]

At the state level, the Liberal National Party (LNP) recently announced a policy of sentencing children as though they are adults for certain serious offences. The LNP was successful at the state election in Queensland. When they implement this policy, it will mean changing the *Penalties and Sentences Act 1992* (Qld).

Practical Application

QUEENSLAND OPPOSITION WANTS TO SENTENCE SERIOUS CHILD OFFENDERS AS ADULTS

Queensland's Coalition Opposition has announced plans to sentence children found guilty of serious crimes, including murder, manslaughter, and robbery, as adults.

It has promised to legislate the policy if it wins the state election in October.

However, some legal experts and advocacy groups have questioned whether the proposed "adult crime, adult time" policy would violate human rights laws.

Children under the age of 10 cannot be held criminally responsible in Queensland.

For children between 10-14 -years-old, prosecutors must prove they were capable of understanding what they were doing was wrong.

17-year-olds in Queensland were tried as adults until 2018 before legislation was amended to reflect the laws in the rest of country.

In Queensland, murder carries a mandatory sentence of at least 20 years in prison followed by lifetime parole. Under the Opposition's proposal, children could receive this sentence.

The state's Human Rights Act says children in the criminal justice system must be "treated in a way that is appropriate for the child's age."

Source: Achol Arok, 'Queensland Opposition wants to sentence serious child offenders as adults', *The Daily Australian*, (Online 9 July 2024) <thedailyaus.com.au/stories/queensland-opposition-plans-to-sentence-child-offenders-as-adults/>.



Practical Application ...

1. What changes would you recommend the Opposition make to the *Youth Justice Act 1992* (Qld) to give effect to its policy? How would you deal with the application of the *Human Rights Act 2019* (Qld) to the proposed amendment? [A]

Public opinion can, of course, have considerable influence on the policies adopted by political parties. Pressure for new or amended laws can also come from other sources. There are also in the Australian community a number of private organisations which offer independent advice, seeking to influence public opinion and governments. One example is the **Wentworth Group of Concerned Scientists**.



Practical Application

WENTWORTH GROUP OF CONCERNED SCIENTISTS

As an independent scientific group we are funded entirely from donors who are passionate about the long term conservation of Australia's natural environment.

(This allows) us to continue to be a trusted source of independent, expert advice for governments, businesses and communities in Australia.

Source: *Wentworth Group of Concerned Scientists*, (Online, 6 August 2024), <wentworthgroup.org/about-us/support/>.

BLUEPRINT TO REPAIR AUSTRALIA'S LANDSCAPES

The Wentworth Group, together with experts from academia, government and business, has developed a Blueprint to Repair Australia's Landscapes. The Blueprint describes a suite of 24 practical actions and investments, across five key environmental asset groups, to repair Australia's degraded landscapes.

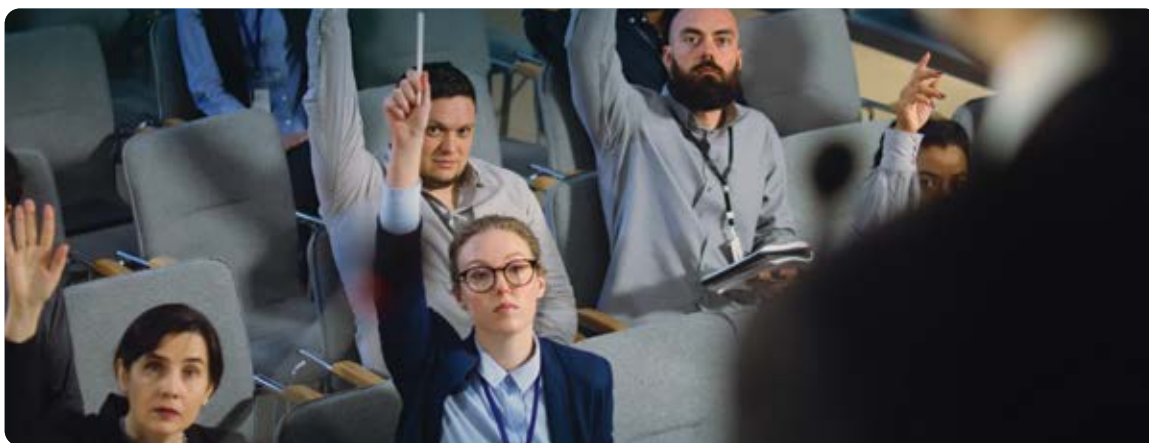
The objective of the Blueprint is to put forward the national case and articulate a practical vision for repairing Australia's landscapes and, in doing so, prepare for the unprecedented climatic pressures ahead.

The Blueprint is effectively an evidence-based prospectus laying out a 30-year action plan and identifying public and private investment opportunities that would repair much of Australia's degraded landscapes and set Australia on a nature positive trajectory.

The Blueprint is the most comprehensive assessment of its kind and demonstrates that it's possible to repair Australia's degraded landscapes – our soils, inland waters, native vegetation, threatened species and coastal environments – while boosting economic productivity and sequestering carbon in landscapes.

Source: 'Blueprint to Repair Australian Landscapes', *Wentworth Group of Concerned Scientists*, (Online 6 August 2024) <wentworthgroup.org/2024/07/blueprint-repair-australias-landscapes/>.

1. Investigate one of the degraded landscapes the Blueprint suggests can be repaired to boost economic productivity and cope with climate pressures ahead. What does the Blueprint assessment suggest over the next 30 years? Recommend changes to the law (state or federal or both) necessary to meet the Blueprints objectives. Justify your recommendations using legal criteria. [C] [A] [E]



The Media play a significant part in bringing current issues to the attention of the government of the day, and holding it to account. We have seen how investigative journalism led to the *Fitzgerald Inquiry* in Queensland. This is one of many programs by *Four Corners*, which over many years, have led to royal commissions, inquiries, and legal change. One such program featured allegations about the behaviour of Australian soldiers serving in Afghanistan, which led to the *Brereton Inquiry*, which found that the allegations could be substantiated.

Research Task

Select a recent topic covered in the media which raises a legal issue facing Australia or Queensland.

- Describe the characteristics (the nature) of your selected topic.
- Outline the issues raised by the media reports.
- State the point of view expressed or implied by the media reports, if any.
- Do you agree or disagree with this point of view? Justify your position. [S] [C] [A]

Pressure or lobby groups, groups of citizens or organisations seeking to persuade members of Parliament to make or amend laws, can be powerful influences on law reform. Examples include human and animal rights campaigners, environmental organisations, business associations, unions and welfare groups, as well as international organisations such as the United Nations. For example, in 2007, the World Health Organization (WHO), an agency of the United Nations, called for a global ban on smoking at work and in enclosed public places. The United Nations agency said a ban would help limit non-smokers' exposure to second-hand smoke, which can kill through heart disease and serious respiratory and cardiovascular illness.

Research Task

1. Identify current pressure (lobby) groups in Queensland or Australia? [S]
2. Provide examples of specific issues in which they are seeking legal change. [C]

It is not always possible to identify a single cause or impetus for each example of law reform. Quite often there are multiple causes, or a number of different contributors. Nevertheless, we will set out examples of law reform and try to identify how each of them came about. These are grouped together under the syllabus headings. You will make your own assessment about the importance of different influences that brought about change in each case.

8.2 Lobby, advocacy groups and the media

Same-sex marriage

There is no doubt that over a long period of time the influence of lobby and advocacy groups was a key factor in changing the law to introduce same-sex marriage. In the inquiries which follow you will have the opportunity to assess this influence for yourselves. It is probably not possible to either tell the complete story or do adequate justice to the people involved in these campaigns in this textbook because of constraints of space. However, you will be able to extend your studies in these areas based on the following inquiries.

Inquiry Focus

What was involved in changing public opinion and overcoming parliamentary opposition so that marriage laws were changed, legalising same-sex marriage

Lobby groups and public opinion

Practical Application

20TH CENTURY GAY RIGHTS MOVEMENT

Gay and lesbian rights movement groups were not organised in Australia until the late 1960s. The **ACT Homosexual Law Reform Society**, a humanist organisation based in Canberra which was formed in mid 1969, and an Australian arm of the **Daughters of Billitis**, which formed in Melbourne in January 1970, are considered Australia's **first gay rights organisations**. However, it was a Sydney organisation, the **Campaign against Moral Persecution (CAMP)**, which was founded in Sydney in June 1970 that was to galvanise



Practical Application ...



the early gay-rights movement in Australia. John Ware and Christabel Poll announced the formation of an organisation called CAMP in an article on the front page of the magazine section of the Australian newspaper on 19 September 1970. Within about 12 months local CAMP groups had formed in each capital city and in many of the universities, soon creating an informed gay-rights network around Australia.

Source: Wikipedia.org 'LGBT history in Australia', (Web Page, 8 May 2019) <en.wikipedia.org/wiki/LGBT_history_in_Australia>.

THE DECRIMINALISATION OF HOMOSEXUALITY

On 27 August 1975, South Australia became the first Australian State to fully decriminalise homosexual acts. For many years...the maximum penalty was life in prison. Gradually, the penalties were reduced, though in Victoria death remained a maximum penalty until 1949. Change came slowly and individuals were still being arrested, charged and convicted for homosexual acts during the 1970s.

In 1994, the federal government...legislated...to implement Australia's international treaty obligations under the *International Covenant on Civil and Political Rights*. The *Human Rights (Sexual Conduct) Act 1994* had a real consequence in highlighting the incompatibility of Tasmania's state law on homosexuality and Australia's treaty obligations. Following South Australia's example, other states (and Territories) gradually reform the laws...the Australian Capital Territory in 1976, Victoria in 1980, the Northern Territory in 1983, New South Wales 1984, Western Australia 1989, Queensland in 1990 and Tasmania in 1997.

Source: Dr Barry York, 'The Decriminalisation of Homosexuality' *Museum of Australian Democracy*, (Web Page, 27 August 2025) <moadoph.gov.au/explore/stories/history/the-decriminalisation-of-homosexuality>.

1. Draw up a time-line which illustrates when Australian governments, state and federal, decriminalised homosexuality. [C]
2. How important do you think it would have been to the debate about treating people equally irrespective of their sexuality to have the federal government pass laws to implement Australia's obligations under the *International Covenant on Civil and Political Rights*? [A]



Practical Application

PUBLIC OPINION OF SAME-SEX MARRIAGE IN AUSTRALIA

Opinion polls

Pollster	Date	% Support	% Opposed	% Undecided
Newspoll	2004	38%	44%	18%
Galaxy	2007	57%	37%	6%
Galaxy	2009	60%	36%	4%
Galaxy	2010	62%	33%	5%
Ipsos	2013	54%	N/A	N/A
Nielsen Polling	2013	65%	28%	N/A
Crosby Textor	2014	72%	21%	N/A
Newspoll	2014	66.6%	N/A	N/A
Ipsos	2015	68%	25%	7%

Source: *Wikipedia*, 'Public Opinion for Same-Sex Marriage in Australia', en.wikipedia.org, (Webpage, 15 May 2019), <wikipedia.com>.

1. Describe the trend in the support for same-sex marriage from 2004 to 2015. [A]
2. Is it reasonable to describe the level of support for same-sex marriage between 2009 and 2015 as high and stable? Give your reasons. [A]

The political and legislative process



Practical Application

SAME-SEX MARRIAGE: DISAPPOINTMENT AND ANGER AS COALITION PARTY ROOM REJECTS FREE VOTE

The push for same-sex marriage to be legalised in Australia has suffered a setback after the governing Coalition decided against allowing its members a free vote in the current term of Parliament.

But Tony Abbott, who firmly opposes same-sex marriage, conceded after a six-hour meeting of his colleagues that it was the last Parliamentary term in which the coalition could maintain its current position.

The Prime Minister held out the possibility of a free vote or alternatively a plebiscite of the entire population during the next term of parliament—a position seen by supporters of same-sex marriage as a stalling tactic.

Practical Application ...

Abbott called the combined meeting of the Liberals and Nationals in Canberra on Tuesday afternoon to discuss the Coalitions stance ahead of the introduction of a cross-party bill to allow same-sex couples to marry.

The Prime Minister's decision to include the Nationals—who are more deeply opposed to same-sex marriage—angered numerous Liberals, including the leader of the house, Christopher Pyne, who reportedly likened it to 'branch stacking'.

The Labor Party immediately sought to capitalise on the decision, tweeting that a Shorten Labor government would introduce a bill for marriage equality within its first 100 days.

Source; Daniel Hurst, 'Same-Sex Marriage: disappointment and anger as Coalition party room rejects free vote' *The Guardian*, (Online, 11 August 2015), < guardian.com/Australia >

PM TURNBULL PROMISES SAME-SEX LEGISLATION, PENDING PLEBISCITE

Prime Minister Malcolm Turnbull has claimed same-sex marriage will be legalised if the public votes in favour of it at a plebiscite following the next election.

Source: 9NEWS, 'PM Turnbull promises same-sex legislation, pending plebiscite', (Online, 22 October 2015), < msn.com >.

1. What does the Prime Minister Tony Abbott mean by a 'free vote'? [C]
2. Why were many Liberal members of Parliament angered by the Prime Minister Tony Abbott calling a combined meeting of the Liberal and National parties to discuss same-sex marriage? What did Christopher Pyne mean when he likened what Mr Abbott did to 'branch stacking'? [C] [A]
3. What did supporters of same-sex marriage say Mr Abbott's tactical position meant? [C]
4. Do you think the Labor opposition would have supported an immediate vote to legalise same-sex marriage? Why? [A] [E]
5. Given public opinion, do you think it was necessary for a national plebiscite to be held in order to establish whether or not to legalise same-sex marriage by a vote in the Parliament? [E]

The legislative process

Practical Application

CHRONOLOGY OF SAME-SEX MARRIAGE BILLS INTRODUCED INTO THE FEDERAL PARLIAMENT: A QUICK GUIDE

The *Plebiscite (Same-Sex) Marriage Bill 2016* was introduced by the Prime Minister, Malcolm Turnbull (LIB, NSW), in the House of Representatives on 14 September 2016. The Bill fulfilled a Liberal party election promise and sought to establish the legislative framework for a compulsory, in-person vote in a national plebiscite that would ask Australians 'should the law be changed to allow same-sex couples to marry?' The Bill passed the lower house on 20 October 2016 but was defeated at the second reading stage in the Senate on 7 November 2016.

Practical Application ...

Following the defeat of the *Plebiscite (Same-Sex Marriage) Bill 2016* the government announced that the Australian Bureau of Statistics (ABS) would be directed to conduct a voluntary survey of 'all Australians on the electoral roll as to their views on whether or not the law in relation to same-sex marriage should be changed to allow same-sex couples to marry'.

The Australian marriage law postal survey did not require legislation. (At the time it was estimated to cost \$150 million). On 15 November 2017, the ABS announced the results of the voluntary Australian Marriage Law Postal survey. The ABS reported that, of the 79.5% Australians who expressed a view on the question '**Should the law be changed to allow same-sex couples to marry?**', the majority (61.6%) indicated that the law should be changed to allow same-sex couples to marry, with 38.4% responding '**No**'.

On 15 November 2017 Senator Dean Smith (LIB, WA) introduced, on behalf of eight cross-party co-sponsors, a bill to amend the *Marriage Act 1961* (Cth) so as to redefine marriage as 'a union of two people'. This was the fifth marriage equality bill introduced in the current (45th) Parliament. Sen Smith's Bill passed the third reading stage in the Senate on 29 November 2017; for the first time a marriage equality bill was debated by another chamber when the Bill was introduced into the House of Representatives on 4 December 2017. The Bill passed a third reading stage in the House on 7 December 2017 and received Royal Assent the following day.

Since the 2004 amendment to the *Marriage Act 1961* (Cth) which inserted the current definition of marriage, 23 bills dealing with marriage equality or the recognition of overseas same-sex marriages have been introduced into the Federal Parliament. Four bills have previously come to a vote: three in the Senate (in 2010, 2012 and 2013), and one in the House of Representatives (in 2012). These bills were all defeated at the second reading stage. The 23 bills were introduced or co-sponsored by members of parliament representing the Australian Democrats, Australian Greens, Australian Labor Party, Derryn Hinch's Justice Party, Liberal Democratic party, Liberal party of Australia, Nick Xenophon Team and by Independents.

Source: Deirdre McKeown, 'Chronology of Same-Sex Marriage Bills introduced into the Federal Parliament: a quick guide,' *Politics and Public Administration Section*, (Online, 15 February 2018), <aph.gov.au/about-parliament>.

1. Prepare a flowchart/timeline of the bills introduced into Federal Parliament to deal with marriage equality or the recognition of overseas same-sex marriages. What does this illustrate about parliamentarians and political parties over this period? Justify your conclusion, analysing what it meant for representative democracy. [C] [A]

What do you think?

Was the Senate right to block the Turnbull government's plebiscite Bill, making it spend an estimated \$122 million on a postal survey, or should the Turnbull government have simply allowed a conscience vote in parliament on the issue? [E]

Double jeopardy

The rule against double jeopardy has been part of our legal system for a long time and is recognised in international and domestic law, notably in the *Human Rights Act 2019* (Qld) s34, which states:

a person must not be tried or punished more than once for an offence in relation to which that person has already been finally convicted or acquitted in accordance with law.

In Queensland, it was the case against Raymond Carroll that caused people to rethink whether the double jeopardy provision was unfair. Raymond Carroll was charged with sexually abusing and murdering a 17 month old baby called Deirdre Kennedy in Ipswich. He was acquitted in the Supreme Court of Queensland in 1985.

Carroll then faced trial for perjury after witnesses came forward alleging he had admitted to them that he had lied when he denied that he killed Deirdre Kennedy. He was convicted of perjury and sentenced to jail. Carroll successfully appealed to the Queensland Court of Appeal, and the Crown appealed the decision to the High Court of Australia. The Hon Justice Gaudron and the Hon Justice Gummow found:

the laying of that indictment was vexatious and oppressive in the sense necessary to constitute an abuse of process; in substance there was an attempt to relitigate the earlier prosecution.

The High Court of Australia upheld the decision of the Queensland Court of Appeal. This did not satisfy public opinion and the media. Subsequently, amendments have been made in the *Criminal Code 1899* (Qld), the last of which was made in March 2024, when the *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Act 2023* (Qld) was passed. This increased the number of offences which are now exceptions to the rule against double jeopardy.



Research Task

1. Investigate the role of lobby groups and the media regarding the rule against double jeopardy following the acquittal of Raymond Carroll. Summarise your findings. [C] [S]
2. Locate the ministerial statement by the Attorney General of Queensland, Yvette D'Ath, published 29 November 2023, at the time she introduced the Bill to amend the *Criminal Code*. Investigate online media articles before and after the ministerial statement. Does the media support or oppose the range of exceptions proposed to double jeopardy? Do you agree with the changes? Justify your position with legal reasons. [E] [S]



8.3 Patterns of crimes and civil offences

The statistics of crime and civil offences, and the patterns they disclose, are a powerful opportunity for stakeholders in the community (governments, community organisations and victims' families) to speak out for reform. Statistics and the patterns they reveal can be powerful drivers of change. A significant example of this is in the area of family and domestic violence.

Domestic and family violence

A statistical picture of violence experienced by men and women in Australia can be found in the data released by the Australian Bureau of Statistics (ABS) based on a Personal Safety Survey (PSS) which collects information from men and women aged 18 years and over about the nature and extent of violence experienced since the age of 15. The data which will be presented to you below from the PSS contains information about partner violence in the community.



Practical Application

1 IN 5 AUSTRALIANS HAVE EXPERIENCED PARTNER VIOLENCE OR ABUSE

Partner violence, 2021-22 financial year

An estimated 4.2 million Australian adults (21 per cent or one in five) have experienced violence, emotional abuse or economic abuse by a partner, according to information from the 2021-22 Personal Safety Survey (PSS) released today by the Australian Bureau of Statistics (ABS).

Women were more likely than men to have experienced violence, emotional abuse, or economic abuse by a partner since the age of 15.

Will Milne, ABS head of crime and justice statistics, said: "The survey found that 27 per cent of women and 15 per cent of men had experienced violence or abuse by a partner."

Prevalence of partner violence and abuse since the age of 15

	Women	Men
Partner violence or abuse	Just over 1 in 4 women experienced partner violence or abuse (27 percent or 2.7 million women)	1 in 7 men experienced partner violence or abuse (15 per cent or 1.5 million men)
Partner violence	1 in 6 women experienced partner violence (17 per cent or 1.7 million women)	1 in 18 men experienced partner violence (5.5 per cent or 526,600 men)
Partner emotional abuse	Almost 1 in 4 women experienced partner emotional abuse (23 per cent or 2.3 million women)	1 in 7 men experienced partner emotional abuse (14 per cent or 1.3 million men)



Practical Application ...

	Women	Men
Partner economic abuse	1 in 6 women experienced partner economic abuse (16 per cent or 1.6 million women)	1 in 13 men experienced partner economic abuse (7.8 per cent or 745,000 men)

Notes:

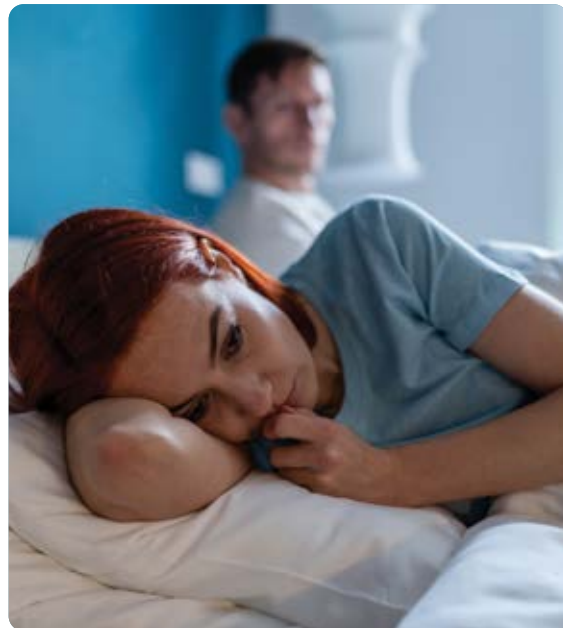
Where a person has experienced multiple forms of violence and abuse by a partner, they are counted separately for each type of violence or abuse they experienced but are counted only once in the aggregated total.

The survey found that financial stress was associated with experiencing partner violence and abuse for women.

“Women living in households with one or more cash flow problems were more likely to have experienced partner violence or abuse in the previous two years than those in households that didn’t have cash flow problems.”

The PSS collected detailed information about the characteristics and impacts of partner violence and abuse.

An estimated 791,100 women who experienced violence by a previous partner while living together were pregnant at some point during the relationship. Of these women, 42 per cent experienced violence during their pregnancy, including 17 per cent who experienced violence for the first time during their pregnancy.



Of the 1.9 million women who experienced emotional abuse by a previous partner, 73 per cent experienced anxiety or fear due to the emotional abuse. Of the 1.1 million men who experienced emotional abuse by a previous partner, 45 per cent experienced anxiety or fear due to emotional abuse.

“We would like to acknowledge the experiences of everyone affected by partner violence and abuse in Australia. We thank those who participated in the survey and shared their experiences to help inform government and service responses,” Mr Milne said.

Source: ABS, ‘1 in 5 Australians have experienced partner violence or abuse’, *Australian Bureau of Statistics*, (Media Release, 22/11/23) <abs.gov.au/media-centre/media-releases/1-5-australians-have-experienced-partner-violence-or-abuse>.

1. Describe the prevalence of violence in Australia in accordance with the Personal Safety Survey conducted by the ABS in 2021-2022. [C]
2. Although the survey was funded by the Department of Social Services under the *National Plan to Reduce Violence against Women and Their Children 2010-2022*, why do you think the ABS survey was conducted in a gender neutral way? [A]
3. What does the data tell you about trends in, and the status of, violence against women? [C]
4. Do the statistics support the need for government intervention and funding in the area of violence against women? Why? [A]



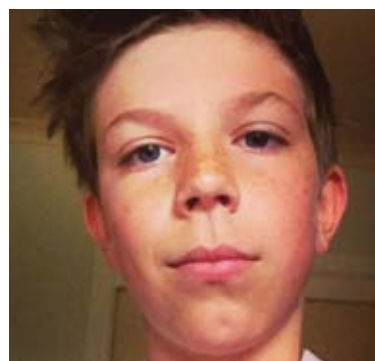
While statistics may be useful to provide evidence that justifies action by governments and organisations responsible for administering government legislation, it is the horror and devastating consequences to the families of victims presented in the media which has led public opinion to support the programs that are necessary to deal with what some people describe is an epidemic of violence within the family unit in our society. It is not necessary to illustrate this to you here because you will see this violence and its consequences regularly if you follow the media. However, one example is provided for you to research to see one woman's response to the tragic death of her son at the hands of his father.

Research Task

ROSIE BATTY: THREE YEARS ON & GRIEF STILL HAUNTS ME

Source: whimm.com.au/people/RosieBatty (Online 22 October 2017)

Three years on and Rosie still battles with the loss of her son, Luke



Rosie Batty experienced the loss of her son Luke in 2014 when he was killed by his father in terrible circumstances. As a consequence she started a campaign against family violence, and started the Luke Batty foundation **NEVER ALONE** (see lukebattyfoundation.org.au/honour-luke). Research her story and write a short 300 word article about her that could be published in your school newspaper. [S] [R]

The extent of violence in the family, particularly the violence perpetrated against women, has been the subject of many media articles and concern by governments, both state and federal. The report of the *Australian Law Reform Commission (ALRC)* (11 November 2010) entitled **Family Violence-A National Legal Response** has been followed in Queensland by several inquiries and task forces commissioned by the government to inform it about appropriate responses to the epidemic of domestic and family violence.



The Queensland government commissioned former Governor-General Dame Quentin Bryce to chair a domestic violence task force in Queensland which reported to the government in May 2019.

Practical Application

DOMESTIC AND FAMILY VIOLENCE TASK FORCE REPORT

Premier Anastasia Palaszczuk has received a report outlining recommended actions to tackle domestic and family violence in Queensland. The Honourable Quentin Bryce AD CVO, chair of the Special Taskforce on Domestic and Family Violence delivered 140 recommendations in the report '*Not now, Not ever: Putting an End to Domestic and Family Violence.*'

The Premier said her government has made a commitment to consider all the recommendations made by the Taskforce.

Source: 'Domestic and Family Violence Task Force Report' *Premier of Queensland Newsroom*, (Online, 31 May 2019) <thepremier.qld.gov.au/newsroom/domestic>.

1. Describe and explain the purpose behind the establishment of the Taskforce. [C] [A]

The specialist task force on domestic and family violence

The report '*Not now, Not ever: Putting an End to Domestic and Family Violence*' handed down on **28 February 2015**, was wide-ranging and comprehensive. It can be accessed online at qld.gov.au/dfvtaskforce. Included in its recommendations were specific recommendations for legislation and involvement by the state institutions which provide legal services. For example, it recommended the establishment of a new offence of '**strangulation**', and of **specialist courts** to deal with domestic and family violence. Other recommendations cover the many activities carried out in the domestic and family violence area, such as safe houses for threatened women and children, and professional training for staff in many areas of need, including training for lawyers who practice in the area. The Foreword of the Report states

As we learned more about domestic and family violence in Queensland, it became clear that three broad areas of reform are necessary; changes in our culture and attitudes, reform to the responses to incidents of abuse of its victims, and reform to the response from our justice system.

The Executive Summary of the Report contains important statements of principle which help the reader to understand the scope and importance of the report. Two paragraphs taken from the Executive Summary illustrate this.

Domestic and family violence, in all forms, is a violation of basic human rights. Everyone, regardless of their sex, religion, nationality, race, language, relationship, or living arrangements, has a right to feel safe and be safe in public and at home. Domestic and family violence, which is perpetrated in the home or among family members, is as much a matter of public concern as crime in the streets. It must not be accepted or excused.

The majority of people who experience domestic and family violence in Queensland are women. This is not to say that women cannot be the perpetrators of fear and violence upon male victims. Men can be and are victims of violence and coercive control, and are victims of domestic and family violence homicides. Any domestic and family violence, regardless of who the victim and perpetrator are, is unacceptable. The statistics (detailed at some length in this Report) tell us, however, that the most common pattern of domestic and family violence is that committed by men against women.



It should be clear from the material that has been covered above on this topic that domestic and family violence **is a nationwide concern**, and an ongoing area of law reform. When the Report was handed down in February 2019, the Queensland government at the time indicated it would adopt the recommendations of the Report. In particular, it amended the *Criminal Code 1899* (Qld) by the introduction of s315A **Choking, suffocation or strangulation in a domestic** setting in line with the Report's recommendation to introduce a separate offence of strangulation.

Practical Application

Criminal Code 1899 (Qld)

Section 315A Choking, suffocation or strangulation in a domestic setting

(1) A person commits a crime if—

(a) the person unlawfully chokes, suffocates or strangles another person, without the other person's consent: and

(b) either---

(i) the person is in a domestic relationship with the other person;

or

(ii) the choking, suffocation or strangulation is associated domestic violence under the Domestic and Family Violence Protection Act 2012.

Penalty—

Maximum penalty—7years imprisonment.

(2) An assault is not an element of an offence against subsection (1).

1. Describe the elements of the offence contained in s315A. [C] [A]
2. Describe and explain *subsection (2)* of s315A. [C] [A]
3. What do you think are the reasons for amending the *Criminal Code* to introduce the new offences under s315A? [A] [E]

The specialist domestic and family violence (DFV) courts

As indicated above, the *Not now, Not ever* Task force recommended the establishment of Specialist Magistrates Courts to deal with domestic and family violence. In Queensland, a trial was established on 1 September 2015, and after two years this permanent DFV court continued at Southport, dealing exclusively with all civil and criminal DFV offences. The position of the DFV courts as set out in the Queensland Government Court website is in the following practical application.





Practical Application

SPECIALIST AND DOMESTIC VIOLENCE AND FAMILY COURTS

The outcomes of the trial informed the establishment of future work in developing a specialist approach to the way DFV proceedings are dealt with in courts across Queensland, including the establishment of specialist DFV courts in Townsville and Beenleigh.

The rollout of the specialist DFV courts was staged over six years (2018 to 2023) and all specialist DFV courts are now operational with Townsville, Beenleigh, Mount Isa and Cairns offering a culturally responsive approach for Aboriginal and Torres Strait Islander court users.

Specialist DFV court justice response

The specialist DFV court justice response aims to:

- provide a coordinated, respectful, and fair justice response to DFV
- enhance safety and wellbeing and provide a better court experience for victim-survivors including children
- support increased accountability for persons using violence, compliance with court orders and demonstrated behavioural change.

The specialist DFV court justice response is working towards the coordination of civil and criminal matters in each location. In locations where these matters are coordinated, dedicated magistrates hear both criminal and civil DFV related matters (i.e. civil applications and criminal matters in the same callover).

Renovations to the Southport, Beenleigh, Townsville and Palm Island courthouses occurred to provide new DFV courtrooms, secure and comfortable waiting areas with direct access to the courtrooms, a specialist DFV court registry and sound proofed meeting rooms. Renovations to facilities in Brisbane and Cairns are ongoing.

A key component of the specialist DFV court approach is collaboration between stakeholders including the Queensland Police Service, Legal Aid Queensland, Queensland Corrective Services, and other non-government service providers who deliver critical support to people involved in DFV proceedings.

Community Justice Groups (CJGs) in Townsville, Mount Isa, Beenleigh, Palm Island and Cairns are funded to support the operation of the specialist DFV courts in those locations. CJGs provide support to Aboriginal and Torres Strait Islander people who are involved in DFV court proceedings. This support may include assisting in transporting people to and from court for court appearances, linking people with programs and helping to ensure people understand the court process and any orders that are made.

13 September 2023

Source: Queensland Courts, 'Specialist and Domestic Family Violence Courts' (Online, 23 September 2023), <courts.qld.gov.au/courts/domestic-and-family-violence-court>.

1. Why do you think the Specialist DFV Courts are achieving superior outcomes to a normal Magistrates Court? [E]
2. Prepare a profile to be used to evaluate applications by lawyers to join the duty lawyer staff of the Specialist DFV Palm Island Court. Justify using legal reasoning the qualifications and experience you expect your ideal applicant to have. [C] [E]



Research Task

An evaluation of the trial conducted at the Specialist DFV Court at Southport was conducted in February 2017 by the **Griffith Criminology Institute** of the Griffith University. Further evaluations have been carried out and are on the Court website. Review one of these. Describe its findings. Do they support the specialist DFV courts? [C]

Alcohol fuelled violence

The issue of alcohol-fuelled violence in the Australian community is common to all jurisdictions. All States and Territories have developed policies over many years in an attempt to limit the effects of violent behaviour in private and public places. The connections between violence and the consumption of alcohol are well-established. The principal stakeholders in the community are the **victims and their families, policymakers** (members of parliament, political parties) and the **economic community** (hotel owners, nightclub owners, entertainment venues etc) which depend upon the sale of alcohol for a living. Getting the balance right has been a concern since at least 2004, when a much liked and well-known former member of the Australian cricket team, David Hookes, was killed outside a bar at St. Kilda in Melbourne.

Following the death of David Hookes, the extent of alcohol-fuelled violence at nights in entertainment precincts, the media pressure and public opinion, forced the Queensland government and the Queensland police to carry out campaigns against the problem.



Practical Application

QUEENSLAND ALCOHOL-RELATED VIOLENCE AND NIGHT TIME ECONOMY MONITORING PROJECT

In 2016, the Queensland government responded to the community's concerns around alcohol-fuelled violence and other harm by implementing a broad-based multi-faceted policy. While this is not the first multi-faceted policy concerning alcohol problems that the Queensland government has introduced, this is the first time earlier last-drinks legislation has been implemented at a statewide level, rather than within a few key entertainment districts.

Most components of the policy are consistent across the state. With some applicable only to designated Safe Night Precincts (SNPs). There are currently 15 SNPs (key entertainment areas that are managed by local boards) across Queensland. The policy has three broad aims:

1. To achieve cultural change around drinking behaviour which includes more responsible drinking practices (in particular drinking behaviour outside of the home and in designated SNPs in Queensland).
2. A safe night time environment, in particular in entertainment precincts.
3. A regulatory framework that balances the interests of the liquor industry with a reduction in alcohol-fuelled violence.

Source: Miller et al, 'Queensland alcohol-related violence time economy monitoring project', *BMC Public Health* (Online, 5 October 2017), < bmcpubhealth.biomedcentral.com/articles/10.1186/s12889-017-4811-9 >.

Practical Application ...

1. In small groups in your class brainstorm specific policies to implement each of the 'three broad aims'. [C] [A]
2. Recommend regulations to ensure responsible behaviour by hotel and club management, and by their customers. Justify your recommendations legally. [A] [E]

Practical Application



MAJOR DROP IN ALCOHOL FUELLED VIOLENCE SHOWS NEW LAWS ARE WORKING

The Palaszczuk Government has today released its response to the independent evaluation of the Government's Tackling Alcohol-Fuelled Violence policy (TAFV) which will further strengthen safety measures for Queensland patrons.

Premier Annastacia Palaszczuk said reducing violence in late night venues has been a commitment of the Palaszczuk Government and we have introduced a raft of measures since 2015.

"The report shows there's been a 49% drop in the number of serious assaults between 3am and 6am on Friday and Saturday nights across Queensland.

"Significantly, there's been a 52% reduction in these assaults in one of the state's most popular precincts - Fortitude Valley."

Attorney-General and Minister for Justice Shannon Fentiman said the research looked at three-year trends from July 2016 to June 2019.

Source: Inga Williams, 'Major drop in alcohol fuelled violence shows new laws are working', *The Queensland Cabinet and Ministerial Directory*, (Online, 25 May 2022), <statements.qld.gov.au/statements/95208>.

1. What are the statistical outcomes which have been achieved by government intervention in the area of alcohol fuelled violence in the night time entertainment precincts? Do the outcomes support the government's policies and legislation? [C]

8.4 Law reform and technology

Introduction

The rapidly expanding capabilities of information and communications technologies (ICT) have created new crimes and new ways to commit old crimes.

Source: Tony Krone, 'High Tech Crime Brief', *Australian Institute of Criminology*, <aic.gov.au>.



Technology has had an immense impact on society and, in turn, the laws that govern our behaviour and oversee the detection and investigation of criminal activity. It has challenged lawmakers and the organisations and institutions, both private and public, responsible for administering and enforcing our laws. In Queensland, the *Criminal Code 1899* (Qld), which was written over 100 years ago, contains many of the State's indictable criminal offences. At the time it was written, Sir Samuel Griffith, Chief Justice of Queensland, could not have imagined that computers, mobile phones, social media, the Internet and 3D printing would be part of criminal law— as technology has created new criminal offences and changed the way individuals commit crime. **While technology changes quite rapidly, our law making process can be perceived as being slow in comparison— as often parliaments respond to technological advances after they occur and courts can only respond to cases that come before them.** However, over time, laws have been amended, adapted or interpreted to reflect Australian society's needs, values and technological advances. For example, the introduction by the federal government of the *Online Safety Act 2021* (Cth). We will now investigate how effectively our legal system has responded to technological advances by examining a number of emerging legal situations and issues, including **deepfake imagery, and online romance scams** such as **catfishing**, and **cyberstalking**.

Deep fake imagery and artificial intelligence

The growth in use of the Internet as a means of communication globally and in Australia has meant that there is enormous reliance on the information it publishes for our consumption and use. As students, you need to be as certain (as you can be) that the Internet sources of information you research or cite are authentic and correct. The skills you learn as part of your legal studies (and other subjects) help you to discriminate and make judgments about the information you study.

The combination of deepfake imagery and artificial intelligence is the latest challenge to our institutions, our lawmakers, law enforcement, and anyone responsible for the use and management of Internet resources.

Inquiry Focus

The nature of deepfake imagery, its effects, and the response of lawmakers to its challenges

Study the sources which follow, and respond to the questions to complete your inquiry. This inquiry introduces you to the topic, and provides a basis for future studies.

Practical Application

Source 1 Background

Artificial intelligence is the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.

Source: The Oxford Dictionary of Phrase and Fable <[oxfordreference.com](https://www.oxfordreference.com)>.



A **deepfake** is a digital photo, video or sound file of a real person that has been edited to create an extremely realistic but false depiction of them doing or saying something that they did not actually do or say.

Deepfakes are created using artificial intelligence software that currently draws on a large number of photos or recordings of the person to model and create content. Manipulation of images is not new, but over recent decades digital recording and editing techniques have made it far easier to produce fake visual and audio content, not just of humans but also of animals, machines and even inanimate objects.

Advances in artificial intelligence (AI) and machine learning have taken the technology even further, allowing it to rapidly generate content that is extremely realistic, almost impossible to detect with the naked eye and difficult to debunk. This is why the resulting photos, videos and sound files are called 'deepfakes'.

Deepfakes have numerous positive applications in entertainment, education, medicine and other fields, particularly for modelling and predicting behaviour. However, the possibilities for abuse are growing exponentially as digital distribution platforms become more publicly accessible and the tools to create deepfakes become relatively cheap, user-friendly and mainstream.

Source: eSafety Commissioner, 'Deepfake trends and challenges – position statement', (Online, 19 August 2024), <esafety.gov.au/industry/tech-trends-and-challenges/deepfakes>.

1. Describe deepfake imagery. How has artificial intelligence facilitated the growth of deepfakes on the Internet. [C]
2. Set out the range of applications for which deepfake imagery can be used on the Internet. [C]



Practical Application

Source 2 Media

FEDERAL GOVERNMENT TO INTRODUCE THE BAN ON SHARING OF NONCONSENSUAL DEEPFAKE PORNOGRAPHY

People who share deepfake pornography will face serious criminal penalties as part of legislation being introduced into federal parliament. There has been an increase in pornographic deepfake images generated by artificial intelligence, prompting the move from the federal government to ban the sharing of non-consensual digitally created and altered sexually explicit material. The sharing of non-consensual deepfake sexually explicit material will carry a penalty of six years in jail.

If a person also created the deepfake shared without consent, there will be an aggravated offence that carries a higher penalty of seven years' imprisonment.

Source: Monte Bovill, 'Federal government to introduce the ban on sharing of nonconsensual deepfake pornography', *ABC News*, (Online, 6 February 2024) <[abc.net.au/news/2024-06-02/deepfake-pornography-sharing-image-based-abuse-criminal-prison/103923814](https://www.abc.net.au/news/2024-06-02/deepfake-pornography-sharing-image-based-abuse-criminal-prison/103923814)>.

1. What has led to the introduction of new laws creating criminal penalties for sharing deepfake pornography? [C]
2. What is 'non-consensual deepfake sexually explicit material'? What is the nature of the new 'aggravated offence'? Do you agree that the penalty should be increased for persons who create the deep fake image? Recommend an appropriate penalty and justify it in legal terms. [C] [E]



Practical Application

PARENT OUTRAGED OVER 'INCREDIBLY GRAPHIC' FAKE IMAGES OF BACCHUS MARSH GRAMMAR STUDENTS

A woman whose daughter attends Bacchus Marsh Grammar said she was sickened by fake nude images of students that were circulated online.

A teenager has been arrested after a series of explicit AI-generated images of students at the school, north-west of Melbourne, were discovered.

Victoria Police said the boy has been released pending further enquiries and its investigation is ongoing.

The school's principal said it appeared images of about 50 girls from the school were taken from social media and manipulated with AI to create obscene images.

In a statement on Wednesday morning, the school said the students affected were being offered support.

"On behalf of the persons and families affected, Bacchus Marsh Grammar is taking this matter very seriously and has contacted Victoria Police.

Practical Application ...

"The wellbeing of Bacchus Marsh Grammar students and their families is of paramount importance to the school and is being addressed."

Source: ABC, 'Parent outraged over 'incredibly graphic' fake images of Bacchus Marsh Grammar students', *ABCNews*, (Online, 12 June 2024) <abc.net.au/news/2024-06-12/bacchus-marsh-ai-images-fake-nude-students-photo-online/103967402>.

1. What is the nature of the teenager's alleged offence? [C]
2. Describe the harm/injury caused by the alleged offence. To whom should the alleged offence apply? Give your reasons and recommend the terms for legislation which would cover the victims you apprehend. [C] [A] [E]

Practical Application

Source 3

Existing legislation

Queensland law

The *Criminal Code (Non-Consensual Sharing of Intimate Images) Amendment Act 2018* amends the Criminal Code, creating three revenge porn offences consisting of the publication, without a person's consent, of intimate images or videos of the person, or making a threat to do so.

It defines intimate images as including:

- A moving or still image that depicts
 - A person engaged in a sexual act
 - The genital or anal region when it is bare or covered only by underwear; or
 - The bare breasts of a female; or
 - An image that has been altered to appear to show any of the above.

There are three revenge porn offences in the *Criminal Code*, all of which attract a custodial sentence (maximum penalty, three years jail)

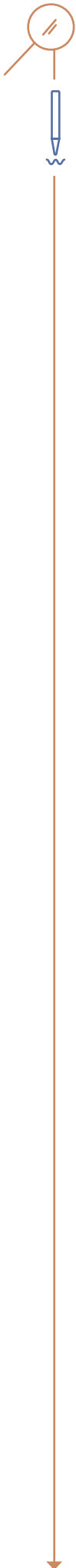
Section 223: it is an offence to distribute intimate images of a person **without** the person's **consent** in a way that would reasonably cause the person distress. It is irrelevant whether the person distributing the images intended to cause distress or actually caused distress.

Consent means free and voluntarily given agreement by a person with the cognitive capacity to consent. A person under 16 is **incapable of giving consent** for the purpose of this provision.

It is a **defence** to a charge under this section if the person distributing the images was doing so for a genuine artistic, educational, legal, medical, scientific or public benefit purpose and their conduct was reasonable for that purpose.

Section 227B: it is an offence to distribute prohibited visual recordings of a person without the person's consent. Prohibited visual recordings include:

- A recording of a person engaged in a private act, in circumstances where a person would be expected to be accorded privacy;



Practical Application ...

- A recording that shows a person's genital or anal region when it is bare or covered only by underwear, made in circumstances where a person would expect to be afforded privacy

Section 229A: a person commits an offence if they threaten to distribute intimate images or a prohibited visual recording of a person:

- without the person's consent; and
- in a way that would reasonably cause the person distress; and
- in a way that would reasonably cause the other person fear of the threat being carried out.

Commonwealth law

The *Online Safety Act 2021* (Cth) commenced on 23 January 2022. This Act was legislated to provide civil penalties for the non-consensual sharing of intimate images, as well as images which have been altered. Section 75 (a) provides for a civil penalty of 500 penalty units (\$111,000) for the distribution or threat of distribution of such images.

Under the Act the eSafety Commissioner can provide a removal notice to online providers (e.g. Facebook) which host intimate imagery, requiring them to remove the image in as short a time period as 24 hours.

In June 2024 the Federal Attorney General Mark Dreyfus introduced the **Criminal Code Amendment (Deepfake Sexual Material) Bill 2024** into the federal parliament.

The Bill will amend Part 10.6 of the Criminal Code to modernise and strengthen offences that deal with the non-consensual sharing of sexually explicit material online, including material created or altered using technology.

The amendments introduce a new offence for the transmission of sexual material relating to persons who are, or appear to be, over the age of 18, without consent.

The phrase 'non-consensual sharing of sexual material' refers to the sharing of an image, video or audio of a person in an intimate manner using a carriage service (such as on social media or using the internet), where the sharing of the image, video or audio was without the consent of the person depicted in the material. It is colloquially known as 'revenge porn', and commonly referred to as 'image-based abuse'.

In recent years, the distribution of sexual material created or altered using technology is increasingly more common as AI programs become more accessible. This type of AI-generated material is commonly referred to as 'deepfakes'. The issue that arises when dealing with such material under the current framework is that because the victim is not involved in the creation of the fictional 'deepfake' version of themselves, an expectation of privacy may not attach to the depiction of the victim. This issue does not arise with the new offences, which do not rely on this definition and instead turn on whether the person depicted in the material consents to its transmission.

1. What type of legal action can the eSafety Commissioner take against an online provider like Facebook, under the *Online Safety Act 2021* (Cth)? Is this likely to deter Facebook or other online providers from allowing customers to publish online nonconsensual sexual material offensive in character? Make a legal recommendation which might achieve such an objective. [C] [A] [E]
2. How will the proposed new amendments to the *Online Safety Act 2021* (Cth) make a difference to the alleged inappropriate behaviours described in Source 2? Justify your answer in legal terms. [A]



Source 4

The following activities illustrate how the law has recently been applied, and highlights the problems that arise at state level at present.

Case Study

ESAFETY COMMISSIONER (Applicant) v ANTHONY ROTONDO (Respondent), FEDERAL COURT OF AUSTRALIA, DISTRICT REGISTRY: QUEENSLAND DIVISION: GENERAL NO QUD 451 OF 2023

Facts: In October 2023 the eSafety Commissioner applied to the Federal Court of Australia for a warrant to arrest one Anthony Rotondo who had not complied with court orders. The application was brought ex parte, that is, without the defendant being present. He was overseas at the time.

Legal Issue: Should the court grant the warrant for the arrest of Anthony Rotondo?

Decision: The decision of the court, which explains why it was made, signed by Justice Rangiah, is set out below.

WARRANT FOR ARREST

To all Queensland and Australian Federal Police officers

Arrest Anthony Rotondo (also known as Antonio Rotondo; DOB 12/02/1970) and detain him in custody and bring him before the Federal Court of Australia to answer the charge set out below.

Anthony Rotondo (also known as Antonio Rotondo) is charged with contempt in that it is alleged that:

1. On 20 October 2023, the Federal Court of Australia made interim orders which relevantly:
 - a. Required Anthony Rotondo (also known as Antonio Rotondo) to take all reasonable steps to remove or have removed from the website mrdeepfakes.com, intimate images of six identified individuals, as soon as practicable.
 - b. Restrained Anthony Rotondo (also known as Antonio Rotondo), pursuant to s 122(1) (a) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) from posting any intimate image on any social media service, relevant electronic service or designated internet service, each within the meaning of s 5 of the *Online Safety Act 2021* (Cth).
 - c. Required the parties not to publish the content of the order, the schedule to the order, or the affidavit of Luke Boon affirmed on 19 October 2023 (the Documents).
2. Anthony Rotondo (also known as Antonio Rotondo) has disobeyed order 1 by failing to take all reasonable steps to remove or have removed from the website mrdeepfakes.com, intimate images of the six identified individuals
3. Anthony Rotondo (also known as Antonio Rotondo) has disobeyed orders 2 and 6 of the Interim Orders because on or around 26 October 2023 he sent an email copied to 49 recipients, in addition to 2 email addresses for the Applicant that:
 - a. distributed the Documents; and
 - b. attached a still image which was an intimate image within the meaning of s 15 of the *Online Safety Act 2021* (Cth).

Date: 22/10/23


Signed by Judge JUSTICE RANGIAH



Case Study ...

1. What is the charge against Anthony Rotondo? [C]
2. What is an ex-parte application? [C]
3. What did the eSafety Commissioner apply for? [C]
4. What order did the Hon Justice Rangiah make? Analyse the legal justification for the order. [A]

Practical Application

ANTONIO ROTONDO GUILTY OF CONTEMPT OF COURT AFTER ALLEGEDLY CREATING DEEPAKE IMAGES OF SCHOOL STUDENTS AND TEACHERS

Antonio 'Tony' Rotondo, 53, appeared via video link from prison and represented himself in the Federal Court in Brisbane on Wednesday.

He is being sued by Australia's E-Safety commissioner, who alleges he created fake pornographic images of several women without their consent and published it to his own website.

He was fined \$25,000 for contempt of court, after admitting he breached three court orders.

The orders were made by a Federal Court judge in October, which demanded he remove the deepfake images from his website, refrain from posting any further images, and which required he not publish the orders, as they contained information which identified some of the women involved in the claim.

On Wednesday the court heard a day after he received the orders by email, he forwarded the documents to E-Safety Commission staff and copied in 49 other email addresses, including those belonging to media outlets, alongside an "intimate" deepfake image of another Australian resident.

Mr Rotondo admitted to all three contempt of court charges.

Further charges laid

On October 27, one day after sending the email to media outlets, Mr Rotondo was arrested by Queensland police and charged with creating deepfake images of Brisbane school students and teachers.

He was charged with five counts of obscene publications and exhibitions, one count of obscene publication and exhibition of a child under 16 years and endangering a property by fire.

Police said on September 10, they received a complaint from a Brisbane school alleging it had been sent an email including deepfake images of students and teachers.

If Mr Rotondo is convicted on the Queensland police charges, it could be the first time a person is criminally prosecuted for distributing deepfake images.

The E-safety commissioner commenced legal action against Mr Rotondo in the Federal Court following a Four Corners story that included allegations that an anonymous online creator was posting deepfake pornography of Australian women, including seven public figures.

Source: Laura Lavelle, 'Antonio Rotondo guilty of contempt of court after allegedly creating deepfake images of school students and teachers', *ABC News*, (Online, 6 December, 2023) <[abc.net.au/news/2023-12-06/qld-deepfake-images-court-charge-antonio-rotondo-school-students/103195578](https://www.abc.net.au/news/2023-12-06/qld-deepfake-images-court-charge-antonio-rotondo-school-students/103195578)>.

Practical Application ...

1. To what charges did Anthony Rotondo plead guilty? [C]
2. With what was Anthony Rotondo charged under Queensland law? Find the relevant sections in the *Criminal Code 1899* (Qld) which apply. Are they new offences created under the *Criminal Code* to charge people who post non-consensual deepfake pornography online or are they existing provisions which can be used to cover Anthony Rotondo's alleged criminal behaviour? Should the Queensland *Criminal Code* contain provisions specifically prohibiting publishing offensive deepfake imagery online? Justify your answer using legal criteria. [C] [A] [E]

Online romance scams and catfishing

Catfish: *someone who uses false information to cultivate a persona online that does not represent their true identity.*

Source: Eric Vanman, *The Conversation & ABC News*, (Online, 26 July 2018) <abc.net.au>.

Technology has had a huge impact on how we meet and connect with people. While many people go online with a genuine intention to form a relationship, some people do not. Sometimes scammers will use the anonymity of the online world to take advantage of people looking for love or friendship. They will develop a fake profile using a fictional name or use another person's identity to lure unsuspecting victims. Over time **perpetrators of this type of crime often build trust with their victims before manipulating them to send money, gifts, intimate images or complete a task.**



Inquiry Focus

The nature of romance scams and the response of lawmakers to its challenges

Consider the information contained in the following sources. Answer the questions in each activity. They will help you form your response to the inquiry.

Source 1 Background

Since January 2016, the Australian Competition and Consumer Commission (ACCC) has published data on romance scams – with catfishing being one type of romance scam. Its website provides statistics of reported romance scams in Australia – but it is important to remember that it is impossible to know how widely this offence occurs, as many victims may be too humiliated to make a report.

Practical Application

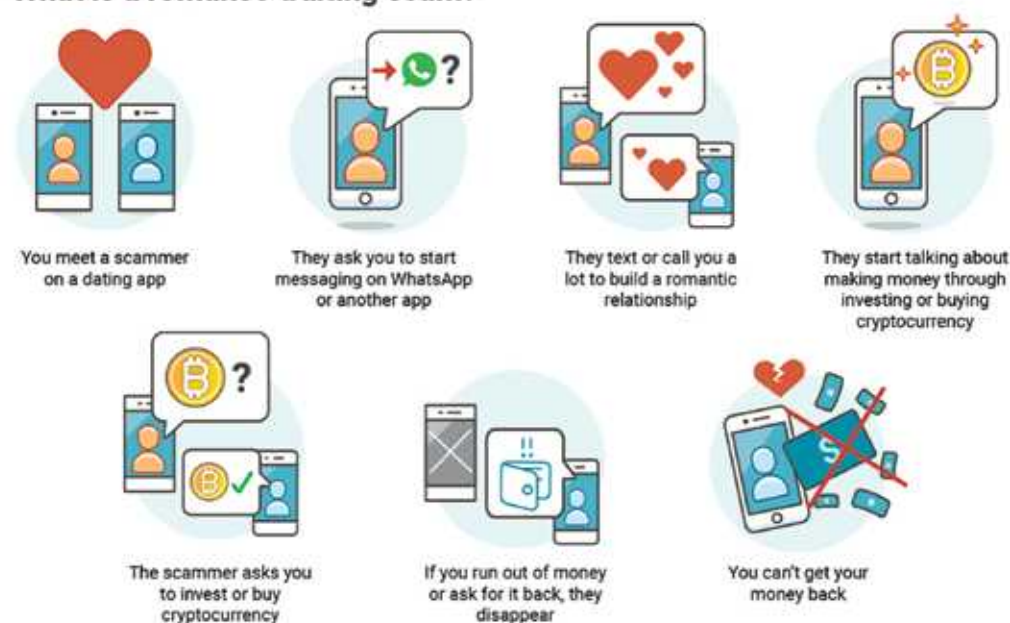
Scamwatch is run by the **National Anti-Scam Centre** to collect reports about scams to help us warn others and to take action to stop scams.

It also provides up-to-date information to help you spot and avoid scams.

The National-Anti Scam Centre:

- makes it easier to report scams
- helps people spot and avoid scams
- improves information sharing to disrupt scammers
- works across government and the private sector to stop scams

What is a romance-baiting scam?



Statistics



Source: Scamwatch, 'Online dating and Romance Scams', (Online, 10 November 2024) <scamwatch.gov.au/about-us>.

1. Describe what happens when someone is scammed. Should the behaviour of the scammer be a criminal offence? Justify your answer. [C] [E]
2. What effect do romance-based scams have on Australians? Which group of Australians are most affected? [C]

Source 2

Legal responses to romance scams and catfishing

No law mentions the word romance scam or catfishing. **Instead our legal system has used pre-existing criminal offences against defendants who deceive others under the guise of a romantic relationship. Words within these pre-existing criminal offences can be interpreted and applied to new types of crime or new methods.** These criminal offences can be found in Commonwealth, State and Territory legislation. **Depending on the circumstances of the romance scam, a defendant could be charged with various offences at a Commonwealth level. These are found in the *Crimes Act 1995* (Cth).** Some criminal offences include: dealing in identification information (s372.1), dealing in identification information that involves using a carriage service (s372.1A), possession of identification information (s372.2), using a carriage service to make a threat (s474.15), using a carriage service to menace, harass or cause offence (s474.17) or money laundering (Part 10.2). **Queensland's *Criminal Code 1899* (Qld) also contains some relevant offences** including fraud (s408C), obtaining and dealing with identification information (s408D), acts done with the intent to defraud (s459), stalking (s359B) or forgery and uttering (s488). If the victim is a child, other offences can apply— an example being grooming (s218B). **But, the criminal offences provided here are not an exhaustive list- romance scams and catfishing can result in physical injury or even death.** To understand how the law operates in practice, we will examine a number of recent cases.

Research Task

Choose and locate one Commonwealth and one Queensland criminal offence related to romance fraud or catfishing from the paragraph above.

1. What are the elements of the criminal offence? [S] [C]
2. What is the maximum penalty of the criminal offence? [C] [S]
3. How does it demonstrate the actions undertaken by a 'catfish'? [A]
4. Do you think the current criminal provision you have chosen provides a sufficient response to a romance scam or catfishing? Why or why not? Consider whether the section you have chosen demonstrates the characteristics of an effective law in the context of this type of crime. [E]

Case Study

R v Abdelmalek (Unreported, Magistrates Court of Victoria, 21 May 2019)

Facts: In 2011 the first victim, accepted a Facebook friend request from actor 'Lincoln Lewis', an old childhood friend. Lincoln and the first victim exchanged messages, telephone calls and photographs. As her and Lincoln's interactions became romantic, she believed she was in a romantic relationship. She later found out that the Facebook and telephone number did not belong to the real Lincoln Lewis, they were fake. She confronted the person who told her his name was Michael Jason Smith. She demanded Michael stop contacting her, which he did. However, she and Michael began speaking again – but he soon confessed his 'real' name was Danny Jason MacGreene, a British actor (but he used Michael as a cover to protect his real identity). While they continued their online relationship, she began to receive anonymous menacing messages, which her 'boyfriend' told her he was also receiving. One





Case Study ...

evening the victim received a message from a man claiming to be a federal police officer stating that her boyfriend had been kidnapped, but this was later discovered to be a lie. The anonymous messages continued and began to threaten her family. The first victim, sought help from the police and mental health professionals, but later killed herself. The second victim also believed she was in a relationship with 'Lincoln Lewis', but like the first victim, discovered the relationship was fake. She reported the matter to the Queensland police, who, with her help discovered the person behind the romance scam was Lydia Abdelmalek.

Legal Issue: Did Abdelmalek's actions constitute the act of 'stalking'? Can this be proven beyond a reasonable doubt?

Decision: Abdelmalek was found guilty of six counts of stalking. She was sentenced to two years and eight months jail, with a non-parole period of one year and nine months.

1. What criminal offence did Abdelmalek commit? [C]
2. Analyse Abdelmalek's behaviour. What does it illustrate? [A]
3. What do you think would happen if Abdelmalek was located overseas? Why? [A] [E]

Practical Application

MELBOURNE WOMAN WHO IMPERSONATED LINCOLN LEWIS RECEIVES LONGER SENTENCE FOR STALKING AS APPEAL FAILS

A Melbourne woman who impersonated soap stars to attract victims online before stalking and harassing them has been sentenced to more time behind bars after losing an appeal.

Lydia Abdelmalek appeared in Melbourne's county court on Tuesday, where she was re-sentenced to four years in prison following a lengthy appeal of her 2019 sentence. The 32-year-old failed to overturn her conviction for six stalking charges earlier this year and then pursued an appeal of her two-year and eight-month sentence.

She must now serve two years and eight months before she will be eligible for parole... During the appeal, the woman's family said the prolonged legal process had delayed their grief and re-traumatised them.

Abdelmalek's victims and their families appeared in court for the sentencing, as judge Claire Quin heeded their calls for an extended sentence.

She said she had warned Abdelmalek and her lawyers "a number of times" that she may impose a more severe jail term if they continued to pursue the appeal.

"This matter proceeded despite an overwhelming prosecution case and full knowledge of the additional stress that flows to the victims as a result," Quin told the court.

She described Abdelmalek's offending as "persistent and malicious", as she said she had spent thousands of hours pursuing her victims online in secret.

"The appellant created a web of false identities and characters," Quin said.

"Despite the content of some of the material being reflective of soap opera, it was not fantasy – it was real and impacted real people.

Source: Australian Associated Press, 'Melbourne woman who impersonated Lincoln Lewis receives longer sentence for stalking as appeal fails', *The Guardian*, (Online, 25 October 2022) <theguardian.com/australia-news/2022/oct/25/melbourne-woman-who-impersonated-lincoln-lewis-receives-longer-sentence-for-stalking-as-appeal-fails>.

Practical Application ...

1. Why did the judge increase the sentence? Do you agree with her decision? [A] [E]

Investigating and policing romance scams and catfishing

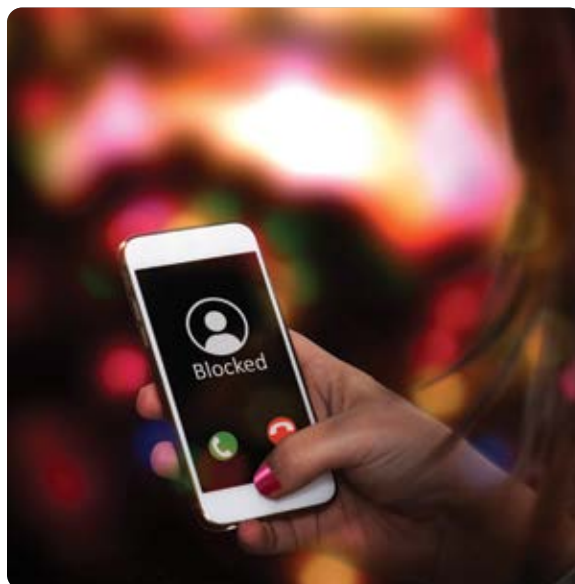
The investigation of online fraud can involve a number of government authorities – including the Australian Competition and Consumer Commission (ACCC), Australasian Consumer Fraud Taskforce (ACFT), Australian Cybercrime Online Reporting Network (ACORN) and Queensland and Federal police. Anonymity and the trans-jurisdictional nature of romance scams such as catfishing can make prosecution difficult, even if Commonwealth and State authorities are working together and sharing information. **Like many cybercrimes, if a defendant is located overseas and takes steps to hide their identity, prosecution can be impossible.** Future improvements in detection technology, co-operation between Commonwealth and State police services and regulators, further enforcement and public awareness campaigns may strengthen the law's responses to this criminal offence.

Practical Application

1. Describe the nature of romance scams and catfishing in your own words. How has the law responded to the problems caused by romance scams and catfishing? Why has it been difficult for law enforcement authorities to investigate and prosecute complaints about romance scams and catfishing? What recommendations would you make? [A] [E]

Cyberstalking

Stalking as a criminal concept is a relatively recent one. In 1993 **Queensland recognised stalking as a specific criminal offence in *Criminal Code 1899 (Qld)* s359B.** The introduction of this criminal offence was the result of changes in community perceptions about respectful behaviour in relationships, increased awareness of domestic violence and the work of women's legal organisations such as the Women's Legal Service. Together these factors influenced legislators to reform the law and create a specific criminal offence to address persistent harassment. Other reasons behind the introduction of this offence can be found by reading the *Criminal Law Amendment Bill 1993 (Qld)* Explanatory Notes:



...many submissions were received from community and women's interest groups contending that the criminal law of Queensland did not adequately provide protection...Although the Criminal Code contains a small number of sections... the Criminal Code does not generally provide for criminal liability in cases where a person has been subjected to behaviour which might reasonably cause an expectation of potential violence.



Stalking involves making unwanted and repeated contact with another person that leaves them feeling intimidated or fearful. The key feature of ‘criminal’ stalking is its repetition. It can include repeatedly following a person, sending a person letters or gifts, loitering around a person’s home or workplace or repeatedly calling a person. Like most crimes, the victim and defendant can be known to each other (a current or former partner, friend, family member or work colleague), but it can also involve a stranger. We usually hear or read about stalking on the news when a fan becomes unhealthily obsessed or continuously harasses a celebrity, causing them to feel unsafe or become fearful for their life – for example in 2023 Nicole Kidman and Keith Urban were forced to spend a considerable sum of money upgrading the security at their home in the New South Wales Southern Highlands after receiving threats online.

The Office of the E-Safety Commissioner describes cyberstalking on its website:

WHAT IS CYBERSTALKING?

Cyberstalking is the use of digital technology to track and harass someone.

Cyberstalking behaviour can include:

- constantly checking in on someone and trying to get their attention even when they make it clear that they are not interested
- making repeated unwanted contact with someone by calling, emailing, texting, messaging, or asking inappropriate questions
- repeatedly sending, posting or sharing unwanted sexual requests, sexual or offensive content, abusive comments, or false accusations to or about someone
- monitoring someone’s movements using the location (GPS) technologies that are built into the operating systems of phones and fitness apps, or using tracking devices or spyware
- following or contacting someone across multiple online accounts and making it known they can’t hide
- accessing or hacking someone’s online accounts to find their personal information, track their movements, read their emails or messages, or change their passwords to lock them out of their own accounts
- ‘gaslighting’ a person by changing their environment in small ways that are difficult to prove to others, such as using remotes to turn internet-connected devices on and off within their home.

Source: e-Safety Commissioner, ‘What is Cyberstalking’, (Online, 23 August 2024) <esafety.gov.au/key-topics/staying-safe/cyberstalking>.



The law in Queensland

In 1999 there were amendments to the *Criminal Code*, which attempted to address cyberstalking. For example, s359B(c) was changed from ‘telephoning or otherwise contacting another person’ to its present version set out below.

Practical Application

Criminal Code 1899 (Qld)

Section 359B

Unlawful stalking is conduct—

- (a) intentionally directed at a person (the stalked person); and
- (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and
- (c) consisting of 1 or more acts of the following, or a similar, type—
 - (i) following, loitering near, watching or approaching a person;
 - (ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;
 - (iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
 - (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;
 - (v) giving offensive material to a person, directly or indirectly;
 - (vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;
 - (vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and
- (d) that—
 - (i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or
 - (ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.

Section 359E

- (1) A person who unlawfully stalks another person is guilty of a crime.
- (2) A person who commits the crime of unlawful stalking is liable to a maximum penalty of imprisonment for 5 years.
- (3) However, a person is liable to a maximum penalty of imprisonment for 7 years if, for any of the acts constituting the unlawful stalking, the person—
 - (a) uses or intentionally threatens to use, violence against anyone or anyone’s property; or



Practical Application ...

- (b) possesses a weapon within the meaning of the Weapons Act 1990 ; or
- (c) contravenes or intentionally threatens to contravene an injunction or order imposed or made by a court or tribunal under a law of the Commonwealth or a State.
- (4) Also, a person is liable to a maximum penalty of imprisonment for 10 years if any of the acts constituting the unlawful stalking are done when or because the officer is investigating the activities of a criminal organisation.

1. Read *Criminal Code 1899* (Qld) s359B(c)(i)-(iv) provided above and answer the following questions:
 - a. Can an individual be charged with stalking for a single incident? [C]
 - b. What impact must the contact have on the victim? [C]
 - c. Is there any technology-related words used in this section? If so, where? [C]
 - d. Explain and provide at least four examples of stalking behaviour that can occur online according to the circumstances outlined in the Act. Are there any parts of the Act that cannot be replicated in the online world? [C] [A]
 - e. Are there any particular online behaviours that you feel should be specifically included in this section? Why or why not? [E]
2. Read *Criminal Code 1899* (Qld) s359E provided above and use it to answer the following questions:
 - a. If a defendant followed a victim and loitered around their home on at least three occasions, what is the maximum penalty he or she could receive? [C] [A]
 - b. If a defendant sends at least two text messages to their former partner threatening to kill their pet and owned a gun, what is the maximum penalty he or she could receive? [C] [A]
 - c. If a defendant emailed a number of violent images to a person and threatened to use violence against them, what is the maximum penalty he or she could receive? [C] [A]
 - d. Do you believe using technology to commit stalking should receive a higher penalty? Why or why not? [E]
 - e. Do you believe cyberstalking should form a separate category like those found in s359E(3)? Why or why not? [E]
3. What are the similarities and differences between the Queensland criminal offence of unlawful stalking (*Criminal Code 1899* (Qld) s359B) and the Commonwealth criminal offence of using a carriage service to menace, harass or cause offence (*Criminal Code Act 1995* (Cth) s474.17). Which do you feel is a more suitable legislative response for cyberstalking if, at all? Why? [A] [E]





Case Study

Phillips v Police [2016] SASC 135

Facts: The victim (MH) in this case was a police officer. The appellant sent private Facebook messages and wrote public posts about MH. The messages and posts alleged that MH had an unlawful sexual relationship with two underage girls. The appellant was charged with stalking and found guilty by a magistrate. The appellant challenged the magistrate's interpretation of the words 'apprehension or fear' in the criminal offence.

Legal Issue: Were the words 'apprehension or fear' limited to circumstances that involve physical harm only? To what extent should the words 'apprehension or fear' be interpreted?

Decision: Chief Justice Kourakis held that the scope of the words 'apprehension or fear' included an apprehension or fear for a person's reputation, an apprehension or fear of adverse consequences or an apprehension or fear of embarrassment in front of his or her family, friends or employer. It also includes an apprehension or fear of emotional or mental harm, as well as physical harm. However, the court also held that the apprehension or fear must be 'serious' and that this could only be decided by examining the facts of the case.

1. What did the appellant do? [C]
2. What evidence do you think would have been used at trial by the prosecution? [A]
3. What consequences could occur if 'apprehension or fear' only extended to include the apprehension or fear of physical harm? [A]

Practical Application

Locate *Criminal Law Consolidation Act 1935* (SA) s19AA and re-read *Criminal Code 1899* (Qld) s359B and answer the following questions:

1. How do both jurisdictions respond to technology facilitated harm? [A]
2. Does the Queensland Act's definition of apprehension, fear or detriment include emotional or mental harm? [A]
3. The South Australian Act was last amended in 2001. Should the Queensland Act be further reformed in any way? If so, how? [A] [E]

Practical Application

WOMEN ARE STILL BEING TARGETED ONLINE 'AT THEIR WEAKEST POINT'

Eighteen months since the dawn of a movement demanding an end to women being viewed as prey, prominent women's safety advocates say measures to protect Australian women online remain "woeful", and cyberstalking, trolling and harassment remain rampant.

#MeToo may have made men in prominent roles more wary of crossing real world boundaries, but according to advocates Ginger Gorman – author of the 2019 book **Troll Hunting: Inside the world of online hate and its fallout** – cyber-harassment researcher, Dr Emma Jane and **Stop Stalking Australia's** Rachel Cassidy, women are still being targeted at 'their weakest point'.





Practical Application ...

Ginger Gorman believes social media companies have been woefully slow to enforce protections for women, and police are also lagging in their response to allegations of online crimes against women, including serious online harassment.

“In terms of policing, it’s like domestic violence was 30 years ago – they think it’s a private matter. They don’t understand the real-life harm it does, the relative [relevant] legislation or how to investigate crimes like this. They don’t have the training or resources to deal with it,” says Canberra-based writer, Gorman.

Rachel Cassidy, CEO of Stop Stalking Now foundation and author of the new book *Stalked – The Human Target*, says there is still often a lag time between law enforcement and the justice system ‘catching up to the current cohort of perpetrators’ who use technology to commit cyberstalking.

Source: Wendy Tuohy, ‘Women are still being targeted online ‘at their weakest point’, *The Sydney Morning Herald*, (Online, 16 May 2019), <smh.com.au/lifestyle/gender/women-are-still-being-targeted-online-at-their-weakest-point-20190516-p51o76.html>.

1. What problems and issues with the current law do Ginger Gorman and Rachel Cassidy identify in the article? How do these impact victims? [C] [A]



Research Task

Find and read the article by Daniel Sullivan, ‘A critical analysis of Queensland’s cyberstalking legislation’, *Computers and Law June 2002*, <austlii.edu.au>. This is a difficult article but it should challenge you to think about the legal issues raised by cyberstalking, and contains a substantial analysis about whether or not Queensland’s response to cyberstalking is adequate. Make your own assessment of this analysis and make recommendations which you think are appropriate to improve the response of lawmakers in Australia, including Queensland, to meet the challenge of cyberstalking. Justify your recommendations in legal terms. [S] [E]



8.5 Transnational and organised crime

The Home Affairs Department coordinates the Australian response to transnational, serious and organised crime (TSOC). It describes TSOC as covering a wide range of serious crime threats and their effects which impact Australians as follows:

- manufacture and trade of illicit commodities, including drugs and firearms
- sexual exploitation of children
- human trafficking and slavery
- serious financial crime
- cybercrime
- key enablers of TSOC include money-laundering, identity crime and public sector corruption

TSOC is well financed and integrated into a global network. Recent research by the Australian Institute of Criminology indicates that TSOC costs Australia up to \$47.4 billion annually.

70% of Australia's serious and organised crime threats are based offshore or have strong offshore links. But the impacts of TSOC are felt locally. The destructive, pervasive and complex nature of TSOC touches the lives of Australians, and includes:

- the sexual exploitation and abuse of innocent and vulnerable children having lifelong impacts on the victims and their families
- the illicit drugs on our streets destroying lives and communities
- the massive money laundering operations distorting our financial markets
- the black market firearms shipments fuelling violence, particularly criminal gang-related violence
- the cyber theft of personal and credit card details to commit fraud
- online investment scams in our inboxes, preying on the vulnerable

Protecting Australians and our national interests against TSOC is critical. As the environment changes and criminals adapt, so too must our national response

Source: Department of Home Affairs, 'What is transnational, serious and organized crime?'. (Online, 10 November 2021) <homeaffairs.gov.au/nat-security/Pages/what-is-tsoc.aspx>.

There are other organisations that participate in the network which provides critical intelligence to law enforcement to protect the Australian community. These roles are both domestic and international.

Research Task

The Australian Criminal Intelligence Commission (ACIC) and the Australian Institute of Criminology (AIC) both provide intelligence and support to combat TSOC.

1. Investigate the online presence of each of the ACIC and the AIC. [S]
2. Describe the role that each of them plays in the National Intelligence Community in Australia. [C]
3. Compare the ACIC and the AIC. Analyse the differences. Do they complement each other? Recommend any changes you consider are appropriate to each of the ACIC and the AIC. Justify your answer with legal criteria. [A] [E]





The federal government body which oversees the providing of such information is the Australian Transaction Reports and Analysis Centre (AUSTRAC).

When the Act was introduced into parliament to establish AUSTRAC, the minister said that it was aimed at addressing up to an estimated \$11.5 billion of money-laundering per year in Australia, and the threat to national security caused by the financing of terrorism. AUSTRAC selects and analyses information provided by reports from the financial sector and then provide that information to law enforcement agencies of Australia to enable them to prosecute serious criminal activity including **terrorism financing, organised crime, money-laundering** itself, and even **tax evasion**. Breaches of the obligations by financial institutions have resulted in extraordinarily large fines.

Practical Application

COMMONWEALTH BANK: HOW SMART ATMS AND A CODING ERROR CAUSED A MASSIVE MISTAKE

The CBA first rolled out the Intelligent Deposit Machines (IDMs) in May 2012. They're a type of ATM that automatically counts the cash into the CBA customer's account.

But AUSTRAC alleges that CBA didn't limit the number of transactions a customer could make per day, and that its IDMs allowed up to 200 notes per transaction.

IDMs also allowed anonymous cash deposits, so it wasn't long before the system was abused by criminals. For a criminal, that means you could potentially put millions of dollars through a machine in one day anonymously. Not only that, but because the money appears instantly, a user can immediately transfer the money to another account – say, one that exists offshore.

Since the Commonwealth Bank introduced the IDMs five years ago, their use has grown significantly. In May and June 2016, more than \$1 billion in cash went through CBA's IDMs.

AUSTRAC has made a number of allegations against the Commonwealth Bank in its civil proceedings. The most significant is that the bank failed to flag more than 53,000 transactions over the \$10,000 limit that passed through the smart ATMs over three years.

It is unclear how it happened, but it is possible whoever installed the machines back in 2012 simply didn't realise transactions above \$10,000 had to be reported, and never wrote the code.

On the ABC's AM program, CBA chief executive officer Ian Nerev explained the error by saying 53,000 "sounds like a big number", but is actually mostly because of just one flaw in the software.

'One very important piece of context here is that the vast majority related to one software coding error in 2012 that we picked up in 2015, fixed within a month and rectified,' he said.

In a statement to the Australian Stock Exchange on Monday, the bank went further, arguing that all 53,000 alleged contraventions of the code could be counted as just one offence. It is an important distinction, because one infraction alone carries a penalty of \$18 million. 53,000 of them...is a rather large fine.

The ABC's business editor Ian Verreder calls that a "brave" and "adventurous" argument but said the law is very clear.

Practical Application ...

'Imagine if you're caught for speeding again and again and again, and you say, "Well, look, my speedo was broken so I didn't know how fast I was going, so therefore I should only have to pay the fine once, not the 450 times that you've caught me speeding.'

'You reckon that'd fly?'



Source: Yasmin Parry and Will Ockenden, 'Commonwealth bank: how smart ATMs and a coding error caused a massive mistake', *ABC News*, (Online, 8 July 2017), <abc.net.au/news/2017-08-07/commonwealth-bank-how-smart-atms-and-coding-error-caused-mistake/8781066>.

1. How many transactions which exceeded the threshold did the CBA fail to report? [C]
2. What is an IDM? [C]
3. From the point of view of AUSTRAC what were the major problems that arose as a result of the 'software error'. [C]
4. Accepting that this failure to report by the CBA existed for three years and given the figures referred to above for May and June 2016, what is the approximate dollar value of the transactions that were not scrutinised and reported upon by the CBA? [C]
5. Do you think the approximate dollar value is a significant sum in the context of money laundering? [A]
6. In your own words set out what the argument was that was unlikely to "fly"? [A]

The result of the above failure by the Commonwealth Bank is best described in the following practical application:

Practical Application

THE COMMONWEALTH BANK AGREES TO PAY \$700 M FINE TO SETTLE MONEY LAUNDERING LAWSUIT

The Commonwealth Bank has agreed to pay \$700m to settle civil proceedings relating to breaches of anti-money laundering and counter-terrorism financing laws. If the federal court accepts the offer it will be the largest civil penalty in Australia's corporate history.

The announcement follows court-ordered mediation between CBA and the government's financial intelligence agency, Austrac. The deal would close civil proceedings against the CBA, which began 10 months ago.

In August Austrac announced it was suing CBA for 53,700 alleged breaches of money laundering and counter-terrorism financing laws. The case related to CBA's use of intelligent deposit machines, a type of ATM launched in 2012, which let customers anonymously deposit and transfer cash.



Practical Application ...

The investigation, undertaken in partnership with federal police, NSW police and Western Australia police, found that the machines were being used to launder the illicit proceeds of crime.

CBA has agreed to pay a civil penalty of \$700m and Austrac's legal costs of \$2.5m to end the matter. It had originally provided for an estimated penalty of \$375m.

Source: Gareth Hutchens, 'The Commonwealth Bank agrees to pay \$700 million fine to settle money laundering lawsuit', *The Guardian* (Online, 4 June 2018) <[theguardian.com/news/2018/jun/04/commonwealth-bank-agrees-to-pay-700m-to-settle-money-laundering-lawsuit](https://www.theguardian.com/news/2018/jun/04/commonwealth-bank-agrees-to-pay-700m-to-settle-money-laundering-lawsuit)>.



1. How much did the CBA agree to pay for its breaches of the anti-money laundering counter-terrorism financing laws? [C]
2. Was the amount of the fine imposed upon the CBA out of proportion to the failure of the CBA? Give your reasons. [E]

The payment of the above fine by the CBA has been the largest civil penalty ever paid in Australian corporate history. Prior to that payment the largest settlement for money-laundering breaches was a fine of \$45m imposed upon TABcorp in March of 2017 when TABcorp failed to alert AUSTRAC to reports of suspicious behaviour on 108 occasions over more than five years where such suspicious activity related to money-laundering and credit card fraud. Prior to this legislation gaming service providers, casinos and even clubs with poker machines had no obligation to disclose details of punters coming into their establishments with large amounts of cash which would be traded for chips or used as credits. This is no longer the case because these institutions now have imposed upon them the same obligations as banks and other financial institutions. They are now required to identify and verify the details of their customers. They are required to report suspicious matters, and they are required to report transactions greater than the threshold figure of \$10,000.00, as well as to keep appropriate records of gambling transactions for seven years.

The crime of money-laundering, in support of transnational crime syndicates, continues to occur in Australia. AUSTRAC, the Federal police, and state law enforcement agencies, have been very active in finding and prosecuting this criminal activity. A recent example follows.



Practical Application

CHINESE NATIONALS JAILED OVER 'EYE-WATERING' MONEY-LAUNDERING SCHEME IN MELBOURNE'S EAST

Two money launderers have been jailed after laundering more than \$60 million in suspected proceeds of crime.

The pair will spend at least three years in jail...As a leader of a criminal syndicate, Boliang Liu became rich enough to buy luxury items and keep \$913,000 cash in his house.

Liu may have thought he could avoid detection from police...Liu and two co-accused, Tao Zhou and Wei Wang, were arrested in a major sting coordinated by Victoria Police, the Australian Crime Intelligence Commission and AUSTRAC.

The group were charged over their involvement in a syndicate that laundered tens of millions of dollars using cryptocurrency, foreign bank accounts and ATMs across Melbourne's east.

When investigators raided the Burwood home where Liu lived, they seized shopping bags filled with money, cash counting machines and numerous credit cards in other people's names. Officers also seized luxury watches, a Gucci bag, three framed pictures of boxer Mike Tyson, the Porsche, and two four-wheel drives.

On Tuesday, Liu and Zhou were sentenced in the County Court of Victoria after pleading guilty to dealing with proceeds of crime. Judge Michael Cahill jailed Liu, 37, for five-and-a-half years, while Zhou, 41, was sentenced to three-and-a-half years.

According to court documents, a combined \$63 million was laundered by Liu and Zhou in 2020 and 2021.

Prosecutors said Liu, Zhou and Wang took commissions from "customers" by taking their money and transferring it into other bank and cryptocurrency accounts controlled by the syndicate. The syndicate disguised their customers' involvement by holding the money in dormant bank accounts, which were purchased from people who no longer lived in Australia.

The judge said the group was able to avoid detection from the banks because individual transactions never exceeded \$10,000. The group was discovered by police when Liu spoke with an undercover officer and boasted that he could convert \$1 million cash into Bitcoin.

Judge Cahill said prior to being caught, Liu and Zhou had no criminal history. He said it was likely the Chinese nationals would be deported after serving their jail sentences.

Source: Kristiane Silva, 'Chinese nationals jailed over 'eye-watering' money laundering scheme in Melbourne's east', *ABC News*, (Online, 7 August 2024) <abc.net.au>.

1. Describe the offence committed by the defendants. [C]
2. What jail terms did Liu and Zhou receive? [C]
3. Who would be the likely victims of the crime syndicate? How important do you think it is to prosecute this kind of criminal activity? Do the sentences received by Liu and Zhou reflect your view of the importance of such prosecutions? Justify your answer using legal criteria. [A] [E]

Review

Comprehend

1. Describe

a. The meaning of law reform.	e. Double jeopardy.	
b. The meaning of same-sex marriage.	f. Romance scams.	
c. The offence of 'choking/suffocating'.	g. Cyberstalking.	
d. Money laundering.	h. Deepfake imagery	[C]

2. Explain each of the following in two or three sentences

- The relationship between social change and law reform.
- The relationship between the policies of political parties and legal change.
- The importance of lobbying and advocacy groups in changing marriage laws.
- Public opinion as a driver of law reform.
- Domestic and family violence as a driver of law reform.
- Youth crime statistics as a driver of law reform. [C]

Analyse and evaluate

- Respond** to the following statements in 250 to 300 words (2 to 3 paragraphs). Set out the current law in Queensland and Australia, to your knowledge. **Describe** and **explain** any concerns you have about existing legislation. Do you have any **recommendations** to change the law? If so, **justify** your proposed changes using legal criteria.
[C] [A] [E]

a.

If existing stalking legislation is to be amended, the real challenge is to draft provisions encompassing incidents of stalking made possible by today's technology, and as far as possible, tomorrow's technology.

Source: Daniel Sullivan, 'A critical analysis of Queensland's cyberstalking legislation', *Computers and Law: Journal for the Australian and New Zealand Societies for Computers and the Law*, (2002) ANZCompuLawJl 15 <<https://classic.austlii.edu.au/au/journals/ANZCompuLawJl/2002/15.pdf>>.

b.

A recent Artificial Intelligence (AI)-generated "deepfake" video of Labor Premier Steven Miles highlights Queensland's lack of truth in political advertising laws that would defend against deception and misinformation in the democratic process.

Source: Media Release, 'Queensland deepfake underscores need for truth in political advertising laws', *The Australia Institute*, (Online, 28 August 2024), <australiainstitute.org.au/post/queensland-deepfake-underscores-need-for-truth-in-political-advertising-laws/>.

Law reform within a dynamic society

Chapter 9: Legal institutions and law reform

9.1 Royal commissions

9.2 Law reform commissions

9.3 Parliamentary inquiries

Learning objectives

At the conclusion of this chapter, students will be able to:

- explain the role of:
 - law reform commissions,
 - royal commissions, and
 - parliamentary inquiries.
- select legal information and analyse the challenges of law reform.

9.1 Royal commissions

Key Term

Royal commissions: a formal, independent public inquiry appointed by the Governor or Governor-General. A royal commission is tasked to investigate an issue of public importance for the government. A royal commission has special powers to collect information and produce a written report making recommendations.

Source: Attorney-General Department, *About Royal Commissions*, (Web Page, Accessed July 2024) <royalcommission.gov.au/about-royal-commissions> and George Gilligan, 'Royal Commissions of Inquiry' (2002) 35 (3) *Journal of Criminology* <doi.org/10.1375/acri.35.3.289>.

What is a royal commission?

Royal commissions have existed for some time, with members of English royalty appointing Royal Commissioners to investigate important social, legal, and economic problems as far back as the 11th century. In Australia, the legislation that establishes the legal framework for this body is the *Royal Commissions Act 1902* (Cth).

Practical Application

Royal Commissions Act 1902 (Cth)

1A Power to issue Royal Commission

Without in any way prejudicing, limiting, or derogating from the power of the King, or of the Governor-General, to make or authorise any inquiry, or to issue any commission to make any inquiry, it is hereby enacted and declared that the Governor-General may, by Letters Patent in the name of the King, issue such commissions, directed to such person or persons, as he or she thinks fit, requiring or authorising him or her or them or any of them to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.

1. Who authorises a royal commission? What arm of government does it represent? [C]
2. What types of matters can a royal commission inquire into? [C]
3. What document restricts the scope of a royal commission? [C]
4. What does a royal commission produce at the end of the inquiry? [C]

Investigative powers of a royal commission

Royal commissions can only investigate matters provided in the terms of reference listed in the Letters Patent (an official document issued by the government). **These letters define the scope and purpose of the investigation, thereby limiting the commission's focus to specific areas of concern.**

Royal commissions, unlike traditional law enforcement bodies, rely heavily on cooperation to fulfill their mandate of uncovering the truth, no matter how uncomfortable or embarrassing it may be for the government, an organisation, or an individual. A commissioner can summon witnesses (s2), search and seize evidence (s4), and offer indemnities (or protection) to those who cooperate. While there is no right to protect oneself from self-incrimination (s6A), evidence can be given privately, and witnesses have the right to refuse to disclose information about secret manufacturing processes (s6D). However, a person who refuses to give evidence can be charged with an offence and penalised up to two years imprisonment (s6).

The typical process followed by a royal commission

The Prime Minister recommends to the Governor-General that a royal commission should be established.

The Governor-General issues Commonwealth Letters Patent appointing Commissioner(s) and the royal commission's terms of reference. The terms of reference outline the scope and specific issues to be addressed. The government provides funding for the royal commission.

Hearings commence. Most hearings are open, but some are closed. Commissioners are assisted by legal counsel to examine key witnesses. Hearings can occur in a single location or throughout Australia. People are also able to make written submissions to the royal commission.

Sometimes a discussion paper, issue paper, case study, consultation paper or an interim report is written and released to the public.

A report is prepared and presented to the Governor-General and tabled in Commonwealth Parliament.

Final report released to the public.

Examples of royal commissions

There have been over 130 royal commissions throughout Australia's history. These royal commissions have investigated a broad range of social, economic, and legal issues or events.

Some examples include:

Royal Commission into Television

In 1953 (three years prior to the first regular television transmission), Prime Minister Sir Robert Menzies established a Royal Commission to investigate:

- the cost of television,
- the perceived impact of television,
- how many commercial television stations could be established,
- who should be awarded television licences, and
- television program standards.

The Royal Commission would play an integral role in guiding the government to establish a television policy.

Royal Commission into Aboriginal Deaths in Custody

The *Royal Commission into Aboriginal Deaths in Custody* studied and reported on the underlying social, cultural, and legal issues behind the deaths in custody of 99 Aboriginal and Torres Strait Islanders between 1 January 1980 and 31 May 1989. The Royal Commission made over 300 recommendations, including that:

- imprisonment should be used as a sanction of last resort,
- people should be arrested only when there is no other way of responding to a situation that exists,
- a formal process of reconciliation should be initiated, and
- medical attention should be sought immediately if any doubt arises about a person's condition.

Sadly, despite this Royal Commission, Indigenous people continue to die in custody. The National Deaths in Custody Monitoring and Research Program at the Australian Institute of Criminology (one of the outcomes of the Royal Commission) reported that in 2022-23, 31 Indigenous people died in custody.

Royal Commission into National Natural Disaster Arrangements

In 2019-20, Australia experienced one of the most severe and catastrophic fire seasons in our country's history. The Royal Commission's investigation into this unprecedented event focused on:

- how the Commonwealth, State or Territory, and local governments prepared for, responded to and recovered from natural disasters and what should be done to improve these arrangements,
- what arrangements Australia had made to improve resilience to changing climatic conditions, and
- the legal frameworks that may require change to support responses to national emergencies.

The Royal Commission issued a total of 80 recommendations, with the Australian Government being primarily responsible for 15 of them. In a 2023 update, it was revealed that 12 recommendations had been implemented.

To understand how royal commissions operate in practice and how effectively they contribute to law reform, we will examine one example, the *Royal Commission into Institutional Responses to Child Sexual Abuse*.

WARNING: The following section includes information concerning the sexual abuse of children that may be harmful or traumatising for some students.

Royal Commission into Institutional Responses into Child Sexual Abuse

Royal commissions are generally established to achieve one of the following essential purposes:

- to uncover the truth about something, or
- to provide advice to assist the government in forming policy.

Both purposes are strongly connected to the law reform process. To understand how royal commissions contribute to legal change and assist in making laws and processes more equitable, modern, fair, or efficient, we will now look at the *Royal Commission into Institutional Responses to Child Sexual Abuse*.

Inquiry Focus

What contributions did the Royal Commission into Institutional Responses to Child Sexual Abuse make to the process of law reform?

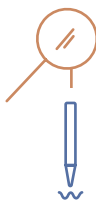
Letters patent, commissioners and terms of reference

There have been too many revelations of adults who have averted their eyes from this evil. I believe in these circumstances that it's appropriate for there to be a national response through a royal commission.

Prime Minister Julia Gillard, 12 November 2012

Since the 1950s concerns about children being abused by religious organisations and government institutions were being raised in courtrooms around Australia. On 12 November 2012, Prime Minister, Julia Gillard, announced the *Royal Commission into Institutional Responses into Child Sexual Abuse*. The Royal Commission had bipartisan support.





Practical Application

Letters Patent

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable Justice Peter David McClellan AM,
Mr Robert Atkinson,
The Honourable Justice Jennifer Ann Coate,
Mr Robert William Fitzgerald AM,
Dr Helen Mary Milroy, and
Mr Andrew James Marshall Murray

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the *Constitution of the Commonwealth of Australia*, the *Royal Commissions Act 1902* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters, and in particular, without limiting the scope of your inquiry, the following matters:

- a. what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;
- b. what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;
- c. what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse;
- d. what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms.

Source: The Letters Patent (Excerpts), (11 January 2013).

1. Who are the commissioners? [C]
2. Briefly summarise what the commissioners were tasked to investigate. [C]
3. What evidence can you find in the Letters Patent to support the view that royal commissions are able to make recommendations critical of the government? How does this demonstrate the concept of accountability? [C] [A]

Legislative amendment

The Letters Patent appointed six commissioners to oversee the Royal Commission. Given the sensitive nature of the inquiry and the vulnerability of potential witnesses, the government amended the *Act* to allow commissioners to take evidence in private sessions.

Mr. DREYFUS (Isaacs—Attorney-General and Minister for Emergency Management)
(9:14am): I move:

That this bill be now read a second time.

...

In developing the terms of reference for the commission, the government worked with people from all parts of Australia.

One of the key themes that arose in this consultation process was the importance of having hearing processes sensitive to the needs of victims, so that they feel supported in preparing and giving evidence. And this bill will assist the commission to put into place the most appropriate processes to hear the stories of those affected.

The bill will allow the chair of the commission, the Hon. Justice Peter McClellan AM, to authorise a fellow commissioner to hold a private session to receive information from victims and others affected by child sexual abuse. A traditional royal commission hearing setting will not generally serve as the best way to facilitate participation in the royal commission by those people affected by child sexual abuse.

Hearings and submissions

The Royal Commission held 57 formal public hearings and 8,013 private sessions. It heard evidence from 1,200 witnesses. The Royal Commission also received over 25,000 letters and emails in response to an issue the commission identified as being important to the inquiry.

Practical Application

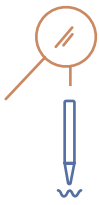
CHILD ABUSE ROYAL COMMISSION BEGINS PRIVATE HEARINGS IN NEWCASTLE

The Royal Commission into Institutional Responses to Child Sexual Abuse will this week hear from Hunter region abuse survivors, as it begins four days of private hearings in Newcastle.

32 people will get the chance to tell of their experiences behind closed doors at the hearings, which get underway this morning.

Spokeswoman for the Royal Commission Danielle Redmond says each session will last around an hour and will see abuse survivors meet with a Commissioner one-on-one. She says the stories will not be considered formal 'evidence', but they will influence the final outcome

'A lot of people who have experienced child sexual abuse in an institution, said they told the person about their abuse when they were a child. They might have told the institution or people around them, and they weren't believed at the time, because they were children. So, for a lot of people having a private session they say it's the first time a person in authority has actually believed them.'



Practical Application ...

Source: ABC News, 'Child abuse Royal Commission begins private hearings in Newcastle', *ABC News* (Online, 24 February 2024) <abc.net.au/news/2015-02-24/child-abuse-royal-commission-begins-private-hearings-in-newcastle/6244136>.

1. How many people provided evidence in a private hearing in Newcastle? [C]
2. How will their evidence be considered by the Royal Commission? [C]
3. What benefits are provided by making provisions to allow people to provide evidence behind closed doors? [A]



ROYAL COMMISSION INTO CHILD ABUSE BEGINS HEARINGS IN ADELAIDE TO EXAMINE SALVATION ARMY HOMES

CHILD sex abuse victims at Salvation Army homes were physically beaten or further sexually abused if they reported crimes against them, the Royal Commission into Institutional Child Sexual Abuse has heard.

Opening the 33rd public hearing of the national commission in Adelaide, counsel assisting Sophie David SC, said the hearing would examine abuse at four Salvation Army homes in South Australia, Victoria and Western Australia between 1940 and 1980.

Ms David said Eden Park employees were reported as far back as 1940, when a staff member was jailed for indecent conduct against three boys.

Abuse survivor Graham Rundle, who won a civil case against the Salvation Army over abuse he suffered at Eden Park, today told the commission he was first taken to the home as a seven-year old.

Source: Andrew Dowdell, 'Royal Commission into Child Abuse begins hearings in Adelaide to examine Salvation Army homes', *The Advertiser*, (Online, 6 October 2025) <adelaidenow.com.au/news/south-australia/royal-commission-into-child-abuse-begins-hearings-in-adelaide-to-examine-salvation-army-homes/news-story/561516ff0fb535aff7824385370c2e5c>.

1. What institution was the focus of the hearings referred to in the article? [C]
2. What criminal and civil consequences have been experienced by the victims of abuse? [C]

Practical Application ...

CHILD ABUSE: DOCUMENTING AUSTRALIA'S SHAME

The Royal Commission into Institutional Responses to Child Sexual Abuse is an unprecedented investigation into an epidemic of depravity across Australia.

Too ill to travel from the Vatican to Sydney to give evidence, Australia's most prominent churchman, Cardinal George Pell, was questioned via video link by the Royal Commission over what he knew about alleged abuse and cover-ups within the Catholic Church.



For four days earlier this year, the senior Vatican official was quizzed, denying any personal wrongdoing but conceding the organisation had made grave errors. 'I am not here to defend the indefensible,' said Cardinal Pell. The Church has made enormous mistakes, is working to remedy those, but the Church has in many places - certainly in Australia - mucked things up.'

When he was 13, John Ellis, a former altar boy, was molested by an Australian monk who was also implicated in a suspected pedophile ring at a former Catholic boarding school in the Scottish Highlands.

'The most important thing for people in being invited to give their own stories and having their stories valued is that somebody cares,' Mr Ellis told the BBC news website.

'For many, many years people have been silenced, people have been fearful of what reaction they will get if they were to tell their truth. The overwhelming emotion people have when they have had that opportunity is empowerment.'

Source: Phil Mercer, 'Child Abuse: Documenting Australia's Shame', *BBC News*, (Online, 20 December 2016) <bbc.com/news/world-australia-38301488>.

1. Which institution's actions are being investigated in the article above? [C]
2. What positives came out of the hearings for one of the victims in the article? What does this demonstrate about the importance of participating in these hearings for victims and their families? [C] [A]

Case studies

The first public hearing of the Royal Commission was held from 16-19 September 2013. To focus the Royal Commission hearing, a case study was used. This case study concerned the responses of organisations, including Scouts Australia, Hunter Aboriginal Services and then Department of Community Services to the conduct of Mr Steven Larkins. Not only did people provide oral evidence (that was transcribed and made available to the public) but the lawyers for all organisations provided written submissions, an excerpt of which is shown below.

Practical Application

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE AT SYDNEY

SUBMISSIONS OF SENIOR COUNSEL ASSISTING THE ROYAL COMMISSION

Available Finding

2. The ‘official warning’ against Mr Larkins was not effectively recorded or communicated to members of Scouts Australia NSW.

[18] Mr Currie wrote that he had also removed Mr Larkins from ‘face-to-face’ contact with youth members. In evidence, Mr Currie said that Mr Larkins was permitted to attend major Scout activities, and was not required to get permission to go to these events.

[19] Mr Currie gave evidence that the action to remove Mr Larkins from face-to-face contact with young Scout members was advised to others through ‘word of mouth’ only. Mr Currie said that at the time, he was attending a large number of Scout activities in the Region, and would have known personally if Mr Larkins had breached this condition. He said he did not receive any reports from local Scout groups that Mr Larkins had attended their groups. Mr Currie agreed that it was ‘*little more than a hope*’ that he could communicate his expectations of Mr Larkins to adults at those events.

[20] In a letter to Mr Larkins, also on 17 April 1997, Mr Currie confirmed these conditions. Mr Currie wrote that the publicity from the incident at Stockton pool was something the Scout Association could ‘*well do without*’. He said the Stockton group was in ‘*damage control*’ and that, as Regional Commissioner, one of his responsibilities was improving the public image of Scouts and doing what was ‘*necessary to keep our good name*’. In evidence, Mr Currie said that in taking the action he did, he would have been ‘*trying to preserve the good name of Scouts, but we would take the necessary action if required*’.

SUBMISSIONS ON BEHALF OF SCOUTS AUSTRALIA NSW

Proposed Finding 2

[5] The official warning given to Mr Larkins by Allan Currie, the Regional Commissioner of the Hunter and Coastal Region after the Stockton pool incident (the evidence establishes that neither Scouts nor its staff knew of the allegations of actual sexual abuse involving AA until 2000, when Mr Larkins was promptly suspended, and did not hear of the allegations of actual sexual abuse involving AC until some years after Mr Larkins had resigned from Scouts) was recorded in at least two places. Firstly, it is clear that a copy of the warning was sent to Branch Headquarters (as it was then called), and placed on a file (a type of “personnel file” called a behavioural file) that specifically concerned Mr Larkins. Secondly, a copy of the warning letter was kept by the Area/Region Secretary in the Area/Region Office.

[6] For reasons referred to below, at that time it was thought to be at least improper – if not illegal – to disseminate suspicions other than founded on a substantial basis.

When a substantial basis was discovered (for example, the allegations made by AA in 2000), Scouts acted promptly.

[7] Mr Olah said in his evidence that behavioural file was available to him in his role as Chief Executive. Mr Olah said that he became aware of the warning letter during his tenure as Chief Executive.

[8] Although the allegations dealt with by Mr Currie in 1997 referred to bizarre behaviour, they were not so directly suggestive of actual abuse as to have required immediate action, nor was it suggestive of the likelihood of actual abuse in the future.

Practical Application ...

1. Which two parties made the submissions above? [C]
2. Why is it important that both parties can make a submission? [A]
3. What issue(s) is in dispute in the submissions above? [C] [A]
4. According to the submission made by the Senior Counsel assisting the Royal Commission how did Mr Currie and Scouts NSW fail children? [C]

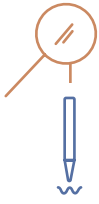
Report and recommendations

The final part of the process is releasing a report to the public. The report contains recommendations. These recommendations generally address the problem(s) and issue(s) identified by the royal commission, but they can also recommend criminal charges for particular people. The *Royal Commission into Institutional Responses into Child Sexual Abuse* handed down its report on 15 December 2017—five years after it first began. The final report comprised of 17 volumes, was thousands of pages long, and contained over 400 recommendations. Some recommendations included the:

- development of a national strategy to prevent child sexual abuse,
- creation of a federal portfolio overseeing policy towards children,
- establishment of a national redress scheme,
- reform of the civil litigation system to provide a more effective means of providing justice for survivors,
- implementation of the Child Safe Standards in all institutions,
- creation of law to protect people who report child sexual abuse in good faith,
- removal of mandatory reporting exemptions for child sexual abuse disclosed during a religious confession,
- establishment of a nationally consistent curriculum for online safety education in schools,
- improvement of record keeping and information sharing, and
- improvement of support and therapeutic services for survivors.

As you can see, royal commissions can provide a detailed plan for improving the law and its associated legal processes to benefit the community.

The potential benefits of these recommendations are significant, but law reform can be challenging, particularly if it involves different levels of government and independent organisations. The articles below illustrate some of the recommendations the royal commission made and the government's progress in implementing these legal reforms.



Practical Application

Source 1

KEY RECOMMENDATIONS FROM THE ROYAL COMMISSION INTO CHILD SEXUAL ABUSE

The five-year Royal Commission into Institutional Responses to Child Sexual Abuse handed down its final report on Friday.

In total, the commissioners have made 409 recommendations, aimed at keeping children safe. Here are some of their key recommendations:

Introduce new laws

Religious ministers, out-of-home care workers, childcare workers, registered psychologists and school counsellors should be brought into line with police, doctors and nurses who are all obliged by law to report sexual abuse.

Introduce new criminal offences

Each state and territory government should create new criminal offences for failing to protect children from sexual abuse, and failing to report child sexual abuse in an institution. The 'failure to report' offence should apply if the person fails to report to police where they know, suspect, or should have suspected that an adult associated with the institution was sexually abusing or had sexually abused a child. The 'failure to protect' offence should apply if an adult knows that there is a substantial risk that another adult associated with the institution will commit a sexual offence against a child under the age of 17.

Remove religious ministers convicted of sexual abuse

Any person in religious ministry who is the subject of a complaint of child sexual abuse which is substantiated or who is convicted of an offence relating to child sexual abuse should be permanently removed from the ministry

Schools should be liable

Schools could be sued for sexual abuse committed by their staff regardless of whether the school was negligent.

Create a national office for child safety

The federal government should establish a national office for child safety that would be part of the Department of Prime Minister And Cabinet. It's first job should be developing a national framework to prevent child sexual abuse, and it should become a statutory body within 18 months.

Establish a legal service for victims

The federal government should establish and fund a legal advice and referral service for victims and survivors of institutional child sexual abuse.

Source: Staff Reporters, 'Key recommendations from the royal commission into child sexual abuse', *Sydney Morning Herald*, (Online, 15 December 2017) <smh.com.au/national/key-recommendations-from-the-royal-commission-into-child-sexual-abuse-20171215-h05en6.html>.



Practical Application ...

Source 2

ANNUAL PROCESS REPORT ON IMPLEMENTATION OF ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE RECOMMENDATIONS

Since the release of the Final Report, significant progress has been made. Action is being taken on all recommendations where the Australian Government is responsible, with work continuing in partnership with states and territories to ensure children are safe from abuse in institutional care.

Key achievements as outlined in the Annual Progress Report include:

- Establishing the National Office for Child Safety – July 2018
- Commencement of the National Redress Scheme – July 2018
- Finalising the National Principles for Child Safe Organisations for Council of Australian Government endorsement and developing National Standards for Working with Children Checks with states and territories
- Opening the Australian Centre to Counter Child Exploitation – July 2018
- National Apology to Victims and Survivors of Institutional Child Sexual Abuse – October 2018
- Implementing the Commonwealth Child Safe Framework across Australian Government entities.

The Prime Minister has also written to all institutions from which the National Redress Scheme has received applications demanding they sign up urgently.

Source: Attorney General, 'Annual progress report on implementation of Royal Commission into Institutional Responses to Child Sexual Abuse recommendation', (Media Release, 14 December 2018) <attorneygeneral.gov.au/Media/Pages/Annual-progress-report-on-implementation-of-carc-recommendations-14-dec-2018.aspx>.

Source 3

CHILD SEXUAL ABUSE SURVIVOR DIES BEFORE REDRESS APPROVED; OTHER TERMINALLY ILL VICTIMS WAITING

Child sexual abuse survivor Geoff Meyers died before seeing a cent through the National Redress Scheme, as figures reveal only 1 per cent of people have received a payout so far.

While Social Services Minister Paul Fletcher has described the scheme as 'up and running' there are major hurdles to thousands of survivors making a claim.

'At the moment about 50 per cent of the applications that have been received from survivors relate to institutions that are not yet within the scheme,' Mr Fletcher told the ABC.

While the Anglican Church partly signed on today, the Uniting and Catholic churches are yet to participate.

In an interview with the ABC, the chair of the Anglican Representative National Redress Scheme Ltd, Garth Blake SC, said he expected by the middle of next year a majority of entities will have joined the scheme.

Mr Blake accepted the process had taken time but said identifying every church-run institution had been a complex and lengthy process.

Practical Application ...

Source: Philippa McDonald, 'Child sexual abuse survivor dies before redress approved; other terminally ill victims waiting', *ABC News* (Online, 7 December 2018) <abc.net.au/news/2018-12-07/child-abuse-survivor-dies-before-redress-approved/10591740>.

1. Identify the range of reforms recommended by the Royal Commission that are raised in Source 1 to Source 3. [C]
2. State the recommendation(s) that are specifically designed to help victims of child abuse. [C]
3. Identify the statutory body the Royal Commission recommended be introduced. Has the government acted on this recommendation? [C]
4. Are there any recommendations that the government can't influence through legal reform? What does this demonstrate about some of the shortcomings of the royal commission process? [A]
5. Explain the government and victim's perspective on the implication of one of the key recommendations, to introduce a national redress scheme. Why is it difficult to implement? What consequences may key stakeholders suffer if the scheme does not achieve its aims? [A]
6. Choose one of the recommendations listed above. Justify whether it should be introduced using legal criteria. [E]

Thinking further about royal commissions

Royal commissions can play an important role in holding a government to account, as they can make findings critical of a government. Although a royal commission is not a court or tribunal and its recommendations are not legally binding, they can encourage momentum for law reform. The royal commission process also allows members of the public to tell their stories.

But royal commissions haven't escaped criticism. In 2009 the Australian Law Reform Commission (ALRC) handed down a report that investigated the operation of the *Royal Commissions Act 1902* (Cth). **The report found that they are costly and time consuming.** Another concern is the fact that governments aren't obligated to change a law or legal processes.

In an article published on *The Conversation*, Scott Prasser (Executive Director of the Public Policy Institute) noted that '...concerns about the powers of royal commissions, [and] the lack of review of their processes...' continue to exist. Legal academic Dr George Gilligan pointed out that royal commissions have become a 'crisis management' strategy—a way for governments to give the appearance of doing something when faced with a controversial problem.

What do you think?

Should royal commissions continue to be utilised in the future to drive legal change and reform? Provide a justification based on legal criteria, principles, and examples. [E]

9.2 Law reform commissions

...over 85 per cent of ALRC reports have been either substantially or partially implemented—making the ALRC one of the most effective and influential agents for legal reform in Australia.

Australian Law Reform Commission, About, 2024.

What is a law reform commission?

Law reform commissions currently exist at both a national (Australia) and state (Queensland) level. The Queensland Law Reform Commission (QLRC) and Australian Law Reform Commission (ALRC):

- are independent,
- established by their own Act, the *Law Reform Commission Act 1968* (Qld) and *Australian Law Reform Commission Act 1966* (Cth) that defines its functions, powers and duties,
- funded by the government,
- led by a judicial officer.

Since being introduced in the 1960s, **law reform commissions have become a key player in shaping and informing how our laws respond to our dynamic and changing society.** These bodies conduct research and provide recommendations to reform a specific area of law or topic referred to it by the Attorney-General of Queensland or the Attorney-General of Australia.

Recent examples include:

Australia 	• Justice Responses to Sexual Violence (2024) • Review of Judicial Impartiality (2020) • Litigation Funding Inquiry (2017) • Review of the Family Law System (2017) • Incarceration rates of Aboriginal and Torres Strait Islander peoples (2016)
Queensland 	• A decriminalised sex work industry for Queensland (2023) • A legal framework for voluntary assisted dying (2021) • Review of consent laws and the excuse of mistake of fact (2020) • Review of Queensland's laws relating to civil surveillance and the protection of privacy in the context of current and emerging technologies (2020) • Review of termination of pregnancy laws (2018)

Objective of a law reform commission

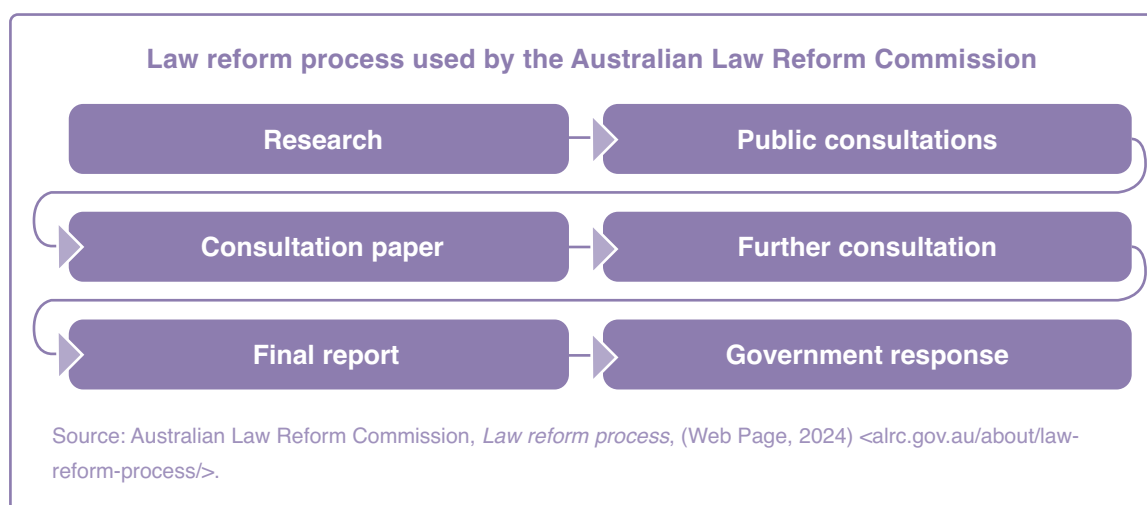
The main goal of a law reform commission is to make a law or a legal process fair, effective, and current. When it makes a recommendation the ALRC aims to:

- bring the law into line with current conditions and needs,
- remove defects in the law,
- simplify the law,
- adopt new or more effective methods for administering the law and dispensing justice, or
- provide improved access to justice.

Similarly, the *Law Reform Commission Act 1968* (Qld) s10 states that the QLRC should develop and reform the law in a way that:

- eliminates anomalies,
- repeals obsolete and unnecessary laws, and
- simplifies and modernises the law.

These objectives will be important to remember when you are asked to decide whether a law reform commission is an effective mechanism to create legal change.



We will now investigate this process using an example.

Inquiry Focus

How effective is the Australian Law Reform Commission (ALRC) in driving legal change?

About the inquiry

Equality is a central value in Australia. For this reason, we have Federal laws that prohibit discrimination based on age, disability, race, sex, intersex status, gender identity, and sexual orientation in particular areas, such as employment. Australia's federal anti-discrimination laws include:

- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1972* (Cth)
- *Sex Discrimination Act 1984* (Cth)

One of the things you have learnt about the law-making process is that legislation must sometimes balance competing interests, and the *Sex Discrimination Act 1984* (Cth) is one example of this in action. While the law prohibits discrimination, it's important to note that it also allows for exceptions, with religious education institutions being able to discriminate on certain grounds (s38).

In November 2022, the Hon Mark Dreyfus KC MP Attorney-General of Australia asked the Australian Law Reform Commission (ALRC) to investigate what reforms, *'...should be made in order to ensure, to the extent practicable, Federal anti-discrimination laws reflect the Government's commitments...in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party including the International Covenant on Civil and Political Rights.'*

The inquiry involved engaging with a range of people including academics, legal professional bodies, parents, students, staff members, unions, peak educational bodies, religious schools, religious organisations and bodies. The ALRC:

- conducted over 131 consultations, and
- received 428 submissions and 41,000 + survey responses.

The *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (ALRC Report 142) was tabled in Parliament in March 2024.

Key recommendation

The ALRC made 11 recommendations in total, but perhaps the most important recommendation was Recommendation 1 (shown below). This recommendation involved either the repeal or amendment of the *Sex Discrimination Act 1984* (Cth).

Recommendation 1 The Australian Government's policy, as expressed in the Terms of Reference, to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed (a 'religious educational institution'):

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;

is best implemented in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party, by amending the *Sex Discrimination Act 1984* (Cth), so that:

- section 38 is repealed;
- section 37 is amended to specify that s37(1)(d) does not apply to an act or practice in relation to an educational institution; and
- section 23 is amended to specify that s23(3)(b) does not apply to accommodation provided by an educational institution.

All other exceptions in the *Sex Discrimination Act 1984* (Cth) that are relevant to religious educational institutions should continue to apply.

Like all persons, and in accordance with s7B of the *Sex Discrimination Act 1984* (Cth) ('Indirect discrimination: reasonableness test'), religious educational institutions should continue to be able to impose on another person, or propose to impose on another person, a condition, requirement or practice which has or is likely to have a disadvantaging effect, if the condition, requirement or practice is reasonable in the circumstances.

Source: Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Summary Report No 142, December 2023) <alrc.gov.au/wp-content/uploads/2024/03/ALRC-ADL-Summary-Report-142.pdf> 14.

Response to the report

Practical Application

Source 1

WHAT IS HAPPENING WITH RELIGIOUS DISCRIMINATION LAWS IN AUSTRALIA?

Will the ALRC's recommendations be implemented? What has the federal government committed to doing on the issue?

The government is not obligated to follow the ALRC's recommendations, but they carry a lot of weight. To date, the government has said it wants to legislate on this matter, alongside legislating on religious freedom more broadly. Even though it probably has the numbers to pass the legislation with the crossbench, it is seeking bipartisan support to avoid the type of divisive and poisonous public debate we have had most recently with the Voice referendum, and a few years ago with the same-sex marriage postal survey.

Source: Professor Lucas Lixinski, 'What is happening with religious discrimination laws in Australia', *UNSW Newsroom*, (Online, 26 March 2024) <unsw.edu.au/newsroom/news/2024/03/religious-discrimination-laws-australia>.

Source 2

THE THORNY QUESTION OF RELIGIOUS SCHOOLS AND DISCRIMINATION LAWS

A new report by the Australian Law Reform Commission has recommended religious schools should no longer be exempt from discrimination laws...

The Australian Human Rights Commission has also welcomed the report, saying the recommendations would protect students and teachers from discrimination on the basis of their sexuality, gender identity, marital or relationship status, or pregnancy.

But faith leaders have hit back, arguing in an open letter that the recommendations would extinguish the distinct and authentic character of religious schools.

Mark Spencer is Director of Public Policy at Christian Schools Australia. He's told SBS News that he thinks the recommendations are outrageous.

'They are a direct attack on faith in Australia. They would gut Christian schools; they would gut other faith-based schools. They would effectively try to tell us what beliefs we can and can't have and which staff we can employ.'

The Law Reform Commission's report also recognises the right to religious freedom. It recommends religious education institutes should still be able to give preference to employing people of the same religion, as long as it is proportionate and necessary to maintaining the faith community - and doesn't breach existing discrimination laws.

The Prime Minister Anthony Albanese has revealed his government has drafted two bills in response to the report, which Attorney-General Mark Dreyfus received in December. Mr Dreyfus has said the drafted legislation aims to strengthen protections against discrimination across all groups. He says no student or staff should experience discrimination against them because of who they are - but neither should people of faith because of their religion.

It's a delicate balancing act.

President of the Islamic Council of Victoria Adel Salman tells SBS News it's possible - as long as there is good faith on all sides.

'We understand that there are competing rights, and the job of the government is to actually ensure we have a fair balancing of those competing rights, while still upholding that fundamental right to religious freedom which Australia signed on to, many years ago.'

Anthony Albanese is determined to avoid the divisive debates that have marred previous attempts at legislating the issue.

'Australians don't want to see the culture wars and the division out there. I want this to be an opportunity for unity going forward. And that's why we've provided the legislation to the opposition, previously - the opposition were briefed on this, and we've said as well we're happy to engage across the parliament on all of these issues.'

The Prime Minister acknowledges that a political compromise on this issue requires bipartisan support.

But Deputy Opposition Leader Sussan Ley says she is deeply disappointed by Mr Albanese's response.

'His approach is completely lacking in transparency. In terms of the legislation itself, I haven't seen it. Members of the opposition may have but under strict embargoes not to share it, so I haven't seen it. I'm not going to comment on it. That legislation needs to progress through the parliament in the same way that all legislation does, including the scrutiny, if necessary, of a senate committee.'

The message from the crossbench, typified by Senator David Pocock, is also that the government should provide more information.

Practical Application

'One of the issues here in Australia is we don't have an over-arching human rights act or framework and so I think these conversations are - yes, they're fraught, but they're so important that we get them right. So, I would ask the government, put forward your proposal and then let's debate it on its merits and then let's deal with this legislation and see what the Senate crossbench thinks.'

Source: Ruth McHugh-Dillon and Tom Stayner, 'The thorny question of religious schools and discrimination laws', *SBS News, News in Depth*, (Podcast, 22 March 2024) <sbs.com.au/news/podcast-episode/the-thorny-question-of-religious-schools-and-discrimination-laws/eyaxbhzgl>.

1. Explain the key recommendation made by the ALRC. [C]
2. According to Source 1 and Source 2, is a government required to implement a recommendation made by the ALRC? What does this demonstrate about the limitations and benefits of involving a law reform commission in the law reform process. [C] [A]
3. Analyse the viewpoint of Mark Spencer (Director of Public Policy at Christian Schools Australia), Adel Salman (President of the Islamic Council of Victoria) or the Australian Human Rights Commission and its consequences. [A]
4. Identify the government's response to the ALRC report. [C]
5. Both Source 1 and Source 2 refer to the need for bipartisan support. What does this mean? [C]
6. Re-read the Senator David Pocock quote. Imagine you are a member of the crossbench. Would you support the implementation of Recommendation 1 in full. Justify your position with legal criteria. [E]

Research Task

AUSTRALIA'S RELIGIOUS AND SEX DISCRIMINATION LAWS NEED FIXING, A NEW REPORT SAYS. WHAT HAPPENS NEXT?

The attorney general, Mark Dreyfus, and Anthony Albanese have made clear that the ALRC report is 'not a report from the government'. That is, it is not government policy.

Labor is proposing two bills to:

- Amend the Sex Discrimination Act, including to repeal section 38.
- Create a Religious Discrimination Act, including the right of schools to preference staff based on religious beliefs and practices and anti-vilification provisions.

Source: Paul Karp, 'Australia's religious and sex discrimination laws need fixing, a new report says. What happens next?', *The Guardian*, (Online, 23 March 2024) <theguardian.com/australia-news/2024/mar/23/australias-religious-and-sex-discrimination-laws-need-fixing-a-new-report-says-what-happens-next>.

According to the news report above, the government will create two Bills in response to the ALRC report. Locate information from either a secondary or primary source to establish whether this was done. [C] [S]

Thinking further about law reform commissions

Law reform commissions play an important role in the law reform process as they can propose changes and suggest improvements to the law and legal processes.

When reflecting on the *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* report (as well as law reform commissions generally), employing a law reform commission as a mechanism to bring about legal change has many benefits and limitations:

Benefits	Limitations
• The law reform commission is independent of the government. • An inquiry is overseen by legal experts. • The process used by a law reform commission comprehensively reviews a specific area of law considering past, current and emerging issues. • An inquiry examines in detail how the law operates in practice. • The inquiry process involves consultation with the public, stakeholders and interest groups.	• The inquiry process can be slow and time consuming. • An inquiry can only be initiated by the government. • There is no guarantee that the recommendations will be adopted or effectively implemented. • Effective inquiries require significant resources, time, expertise and funding.

9.3 Parliamentary inquiries

The work of inquiries facilitates an in-depth investigation of issues to assist with better legislative decisions, direct public input into parliamentary and policy processes, public debate and awareness of issues.

Parliament of Victoria, Parliamentary inquiries, 2024.

In an earlier chapter you learnt that one key stage of the legislative process involves a committee investigating a proposed law. But a committee can also inquire into a topic not contained within a bill. Topics can be very diverse, with recent examples including:



Recent parliament inquiries		
The Senate Standing Committee on Rural and Regional Affairs and Transport conducted an <i>Inquiry into Australia's preparedness to host Commonwealth, Olympic and Paralympic Games</i>. 	In New South Wales the Legislative Assembly Committee on Community Services conducted an inquiry into <i>Improving access to early childhood health and development checks</i>. 	In West Australia the Standing Committee on Public Administration conducted an <i>Inquiry into regional telecommunications in Western Australia</i>. 
In the ACT the Standing Committee on Education and Community Inclusion conducted an <i>Inquiry into Loneliness and Social Isolation in the ACT</i>. 	The Senate Standing Committee on Community Affairs conducted an <i>Inquiry into the issues related to menopause and perimenopause</i>. 	In Victoria the Legislative Council Environment and Planning Committee conducted an <i>Inquiry into Climate Resilience</i>. 

Much like other inquiries we have examined earlier, a parliamentary committee will follow an inquiry process when asked to investigate a particular issue or topic.

The typical inquiry process used by a parliamentary committee		
1		An inquiry will be announced.
2		The committee gathers evidence. This can include: • written or spoken submissions made by the public or experts, • online surveys, • public hearings or briefings, • roundtables with key stakeholders, and • interviews with experts.
3		The committee will synthesise the evidence, write a report and make recommendations.
4		The report is presented to the Parliament.

To understand more about how a parliamentary committee contributes to law reform, we will examine the key events and outcomes of the *Inquiry into serious vilification and hate crimes* (Legal Affairs and Safety Committee, Queensland Parliament).

Inquiry Focus

How does a parliamentary committee contribute to law reform?

About this inquiry

The *Inquiry into serious vilification and hate crimes* occurred in 2021. The inquiry, which was overseen by the Legal Affairs and Safety Committee (Queensland Parliament), was asked to inquire into and report on whether:

- there was evidence of increasing instances of hate crimes and serious vilification,
- the current law was responding to hate crimes effectively.

Prior to this, various community and religious leaders had raised concerns about whether the law was effectively denouncing, deterring and penalising behaviour targeting specific racial and ethnic groups against a backdrop of increasing tension as the world dealt with a pandemic. **This inquiry provides an example of a significant event acting as an impetus for legal change and reform.**

Practical Application

Source 1

QUEENSLAND GROUPS SAY RACIAL HATE CRIMES NOT TAKEN SERIOUSLY AND STRONGER LAWS ARE NEEDED

A wave of racist incidents linked to the coronavirus pandemic has prompted community and religious leaders from across the spectrum to call on Queensland politicians to do more to stamp out hate crime and vilification.

Queensland's Human Rights Commissioner Scott McDougall said the diverse coalition of about 20 organisations was 'very unusual' and showed how critical the issue was across the community.

'We've heard of lots of incidents happening over the years [but] since COVID, there has been more fear in the community, and we've seen the Asian community targeted initially and more recently the African community,' he said.

Mr McDougall said the group was pushing for stronger legal protections after compiling a dossier of hate-related incidents dating back to 2013 it said demonstrated the state's anti-discrimination laws were not 'doing their job'.

'In the last 20 years, we've had very few prosecutions,' he said.

Source: Kate McKenna, 'Queensland groups say racial hate crimes not taken seriously and stronger laws are needed', *ABC News*, (Online, 14 September 2020) <abc.net.au/news/2020-09-14/racist-hate-crimes-amid-pandemic-prompt-calls-for-stronger-laws/12660174>.



Practical Application ...

Source 2

HATE CRIME LAW REVIEW A LANDMARK MOMENT FOR QUEENSLAND COMMUNITIES

The Cohesive Communities Coalition, representing over 20 of Queensland's diverse ethnic and religious communities, has welcomed the Palaszczuk's Government's referral of the state's vilification and hate crime laws to a parliamentary committee for review.

The Queensland Parliament will consider the Coalition's Options Paper, 'Serious vilification and hate crime: The need for legislative reform', which recommends clearer laws and penalties for hate crimes, options for victim protection, as well as measures to improve the way hate crimes are policed like a new community scrutiny panel.

Source: Cohesive Communities Coalition, 'Hate crime law review a landmark moment for Queensland communities', *Queensland Human Rights Commission*, (Media Release, 21 April 2021), <qhrc.qld.gov.au/__data/assets/pdf_file/0011/32213/2021.04.21-Media-statement-Hate-crime-law-review-a-landmark-moment-for-Queensland-communities.pdf>.

1. What is the Cohesive Community Coalition? [C]
2. Identify the significant event that the Cohesive Community Coalition believe is behind an increase in hate crime and vilification. [C]
3. Identify one of the laws that may be relevant to this situation. [C]
4. Explain the evidence community and religious groups are highlighting as evidence the law is not achieving its purpose. [C]
5. List the different recommendations made by the Cohesive Community Coalition. [C]

The inquiry process

As you read in the Media Release above (Source 2), the Cohesive Community Coalition, played a pivotal role in advocating for the review of the state's vilification and hate crime laws by the Palaszczuk Government. Their efforts led to the government referring these laws to a parliamentary committee.

The Legal Affairs and Safety Committee conducted a comprehensive inquiry, seeking evidence and information from a wide range of sources. The Committee:

- actively sourced written, video or audio submissions,
- received written briefing documents from key organisations (such as the Queensland Human Rights Commission and the Department of Children and Youth Justice and Multicultural Affairs),
- held four public hearings in Brisbane, involving members of parliament hearing first-hand from 44 organisations and 85 witnesses. These hearings were conducted in a structured manner, with each organisation and/or witness given a specific time to present their views and evidence.

One pressing issue that the Committee investigated was the display and sale of hate symbols, such as the Nazi symbol. The Committee report noted:

- The Queensland Jewish Board of Deputies Incorporated (QJBD) emphasised that the public display and sale of hate symbols profoundly impacts the safety and security of all Queenslanders.
- The Executive Council of Australian Jewry's *Antisemitism in Australia Report*, which noted an increase in the display of Nazi symbols.
- That a Nazi flag was flown over a synagogue in Brisbane while the inquiry was being held.

The QJBD called for a legislative ban on the public display of hate symbols, with the Queensland Human Rights Commission, Professor Katharine Gelber, and Aboriginal and Torres Strait Islander Legal Service submitting that any law must be worded in a way to ensure it achieves its objectives and avoids unintended consequences.

The Queensland Law Society, a key stakeholder, did not support the offence of displaying offensive materials, stating, '...a standalone criminal offence rarely solves complex social problems.'

Reflection

What can you learn from the parliamentary inquiry process that can help you investigate a legal issue in your next report or essay. [C]

Making a recommendation

The 16th recommendation of the Committee was:

...that the Queensland Government establish a criminal offence that prohibits the display of hate symbols, including those relating to Nazi and ISIS ideology, with considered exceptions to the prohibition.

Legal Affairs and Safety Committee, 'Inquiry into serious vilification and hate crimes', Queensland Parliament (2022), x.

Practical Application

QUEENSLAND TO CRIMINALISE PUBLIC DISPLAY OF SWASTIKAS AND HATE SYMBOLS

Queensland has joined Victoria in becoming the second state to criminalise public displays of hate symbols like swastikas.

New laws, stemming from a parliamentary inquiry into hate crimes in Queensland, seek to combat the targeting of diverse groups and better protect victims by banning references to Nazism in public.

The change was announced by the Palaszczuk government this morning, with new laws and recommendations to take effect later this year.

Source: Marina Trajkovich, 'Queensland to criminalise public display of swastikas and hate symbols', *9 News* (Online, 26 May 2022) <[9news.com.au/national/queensland-criminalise-bans-public-display-swastikas-hate-symbols/52831d9f-e295-473b-9aa6-1f1bec42356b](https://www.9news.com.au/national/queensland-criminalise-bans-public-display-swastikas-hate-symbols/52831d9f-e295-473b-9aa6-1f1bec42356b)>.



Practical Application ...

1. Identify the first state to ban the public display of hate symbols. [C]
2. Explain the role the Legal Affairs and Safety Committee played in the law reform process. [C]

STRONGER HATE CRIME LAWS ARE NOW IN EFFECT

From 29 April 2024, vilification protections under Queensland law became stronger. The changes mean that:

- Displaying certain hate symbols that cause a member of the public to feel menaced, harassed or offended is a crime.
- When crimes are motivated by hatred or serious contempt because of the victim's race, religion, sexuality, sex characteristics or gender identity, the penalty imposed by the court may be tougher than usual.

What hate symbols will be illegal?

From 29 April 2024, the display of the hate symbol commonly referred to as the Nazi Hakenkreuz (the 'hooked cross') was expressly made illegal. The Hakenkreuz is the most widely recognised sign of the Nazi Party and the atrocities it committed prior to and during World War 2.

A hate symbol can only be made illegal by regulation if the image represents the ideology of extreme prejudice against people based on their race, religion, sexuality, sex characteristics or gender identity. The government must also consult with the Queensland Human Rights Commissioner before a hate symbol can be banned under the law.

Source: Queensland Human Rights Commission, 'Stronger hate crime laws are now in effect', *News*, (Web page, n.d.) <qhrc.qld.gov.au/about-us/news/stronger-hate-crime-laws>.

1. Identify the date these laws came into effect. [C]
2. State the specific hate symbol that was made illegal. [C]
3. Explain the circumstances when a hate symbol can become illegal by regulation. [C]

What do you think?

Do you think this law will effectively address the rise in hate crimes and serious vilification highlighted by the Cohesive Communities Coalition? Why or why not? When formulating your response also consider whether this parliamentary inquiry was effective. [E]

But not all parliamentary committee inquiries result in statute law being created, amended or repealed. A committee can also suggest other responses to an issue facing Australians.

Research Task

On 1 December 2022, the Senate referred an inquiry into *Concussions and repeated head trauma in contact sports* to the Senate Community Affairs References Committee.



Research Task ...

Locate and select information about this inquiry that responds to the following questions:

1. Identify the locations a public hearing was held for this inquiry [C]
2. State a player association, medical expert, professional sporting code and government department who made a submission or was a witness during the inquiry process. [C]
3. Identify the date the Committee's report was published. [C]
4. How many recommendations did the Committee make? Identify which ones (if any) involve creating, amending or repealing legislation. [C]

TIP: A good place to start your research is the Parliament of Australia website (aph.gov.au).

Review

Comprehend

1. **Describe** the following key terms in your own words:
 - a. Consultation
 - b. Royal commission
 - c. Submission
 - d. Terms of reference [C]
2. **Explain** the role and purpose of a royal commission. [C]
3. **Explain** the role the Legal Affairs and Community Safety Committee had on the creation of a new section of the *Criminal Code 1899* (Qld) s52D, Display, distribution or publication of prohibited symbols. [C]
4. **Explain** the key features of a law reform commission. [C]
5. **Describe** the process the Australian Law Reform Commission uses when conducting an inquiry. [C]

Analyse

The *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, headed by the Hon Justice Hayne, was established on 14 December 2017. As the name suggests, it was tasked with inquiring into the behaviour of several financial industries, including mortgage brokers as detailed in the article below.

GOVERNMENT FLIPS ON ROYAL RECOMMENDATION ON MORTGAGE BROKERS

The Morrison government, under heavy fire from politically influential mortgage brokers, has backed down on a key recommendation from the Hayne royal commission, and will no longer ban trailing commissions from 2020.

The flip was revealed by the treasurer, Josh Frydenberg, after a cabinet meeting on Tuesday. He told reporters the government had resolved not to prohibit trail commissions on new loans, but rather review their operation in three years.

Frydenberg said the government changed its position because 'we are concerned about the impact on competition in the mortgage-lending market'. He said brokers played a 'critical role' in the home lending market and declared the government 'stands side by side with mortgage brokers'.

On the day the findings were handed down, the government said it would prohibit the payment of trail commissions for new loans from July 2020 – which prompted an immediate warning from the sector that the changes would cripple their business model and decrease competition in the home loan market, hurting consumers.

Labor, in its response to the Hayne report, initially indicated it would implement all the recommendations, then under pressure from the industry, also backflipped, proposing a fixed-rate commission for mortgage brokers rather than accept the banking royal commission recommendation to apply user-pay fees to the service.

Brokers are well organised and politically influential and have been lobbying intensively since the royal commission findings were handed down.

Source: Katharine Murphy, 'Government flips on royal recommendation on mortgage brokers', *The Guardian* (Online, 12 March 2019) <[theguardian.com/australia-news/2019/mar/12/government-flips-on-royal-commission-recommendation-on-mortgage-brokers](https://www.theguardian.com/australia-news/2019/mar/12/government-flips-on-royal-commission-recommendation-on-mortgage-brokers)>.

1. **Analyse** the Government and Opposition's view on the use of fixed-rate commissions paid by lenders, and its consequences. What does this highlight about the benefits or shortcomings of the royal commission process? [A]

OVERWHELMING' NEED FOR ROYAL COMMISSION INTO COVID PANDEMIC RESPONSE IN AUSTRALIA, SENATE COMMITTEE FINDS

The Senate committee that has been examining Australia's handling of the Covid-19 pandemic has recommended the establishment of a royal commission, arguing the case for a full-blown inquiry with investigative powers is 'overwhelming'.

In a report tabled out of parliamentary session on Friday, the Senate's legal and constitutional affairs committee said a royal commission should be created to examine the key elements of the pandemic's emergency phase.

It said a commission should examine the adequacy of planning on the health, social, economic and human rights implications of the pandemic, the consistency between planning and actual response and the level of coordination between governments. It also recommended that the federal government encourage the states and territories to pass complementary legislation to allow them to also participate in a national royal commission.

'The committee considers that there is an overwhelming case for the establishment of a Covid-19 royal commission,' the report said. 'The people of Australia deserve an opportunity to learn from the experiences of the Covid-19 pandemic and the response to it.'

Source: Karen Middleton, "'Overwhelming' need for royal commission into Covid pandemic response in Australia, Senate committee finds', *The Guardian*, (Online, 22 April 2024) <[theguardian.com/australia-news/2024/apr/22/overwhelming-need-for-royal-commission-into-covid-pandemic-response-in-australia-senate-committee-finds](https://www.theguardian.com/australia-news/2024/apr/22/overwhelming-need-for-royal-commission-into-covid-pandemic-response-in-australia-senate-committee-finds)>.

1. **Analyse** the viewpoint of the Legal and Constitutional Affairs Committee on whether a royal commission into COVID-19 is required, and its consequences. Do you agree or disagree with the Committee's position. Why? [A]

Evaluate

1. In the chapter entitled, 'Australian Royal Commissions and Public Inquiries: Their Use and Abuse and Proposals for Reform,' author Scott Prasser (p 248) stated: *Nevertheless, public inquiries of the inquisitorial royal commission type still remain the 'institution of law resort' for governments when all other bodies are deemed unsuitable for handling issues of high political salience and sensitivity.* Why do you think royal commissions are viewed by the author as an option of last resort? Decide whether you believe this is a fair and just assessment, **justifying** your opinion with legal criteria. [E]
2. In a speech to the Alberta Law Reform Institution in 2008, the Hon Michael Kirby AC CMG stated, '*permanent law reform bodies keep the flame of ideas alight.*' Do you agree or disagree that having a permanent law reform body, such as a law reform commission, supports the law reform process in the long term. **Justify** your decision. [E]

Law reform within a dynamic society

Chapter 10: Coronial inquests and investigations

10.1 About the Coroners Court of Queensland

10.2 Coronial investigations

10.3 Coronial inquests

10.4 Specialist taskforces

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
 - that laws and related processes require change because of a range of impetuses
 - the role of specialist taskforces.

10.1 About the Coroners Court of Queensland

In Queensland coronial inquests and investigations are conducted by coroners who are magistrates in Queensland. The most senior coroner in Queensland is the State Coroner who is appointed by the government. A Deputy State Coroner is appointed as well.

It is the coroner's duty to investigate some deaths in Queensland. Coroners do not investigate all deaths. A coroner has a duty to investigate 'reportable deaths'. Reportable deaths are defined in the *Coroners Act 2003* (Qld) s7, and are those where:

- a. It is not known who the person is; or
- b. The death was a violent or otherwise unnatural death; or
- c. The death happened in suspicious circumstances; or
- d. The death was a healthcare related death; or
- e. A cause of death certificate has not been issued and is not likely to be issued, for the person; or
- f. The death was a death in care; or
- g. The death was a death in custody; or
- h. The death happened in the course of or as a result of, police operations (e.g. a police motor vehicle pursuit for the purpose of apprehending a person).

Once the coroner has been notified of a reportable death, the coroner conducts an investigation into the circumstances of the death to establish:

- the identity of the person who has died;
- how the person died;
- when the person died;
- where the person died; and
- what caused the person to die.

The coroner coordinates each step of the investigation. Police officers help the coroner gather evidence. An initial report is prepared. After considering the initial report the coroner then may ask the police to investigate further. This may include getting more medical records or other statements from witnesses. In most cases the coroner orders an autopsy to assist in answering the questions he or she needs answered. **The coroner then decides whether an inquest is required. The inquest is a court hearing conducted by the coroner.**

Not all reportable deaths result in an inquest. In fact, very few coronial investigations proceed to an inquest. However, an inquest must be held if any of the following occur (*Coroners Act* (Qld) s27):

- the death occurred in custody;
- the death occurred while a person was in care and there are issues about the care;

- the death occurred as a result of police operations (unless the coroner considers an inquest is not needed); or
- the Attorney-General of Queensland, the State Coroner or the District Court of Queensland directs that an inquest be held.

10.2 Coronial investigations

Many investigations made by the coroner are not inquests. Below are some recent investigations by coroners that did not result in inquests, but in which coroners have made findings after an investigation.



Practical Application

In respect of each of the following case studies answer the following:

1. Explain why each of the following case studies can be regarded as a reportable death. [A]
2. Look back at the reasons why a coroner might hold an inquest. Why do you think the coroner in each of these cases decided no inquest should be conducted? [A]



Case Study 1

Non-inquest findings into the deaths of Pilot 1 and Pilot 2

Coroners Court of Queensland, Southport (22 August 2024)

Facts: Two pilots died in a light plane crash on 5 April 2020. The Queensland Police Service reported the deaths of the pilots to the coroner because those deaths appeared to be violent or unnatural and within the definition of a reportable death.

Findings: During the course of a recreational flight the aircraft struck powerlines and crashed into the ground, causing fatal injuries to the pilots. The cause of the crash was a failure of the plane to produce sufficient thrust to maintain a normal climb.



Case Study 2

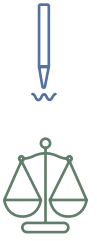
Non-inquest findings into the death of Mahsan Muhammad

Coroners Court of Queensland (20 August 2024)

Facts: Mr Muhammad was a deckhand on a commercial fishing trawler off the coast of Queensland. In 'rough seas' Muhammad climbed out on one of the boom arms of the trawler in an attempt to reconnect a recovery rope to one of the otter boards. He was not wearing a Personal Flotation Device (PFD) and fell off the boom arm into the sea. He grabbed one of the boat's fishing nets being dragged behind. The boat was then struck by a large wave. The vessel rolled sharply, and Muhammad let go of the net while he was under water. Attempts to grab him in the water were unsuccessful. Muhammad floated away and was never seen again.

Findings: Given Muhammad was wearing waterproof waders and gumboots and no PFD it was highly likely he was weighed down by his wet clothing and drowned.

Practical Application ...



Case Study 3

Non-inquest findings into the death of Mr G

Coroners Court of Queensland, Cairns (16 April 2024)

Facts: Mr G was a Japanese man who died on 10 March 2024, after jumping from a waterfall into the waterway at Crystal Cascade Waterhole (Redlynch). After jumping Mr G surfaced and struggled to swim to the bank. He went under the water several times and did not resurface. He was found dead on the next day by emergency services. Mr G had accessed the waterfall by swimming across the waterway and walking to the top of the waterfall. There were warning signs saying swimming was prohibited beyond a certain sign, which he passed. There was international signage (symbols recognised internationally) stating 'no swimming' and 'no diving'. An autopsy was required. The pathologist found the cause of death was drowning.

Findings: Mr G drowned after jumping into the waterway where swimming was prohibited. He accessed that area despite the warning signs and drowned.

10.3 Coronial inquests

One of the considerations of the coroner in deciding whether to hold an inquest is the public interest. There might be some serious doubt about the cause and circumstances of death or more commonly a coroner may believe an inquest is needed so that future deaths of the type that have occurred may be avoided by the conduct and recommendations arising from an inquest.

If the coroner decides not to conduct an inquest into a death, a person may apply to the coroner investigating a person's death to hold an inquest into the death (*Coroners Act 2003* (Qld) s30).

An inquest is not a typical court case. Its purpose is not to determine guilt or civil liability. It is therefore conducted in a different manner to the usual court cases in Queensland.

The coroner identifies the issues to be investigated and the means of investigation, which is usually a police investigation. A coroner determines who will be given leave to appear at the inquest and what witnesses will give evidence. It is his/her role, to instruct police in what inquiries should be made, to require witnesses to answer questions, and to obtain reports from experts. A coroner may order that a post-mortem be performed (autopsy). The inquest is not bound by the rules of evidence. Interested parties are commonly represented by lawyers at the inquest.

After the inquest is completed the coroner brings down findings. As a matter of law, the coroner must not include in his/her findings any statement that a person is or may be guilty of an offence or liable for some action (s45(5)). **In short, the purpose of an inquest is to establish the facts, not to cast blame or to determine criminal or civil liability.** Apart from making the usual findings about how, when and where the person died, and what caused the person to die, the coroner is entitled to make further comments under s46. The coroner can comment on anything connected with the death investigated at an inquest, that relates to:

- a. public health or safety; or
- b. the administration of justice; or
- c. ways to prevent deaths from happening in similar circumstances in the future.

A coroner quite often makes recommendations about these matters after the inquest. See the following case study.



Case Study

Citation: Inquest into the disappearance and death of Matthew Stephen Barclay

Title of Court: Coroners Court of Queensland

Jurisdiction: Brisbane

Delivered on: 15 January 2016

Facts: Matthew Barclay was a 14 year old boy who was competing in the second round of the Under 15 board race at the Australian Surf Lifesaving Championships at Kurrawa Beach. While he was attempting to negotiate the waves on the outer bank, his board flew into the air, became submerged and within seconds was lost in the surf break. Matthew was observed to be in difficulty by fellow competitors and several rescue watercraft operators. His body was not located until after 9.00am the following morning, approximately 2.5 kilometres from his last observed position. At the time of his death Matthew was in Year 10 and was regarded as one of the best open water swimmers in Queensland for his age group, and was one of the best competitors in the competition from the Maroochydore Surf Club. A report was obtained from the Office of Fair and Safe Work Queensland (OFSWQ) which identified that the *Work Health and Safety Act 2011* (Qld) (WHS Act) imposes duties on organisations such as Surf Lifesaving Australia (SLSA) to ensure the health and safety of its contestants. The SLSA is required to eliminate risks to health and safety as far as reasonably practicable, and where it is not practicable, is required to minimise those risks by implementing risk control measures. It had implemented risk control measures. There were a series of assessments of risk throughout the day. There were at least four risk assessments of the state of the surf during the day. The evidence of witnesses was taken by the police. There were differing opinions from witnesses as to the safety of the surf, at the time of the event.

Legal Issue: Were the policies of the SLSA relating to postponement or abandonment of competition for the safety of competitors adequate?

Decision: The SLSA was aware of its obligations under the WHS Act and that the policies and plans adopted by SLSA were sufficiently detailed. The coroner also found that the policies relating to the postponement or abandonment of competition were applied appropriately. The coroner went on then to make recommendations, which included:

- a. That SLSA mandate the use of helmets and level 25 life jackets for all surf craft events involving competitors 17 years and under.
 - b. That SLSA mandate that surf events are not to start unless there is a viable means of rescuing an unconscious person from the water (that is, a crewed rescue boat or crewed jetski on the water in the competition area).
 - c. That in the event of a future death at a surf lifesaving event an investigation be carried out by the regulator under the *Work Health and Safety Act 2011* (Qld), in consultation with the Queensland Police Service.
-



Case Study ...

1. State the reasons why the inquest was held. [C]
2. Describe the duty imposed upon the SLSA which ensures the health and safety of its contestants. [C]
3. What is the effect of accepting a recommendation that where such a death occurs that the police refer the matter to Workplace, Health and Safety Queensland (WHSQ) . Do you think that a recommendation for a death to be investigated by WHSQ with the QPS is appropriate in the circumstances? Justify using legal criteria. [E]

The last recommendation referred to above was adopted and implemented by the Queensland Government. The Queensland Government responds to recommendations directed to its agencies at inquests by advising the community that a recommendation is to be adopted or the reason why such a recommendation is not adopted. The last recommendation referred to was implemented by the Queensland Government by having the Queensland Police Service make a change to its *Operational Procedures Manual*. (This is a manual that police refer to that gives them direction as to what they should do in certain circumstances). The change made was the insertion of a separate heading called 'Drowning death at a surf lifesaving event' in Chapter 8 of the *Manual*. This change provided that police officers responding to a drowning death or missing competitor who is suspected to have drowned at an official surf lifesaving event are to notify the Office of Industrial Relations through the Duty Officer at the Police Communication Centre Brisbane. Thereafter, the investigation of such a death is to be conducted in conjunction with inspectors from Workplace Health and Safety Queensland.

The important role of the coroner in an inquest is to make recommendations with respect to what should occur in the future. These recommendations deal essentially with the health and safety of people and what legal reforms need to be made to ensure the future health and safety of individuals. The *Coroners Act 2003* (Qld) s46 provides that a coroner may comment on:

- a. Public health and safety.
- b. The administration of justice.
- c. Ways to prevent deaths from happening in similar circumstances in the future.

We now turn to a recent inquest which illustrates this.

Case Study



Citation: Inquest into the Death of Johann Ofner

Title of Court: Coroners Court of Queensland

Jurisdiction: Brisbane

Delivered on: 25 January 2022

Facts: In December 2016 the Australian pop music group, 'Bliss N Eso' engaged a creative agency to produce a music video for their new song 'Friend Like You'. The film director of the music video required stunt men for the filming of the music video. Mr Johann Ofner (the deceased) and three Japanese-based stunt men were engaged as stunt performers. Mr



Case Study ...

Ofner was a professional actor and a highly skilled and athletic stunt performer. In the months before his death, he entered a television contest, 'Australia Ninja Warrior', and made it to the Grand Final.

The concept of the video 'Friend Like You' was based on a \$50 note passing through the hands of different people over a long period of time; a small child, a poker game, and an old man. The bar scene involved an underground poker game being played around a large round table where an argument was to erupt between the four stunt actors. During the argument one of the Japanese stunt actors was to point a gun at Mr Ofner who returns fire from a weapon from under the table. It was planned that Mr Ofner was to 'pistol whip' him. The other stunt actor was to remove a 12 gauge sawn-off shotgun from his waist band and fire from his hip at Mr Ofner in the chest at close range. Mr Ofner was to wear a 'jerk vest' attached to a 'jerk rope' which, by pulling him back quickly simulated impact from the shotgun blast catapulting him backwards.

An experienced and licensed theatrical armoured, Mr Richie, was engaged to provide the firearms for the scene. He brought several firearms to the set. One weapon that he supplied was a 12 gauge hand shortened shotgun. This was an operable firearm, which was not permitted for theatrical productions. He also had illegally obtained 'homemade shotgun shells' purportedly for theatrical productions from Mr C. These did not contain metal 'projectile shot', but did contain ignition powder, cloth wadding and a plastic casing which was effectively a projectile.

The loading and unloading of the firearms was conducted by Mr Richie. The scene proceeded as planned and the jerk rope attached to Mr Ofner was pulled backwards just as the double barrel shotgun discharged. The effect was as if he had been hit by a shotgun blast. However, Mr Ofner did not get up. Despite resuscitation efforts Mr Ofner was declared dead.

Findings: The coroner found that:

- Mr Ofner died of a heart attack because he was struck in the chest by projectiles from the shotgun blast.
- The sawn-off shotgun provided by Mr Richie was capable of firing live rounds and pursuant to s39(1)(a) of the *Weapons Act Regulations 2016* (Qld) all weapons supplied under a theatrical ordinances supplies licence were to be blank and permanently inoperable. The shotgun was an operable firearm because it was capable of discharging a projectile out through the barrel.





Case Study ...

- Mr C did not know that the shotgun shells were to be discharged in an enclosed space or in a shotgun that was to be aimed at a person.
 - At the time of the music video production Mr Richie was suffering from a terminal illness and later died of natural causes before the inquest. The coroner found that had Mr Richie survived, he would have faced the prospect of a manslaughter charge, unlawful possession of a handgun charge, and a breach of workplace health and safety regulations.
 - The coroner made recommendations with respect to ensuring the safety of persons in similar circumstances. These recommendations were that:
 - The Queensland Government review the provisions of the *Weapons Act 1990* (Qld) and *Weapons Act Regulations 2016* (Qld) as it relates to:
 - a. The definition of blank-fire ammunitions and their practical use in theatrical productions.
 - b. The establishment of a section of the Queensland Police Service to specifically review the role of theatrical armourers and introduce standards for the qualification necessary to obtain a theatrical ordinance supplier licence.
 - c. Making it absolutely clear that operable firearms and non-blank firing weapons cannot be used in theatrical performances.
1. Why could it be said that the death of Mr Ofner arose from an illegal activity? [A]
 2. What recommendations did the coroner make with respect to the future public health and safety of Queenslanders? [C]

In the above case the responsible agency was the Queensland Police Service (QPS). On 7 May 2023 the QPS responded that it had reviewed the relevant provisions of the *Weapons Act 1990* (Qld) and *Weapons Act Regulation 2016* (Qld) and was satisfied that the existing provisions met the intent of the recommendations because:

- a. Firearms that are capable of discharging a projectile are not blank-firing firearms and cannot be used in the theatrical productions under the current law.
- b. The *Weapons Act 1990* (Qld) allows for the issue of a blank-fire firearms licence which enables individuals or organisations to possess and use blank-fire firearms. Any firearms capable of discharging a projectile are not blank-fire firearms.
- c. The QPS weapons licensing process assesses each armourer's application for a licence on a case by case basis. They are required to have a combination of practical experience and knowledge. They are also required to complete a safety training course approved by the Commissioner of Police and to keep a register which can be used as an indicator of experience.

What do you think?

Was the review of the current law by the QPS adequate? Could the coroner have made other recommendations to ensure the safety of the actors? Justify your answer with legal reasons. [E]



10.4 Specialist taskforces

Specialist taskforces are another way we identify different ways a legal issue can be resolved. Specialist taskforces are established by the government. They are principally designed to investigate failures or inadequacies in our legal system and then to identify ways in which those problems can be solved. There have been many specialist taskforces established, including:

- Queensland Anti-Cyberbullying Taskforce (2018) — with the parliament indicating in 2020 that the implementation of all 29 taskforce recommendations was complete.
- Specialist Joint Taskforce investigating subcontractor non-payment in Queensland (2019)

The Women's Safety and Justice Taskforce, established in 2021 and chaired by the Honourable Margaret McMurdo produced two reports *Hear Her Voice*. The first report, which focused on the domestic and family violence, made 89 recommendations. One of these recommendations was that a new criminal offence should be created to criminalise coercive control, which was passed into law.

This offence is expected to come into force in 2025 and will carry a maximum jail sentence of 14 years. Coercive control occurs when an adult engages in a course of conduct of abusive behaviour that is intended to coerce or control the other person. What is unusual about this change in the law is that it means to prevent another form of non-physical (as opposed to physical) domestic and family violence perpetrated on citizens. It requires the proving of a pattern of abusive behaviour conducted by a person which is designed to intimidate or control their partners.

The second report focusses on women and girl's experiences in the criminal justice system, as victims/survivors of sexual violence and as accused persons and offenders. There were 188 recommendations made by the taskforce to improve the experiences of women and girls in the criminal justice system.

Review

Comprehend

1. **Explain** the purpose of the inquest. [C]
2. **Describe** why specialist taskforces are established. [C]

Analyse and evaluate

1. Using one of the examples covered in this chapter **analyse** and **evaluate** whether a coronial inquest or a taskforce is an effective means of achieving law reform. [A] [E]

Law reform within a dynamic society

Chapter 11: Current and emerging legal issues

11.1 Where next for law reform?

11.2 Current and emerging legal issues

Learning objectives

At the conclusion of this chapter, students will be able to:

- describe why laws and related processes require change because of a range of impetuses,
- select legal information, analyse legal issues then evaluate the legal situation to make recommendations.

11.1 Where next for law reform?

You now know that changing values, needs, morality, ethics, technological advancements, and significant events have driven legal change and reform.

So, what legal issues will arise in the next five to ten years? In 2019, the Australian Law Reform Commission (ALRC) released a report on the *Future of Law Reform* project. This report identified several key areas of law that could potentially undergo significant reform in the future, including:

- the *Australian Constitution*, specifically whether Australia should become a republic, eligibility for parliament (s44), fixed parliamentary terms, as well as recognition of First Nations people(s);
- whether state and territory surrogacy laws (and adoption laws) would benefit from being consistent and reviewing their compliance with Australia's international obligations;
- the regulation of 'buy now, pay later' services and services targeting people at risk of financial hardship;
- the introduction of anti-corruption measures, such as capping political advertising, strengthening disclosure regimes for political donations and making lobbying more transparent;
- how the law might be reformed to provide appropriate and effective protection for journalists and whistleblowers;
- how best to ensure automated decision making is fair, transparent, accountable and reviewable; and
- defamation in the digital age.



What do you think?

If you could nominate an area or an issue for the ALRC to examine, what would it be? Using legal criteria, justify why you think this area or issue requires reform? [E]

Some of these areas are currently in progress, stalled or failed to be passed into law, whilst others have not been dealt with by lawmakers just yet. For example, an attempt to recognise First Nations people(s) in the *Constitution* was unsuccessful, when both the majority of Australians and majority of States did not vote in favour of the change.

In the following section we will explore some areas that may require reform in the future.



11.2 Current and emerging legal issues

The age of criminal responsibility

Keeping an eye on the laws that are being introduced in other States and Territories can be a source of ideas for law reform topics, as it is likely Queensland is facing similar challenges. The age of criminal responsibility is one such topic. In 2023-24:

- The Australian Capital Territory became the first jurisdiction to raise the age of criminal responsibility to 14 years.
- The Northern Territory has recently lowered the age of criminal responsibility to 10 years, which was one of the Country Liberal Parties (CLP) key election promises.
- Victoria had introduced a bill to lift the age of criminal responsibility to 12, with a view to raising it to 14 by 2027.
- The Standing Council of Attorneys-General published the *Age of Criminal Responsibility Working Group Report* that outlined principles that jurisdictions considering reform could apply after an earlier attempt to recommend a nation-wide minimum age of criminal responsibility failed.

The inconsistencies between different jurisdictions has often been a criticism of this area of law. In Queensland, a bill to raise the age of criminal responsibility was presented in 2021.

Practical Application

BILL TO RAISE AGE OF CRIMINAL RESPONSIBILITY TO 14 IN QLD REJECTED BY COMMITTEE

A Queensland parliamentary committee has stymied an effort to raise the age of criminal responsibility to 14, instead recommending a continued national approach to increasing the age to 12.

It recommended that Parliament did not pass Greens Maiwar MP Michael Berkman's private members bill, commenting that 'there is more work to be done' before such a move was made.

This included national efforts among Australian attorneys-general to increase the age young people can be held responsible for criminal actions from 10 to 12, as called for by former Queensland police commissioner Bob Atkinson in his landmark 2018 youth justice system report.

In 2019, the United Nations Committee on the Rights of the Child raised its decade-old benchmark for the minimum age of criminal responsibility from 12 to at least 14.

The Queensland parliamentary committee report noted that most of the people who made submissions to the inquiry, including government bodies such as the Queensland Family and Child Commission, supported the UN's call.

Source: Matt Dennien, 'Bill to raise age of criminal responsibility to 14 in Qld rejected by committee', *Brisbane Times* (Online, 15 March 2022) <[brisbanetimes.com.au/national/queensland/bill-to-raise-age-of-criminal-responsibility-to-14-in-qld-rejected-by-committee-20220315-p5a4we.html](https://www.brisbanetimes.com.au/national/queensland/bill-to-raise-age-of-criminal-responsibility-to-14-in-qld-rejected-by-committee-20220315-p5a4we.html)>.





Practical Application ...

1. Identify which member of parliament introduced the Bill which sought to raise the age of criminal responsibility in Queensland. [C]
2. Identify the key viewpoints in the article. Categorise these viewpoints as either supporting or opposing the proposed law. [C]
3. Thinking back to the key stages of the legislative process, how likely was it that the Bill would be passed? Support your response with reasons. [A]



What do you think?

As a class, place 'Strongly Agree' and 'Strongly Disagree' signs at opposite ends of the classroom. Find a place along the line that represents your opinion on the question, 'Should Queensland raise the age of criminal responsibility'? Justify and discuss your decision. [E]

The establishment of a Criminal Cases Review Commission (CCRC)

Another approach you can use to identify an area in need of legal reform is to read primary or secondary sources on past or recent cases. **A legal decision sometimes reveals a miscarriage of justice, a gap or a limitation on how a law is being applied or interpreted.** The case *R v Folbigg* is an example of this.

In 2003, Kathleen Folbigg was convicted of the murder and manslaughter of her four children: Caleb, Patrick, Sarah, and Laura. After an appeal against her conviction was unsuccessful, she continued to maintain her innocence for the next 20 years.

In 2021, 90 Australian and world-renowned scientists and medical practitioners publicly called for an inquiry into her convictions. They believed that her children may have died of a rare genetic disease that was not known at the time of her trial. This led to the formation of a Special Commission of Inquiry that found that reasonable doubt existed due to the emergence of new medical evidence. As a result, she was pardoned, and the New South Wales Court of Appeal quashed her convictions.

Her case has led to some calling for reform.



Practical Application

AUSTRALIA NEEDS A DEDICATED BODY FOR WRONGFUL CONVICTIONS

The Folbigg case is a particularly tragic case, but it's not unprecedented. The criminal justice system carries an inbuilt risk of wrongful conviction. Ad hoc commissions of inquiries like the Folbigg inquiry are inefficient and expensive. The system needs reform.

The Folbigg case is yet another demonstration that Australia needs a Criminal Cases Review Commission (CCRC) – a statutory body working at arm's length to investigate claims of wrongful conviction.

Practical Application ...



A CCRC would have the powers and resources to investigate defendants' claims to have been wrongfully convicted. Claims found to have substance can be referred back to the court of criminal appeal. Standing CCRCs have proven to bring a cost-effective improvement to the accuracy of criminal justice systems overseas.

Preferably, it would be a single federal body covering all jurisdictions, or failing that, one for each jurisdiction.



...

The criminal justice system needs to do more to address the statistical certainty of the occasional wrongful conviction. Overcoming this injustice shouldn't demand superhuman reserves of fortitude, or the chance arrival of a champion.

The systemic risk of wrongful conviction demands a systemic solution.

Other developed nations have recognised that CCRCs are well-suited to this task, including England and Wales, Scotland, New Zealand, and Canada. Australia should follow in this path.

The extent of the change can be carefully calibrated through the design of the CCRC. The CCRC is a gatekeeper, and legislation can determine how widely the gate is opened.

The call for this key piece of criminal justice infrastructure isn't new. The Australian Law Council expressed support for a federal CCRC in 2012. Commentators have called for an Australian CCRC on many occasions.

Last year former High Court Justice, Michael Kirby, reiterated his view that 'such a commission is needed'. And the Sydney Institute of Criminology is currently calling on governments to take steps to establish an Australian CCRC.

Cases like Folbigg's demonstrate that this reform is urgently required.

Source: Professor David Hamer and Dr Andrew Dyer, 'Australia needs a dedicated body from wrongful convictions', *The University of Sydney—News and Opinion* (News, 6 June 2023) <sydney.edu.au/news-opinion/news/2023/06/06/australia-needs-a-dedicated-body-for-wrongful-convictions.html>.

1. Explain how the Folbigg case demonstrates the need for a Criminal Cases Review Commission (CCRC). [C]
2. Identify the limitations the author believes exist in our legal system that require reform. [C]
3. Explain whether the introduction of a Criminal Cases Review Commission (CCRC) is a new and recent recommendation. Use a quote(s) from the news article to support your response. [C]
4. Identify the different viewpoints raised in this article. Select and analyse one viewpoint, examining its consequences. [C] [A]



Research Task

Remember one strategy you can use when thinking about what legal alternatives might respond to a specific legal issue is looking at what is happening in other Commonwealth countries. As shared in the article above, a Criminal Cases Review Commission (CCRC) (or similar body) exists in England and Wales, Scotland, New Zealand, and Canada.

To complete this task, select one of the countries listed above to research. Locate 2 to 3 relevant secondary sources that assist you to answer the following questions:

1. Describe the objective or purpose of the body. [C].
2. Identify who the decision maker(s) are that sit on the body. [C]
3. Explain the legal process a defendant must follow to have their case heard by this body. What process does the body use to make a decision? [C]
4. Analyse a benefit and/or a limitation of this body. [A]



What do you think?

The authors of the article make a clear recommendation, Australia or States and Territories individually should introduce a Criminal Cases Review Commission (CCRC). Do you agree or disagree? Justify your decision using legal criteria. [E]

Commercial or compensated surrogacy

Legal or medical academics can also highlight an area of law that needs reform.

Australians who are unable to give birth can enter an altruistic surrogacy arrangement, which only allows the surrogate to cover their expenses. In Queensland, commercial surrogacy arrangements are prohibited (*Surrogacy Act 2010* (Qld) s56).

But, not every country prohibits commercial surrogacy. This has caused some Australians to enter a surrogacy arrangement overseas, as evidenced by the statistics below.





Practical Application

COMPARISON OF INTERNATIONAL AND DOMESTIC BIRTHS VIA SURROGACY IN AUSTRALIA

Domestic		International	
2009	16	2009	10
2010	13	2010	< 10
2011	19	2011	30
2012	16	2012	266
2013	29	2013	244
2014	30	2014	263
2015	43	2015	246
2016	37	2016	204
2017	51	2017	164
2018	71	2018	170
2019	61	2019	232
2020	76	2020	275
2021	N/A	2021	223
Total	462		2,327+

Source: Stephen Page, 'Surrogacy in Australia: The 'failed experiment'?' (2023) 174 *Precedent* 22 <austlii.edu.au/cgi-bin/viewdoc/au/journals/PrecedentAULA/2023/6.html#nB30>, with original data noted as coming from Department of Home Affairs, compiled from data on applications for citizenship by descent by children born overseas through surrogacy, obtained by FOI.

1. Identify the year Australia witnessed the highest number of domestic births via surrogacy. Describe the pattern of domestic arrangements for the period 2009 to 2020. [C] [A]
2. Identify the year Australia witnessed the highest number of international births via surrogacy. Describe the pattern of international arrangements for the period 2009 to 2020. [C] [A]
3. Compare and contrast the total number of births via surrogacy in Australia and internationally. [A]
4. The Australian Government website titled *Surrogacy in Australia* (accessed 22 September 2024) states, 'It is also illegal for some Australians to engage in commercial surrogacy overseas. If Australians engage in commercial surrogacy, they are usually not recognised as legal parents in Australia and the surrogate remains the legal parent of the child.' Using the data above, make a decision about whether the law and our legal system is operating effectively. [E]



The existing law presents legal, ethical, and human rights challenges that have been raised over the last decade. In 2015, then Chief Justice of the Family Court Diana Bryant expressed her opinion that *'Australian women should be able to be paid to be a surrogate mother...I personally think we should regulate and allow commercial surrogacy in Australia.'* Additionally, in 2016, an article published by *The Medical Journal of Australia* stated, *'[t]he current status quo is unsatisfactory on legal, ethical and practical grounds. It is time to openly debate how Australia should balance the desire for childbearing through surrogacy with the limited domestic availability of women willing to act as surrogates.'* More recently, Ronli Sifris (Senior Lecturer in Law at Monash University) advocated for amendments to the law to allow for compensated surrogacy.

Research Task

1. Locate and select 2 to 3 sources about compensated surrogacy. [S]
2. Within these sources, identify and examine 2 viewpoints for or against the introduction of compensated surrogacy and their consequences. Ensure your response is related to the legal issue(s) identified in the current system. [A]
3. Recommend whether compensated surrogacy should be introduced in Australia. Justify your decision using legal criteria. [E]

Specialised sexual offence courts

Earlier, you learned that patterns of criminal behaviour or civil actions can point to an area of the law that requires reform. **An area of law reform can also be the central feature of a campaign.** It has long been acknowledged that victims of sexual offences face significant barriers in their pursuit of a just and fair outcome. Of the total number of reported sexual offenses, few are heard in court, and conviction rates are poor. One recommendation raised by stakeholders is that State and Territory Parliaments should consider introducing a specialist court to hear this specific category of criminal offence. An example of this is seen in an open letter shared by Dr Marisa Paterson, Member for Murrumbidgee (ACT Legislative Assembly). On her website she wrote:

On 21st August 2023, I, alongside a host of ACT organisations including, the Canberra Rape Crisis Centre, Domestic Violence Crisis Service, YWCA, Meridian ACT, A Gender Agenda, Toora Women Inc., Aboriginal and Torres Strait Islander Elected Body and Women with Disabilities ACT, handed over an open letter to the Chief Minister, Attorney General, and Deputy Chief Minister urging them to explore the establishment of a specialist sexual offences court in the ACT.

I believe here in the ACT we have the opportunity to be nation-leading in how our justice system addresses sexual offences. The status quo is not sufficient. There is increasing international evidence highlighting the benefits of a specialist, trauma-informed, court in progressing justice.

Source: Dr Marisa Paterson MLA, 'Open Letter: Call for a specialist sexual offences court in the ACT', *ACT Labor*, (Web Page, 2023) <marisapaterson.com.au/campaigns/specialist-sexual-offences-court/>.



Practical Application ...

DOES AUSTRALIA NEED DEDICATED SEXUAL ASSAULT COURTS?

Some countries, such as South Africa, operate specialist sexual offences courts. Scotland is setting up a pilot specialist court.

The benefit of these courts is that all court personnel are trauma-informed and can deal with complex social issues and laws.

One early evaluation in South Africa shows 94.9 per cent of victim/survivors were satisfied with prosecutors, and 87.5 per cent were satisfied with their preparation for trial. Almost all felt totally or fairly safe at court. Only 20 per cent found the defence attorney intimidated them, and less than a third felt their personal dignity was insulted during cross-examination. South Africa also implements 'juryless' trials, heard by a judge and a two-person lay panel, which may be a factor in the favourable findings. Specialists courts can also reduce delays.

Yet there are risks to such a narrow approach. It may lead to a gradual loss of more general legal skills and too narrow a focus, which may result in biased decision-making.

In fact, it may not be necessary to create a separate standalone court to get better outcomes. Research has shown trauma-informed training is necessary for court personnel to understand and help prevent victim/survivor re-traumatisation. This can be achieved within the existing court system.

Regular courts can have a 'specialist approach' — a different way of running proceedings for sexual assault cases that better meet the needs of victim/survivors. This can be on specific days of the week around normal court operations.

Significantly, having a separate specialist approach within the general criminal court system to deal exclusively with sexual assault cases may introduce positive culture change.

Studies indicate a comprehensive specialist approach may be the missing link in reforming the adversarial system.

Source: Vicki Lowik and Amanda-Jane George, 'Does Australia need dedicated sexual assault courts?', *SBS News*, (Online, 30 October 2023) <sbs.com.au/news/article/does-australia-need-dedicated-sexual-assault-courts/row9g8cki>.

1. Identify two countries that have or are thinking of introducing a specialist sexual assault court. [C]
2. Identify and explain the benefits and limitations raised by the authors of this suggested reform. [C]
3. If a specialised sexual assault court isn't possible, identify the legal alternative raised in the article by the authors. [C]
4. Justify whether or not you would recommend Queensland introduce a specialist sexual assault court. Ensure you use legal criteria to support your decision and discuss the implications of your recommendation. [E]

Review

Comprehend

1. List the different ways you can discover legal issues that may need reform as identified in this chapter. Are there any other approaches you can add to the list? [C]

Unit 4

Human rights in legal contexts

Unit 4 explores how legal frameworks protect our human rights through the critical examination of real-world applications in national and international contexts.

Topic 1

Human rights

Topic 1 introduces you to the key international laws and institutions that affect Australia.

Chapter 12: The human rights background to international law

Chapter 13: International law

Chapter 14: Human rights of children and prisoners

Chapter 15: Human rights and discrimination

Human rights in legal contexts

Chapter 12: The human rights background to international law

12.1 What are human rights?

12.2 Origin of human rights

12.3 *United Nations Charter*

12.4 *Universal Declaration of Human Rights*

12.5 Principal covenants

Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend:
 - the nature and origins of modern human rights
 - the development of international law from the *International Bill of Human Rights*.
- analyse and evaluate the rights contained in the principal covenants as sources of international law.

12.1 What are human rights?

Key Term

Human rights: Fundamental freedoms and protections that belong to every single one of us.

Source: Amnesty International, 'How it works', (Web Page, 3 September 2024), <[amnesty.org.au/how-it-works/what-are-human-rights/#:~:text=Human%20rights%20are%20based%20on,choices%20about%20your%20own%20life.>](https://www.amnesty.org.au/how-it-works/what-are-human-rights/#:~:text=Human%20rights%20are%20based%20on,choices%20about%20your%20own%20life.>)>.

The Amnesty International website further states:

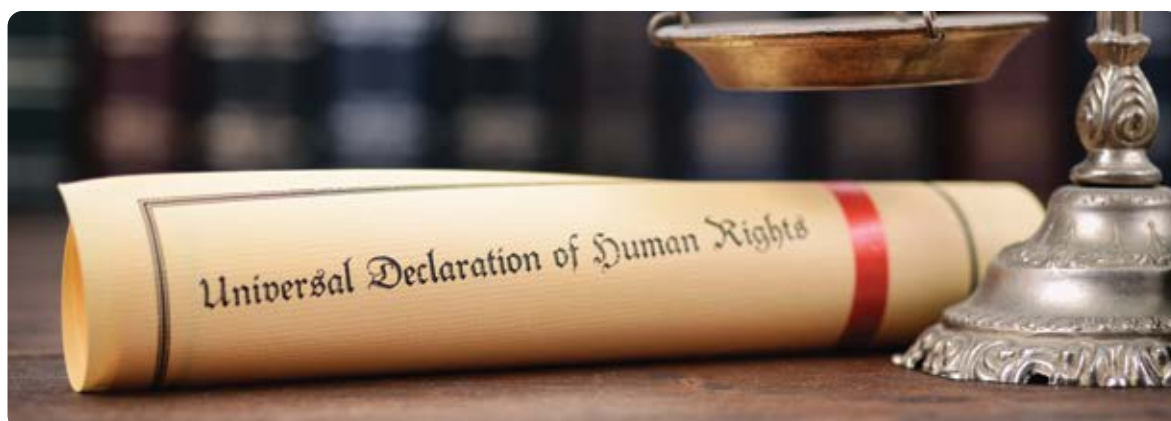
Your rights are about being treated fairly, treating others fairly and having the ability to make choices about your own life. These basic human rights are:

- **Universal**—They belong to all of us, everybody in the world.
- **Inalienable**—They cannot be taken away from us.
- **Indivisible and interdependent**—Governments should not be able to pick and choose which are respected.

The basis of modern human rights, is the United Nation's *Universal Declaration of Human Rights* (1948) (the *Declaration*). **It is the single most influential document that states your rights as a human being.** This does not mean that prior to 1948 there were no recognised human rights. For example, wherever the right to a fair trial is discussed, the *Magna Carta* (1213) may be featured, as it contained a statement regarding the right an English person had to trial by jury.

12.2 Origin of human rights

For the most part, modern human rights, as stated in the *Declaration*, have been developed in western countries. Ideas and philosophies about human rights developed because of the work of individuals, the influence of political and social events, and on some occasions because of the need to understand and make sense of war and conflict. The growth in the nature and scope of human rights reflects the cooperation and hard work done by the countries that grouped together to form the United Nations in 1945 after World War II. Understanding the history of the development of human rights will give you an appreciation of how human rights on a global scale have become important.



A HUMAN RIGHTS HISTORY

1213	<i>Magna Carta (England)</i>	We have also granted to all free men of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.
1679	<i>Habeas Corpus Act (England)</i>	This law protected and extended the right of the detained person to go before a judge to determine whether the detention was legal, a crucial step towards the right to a fair trial.
1689	<i>English Bill of Rights (England)</i>	Included the freedom to petition the monarch (a step towards political protest rights) and freedom from cruel and unusual punishments—the forerunner to the ban on torture in the <i>Human Rights Act 1998</i> (UK).
1776	<i>American Declaration of Independence (America)</i>	...that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty...and the Pursuit of Happiness...
1789	<i>Declaration of the Rights of Man and Citizen (France)</i>	Men are born free and equal in dignity and rights (Article 1).
1940	<i>A Declaration of the Rights of Man</i>	HG Wells, author and social commentator, prepared a charter in 1940, when he published a book entitled <i>The Rights of Man</i> which contained many ideas set out in the <i>United Nations Charter</i>. Its first paragraph states: The Right to Live Everyman is a joint inheritor all the natural resources and of the powers, inventions and possibilities accumulated by our forerunners. It is entitled, within the measure of these resources and without distinction of race, colour or professed beliefs or opinions, to the nourishment, covering and medical care needed to realise his full possibilities of physical and mental development from birth to death. Notwithstanding the various unequal qualities of individuals, all men shall be deemed absolutely equal in the eyes of the law, equally important in social life, equally entitled to the respect of fellowmen.



Research Task

- 1. Locate and select information that assists you to identify 5 individual human rights Australians may have enjoyed prior to World War II. Some examples include the right to citizenship, the right to vote, the right to freedom of movement, the right to ownership of property, the right of refugees to asylum, and the right to marry. [C] [S]
- 2. Investigate the involvement of First Nation Peoples as active participants in World War II. Did the First Nations men who participated in the armed forces enjoy the same rights as other Australian soldiers when they enlisted? [C] [S]
- 3. Summarise your findings in about 300 words and deliver it orally to your class. [R]

12.3 United Nations Charter

The *International Bill of Human Rights*, comprises the:

- *Universal Declaration of Human Rights* (1948)
- *International Covenant on Civil and Political Rights* (1966) (ICCPR), and
- *International Covenant on Economic, Social and Cultural rights* (1966) (ICESCR).

Prior to these documents was the *United Nations Charter*, which was signed by Dr Herbert Vere Evatt (1894 to 1965) on 26 June 1945, and adopted unanimously on 24 October 1945. Dr Evatt led the Australian delegation at a meeting held in San Francisco after World War II. It was here that the nations of the world agreed to form the United Nations. Dr Evatt was highly respected overseas and enhanced Australia’s reputation with his work in the international sphere.

Dr Evatt was elected president of the General Assembly of the United Nations in 1948. He remains the only Australian to have ever held that position. He presided over the United Nations when the *Declaration of Human Rights* was published in 1948.

Practical Application



UNITED NATIONS CHARTER

The *Charter of the United Nations* is the founding document of the United Nations. It was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

The United Nations can take action on a wide variety of issues due to its unique international character and the powers vested in its Charter, which is considered an international treaty. The *UN Charter* is an instrument of international law, and UN Member States are bound by it. The *UN Charter* codifies the major principles of international relations, from sovereign equality of States to the prohibition of the use of force in international relations.

Since the UN's founding in 1945, the mission and work of the United Nations have been guided by the purposes and principles contained in its founding Charter.

Source: United Nations, *About* (Web Page, 5 September 2024) <un.org/en/about-us/un-charter>.

- 1. What are two principles of international relations codified in the *UN Charter*? [C]
- 2. Explain why the *UN Charter* is an ‘instrument of international law’. [C]

As a signatory of the *United Nations Charter*, and one of the founding nations to establish the United Nations, Australia is committed to its *Purposes, Principles, and Processes*. Our international relationships and our role in the international community have seen Australia involved in armed conflict and in peacekeeping operations in countries outside Australia. It has seen Australia participating in cases before the International Court in the Hague. The extent to which Australia has met its international obligations under the *United Nations Charter*, and the extent to which other signatories have met their international obligations will become clearer as we proceed.



United Nations Charter **Preamble**

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace, and

to unite our strength to maintain international peace and security, and

to ensure that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

Accordingly, our respective Governments have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

Source: United Nations, *United Nations Charter*, (Web Page, 5 September 2024) <un.org/en/about-us/un-charter/preamble>.

United Nations Charter

Chapter I: Purposes and Principles

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security...

2. To develop friendly relations among nations ...
3. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members...
2. All Members ...shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means...
4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles...
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...

Chapter II: Membership

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly ...

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly...

**Chapter III:
Organs
Article 7**

There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

Source: United Nations, *United Nations Charter*, (Web Page, 5 September 2024) <un.org/en/about-us/un-charter/chapters1-2-3>.



Practical Application

Refer to the above excerpts from the *United Nations Charter*:

1. Who are the members of the United Nations? How do members become qualified to be members? [C]
2. Describe in your own words the obligations set out in the *United Nations Charter* which attach to membership of the United Nations. [C]
3. Describe the legal relationship among members of the United Nations. What penalty is attached to a member who breaches its obligations set out in the *United Nations Charter*? [C]
4. Identify and describe the paragraph in the Preamble which refers to individual human rights. Is this a basis for the United Nations to make a declaration about human rights, including the rights of First Nations Peoples? [C] [A]
5. Draw up and complete this table:

Purposes of the United Nations	Principles set out in the <i>United Nations Charter</i>
• List the purposes of the United Nations.	• List the principles members are required to follow.

6. In what ways do you think supporting and complying with the principle of the 'sovereign equality of member states' would help to achieve the purposes of the United Nations? Give examples supported by legal reasoning. [C] [A]

12.4 Universal Declaration of Human Rights

The atrocities perpetrated against millions of innocent people during World War II were the prime driver of global recognition of human rights in the *Universal Declaration of Human Rights* (1948) (the *Universal Declaration*).

In the *Preamble* the General Assembly of the United Nations proclaims the *Universal Declaration* as:

...a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Source: United Nations, *Universal Declaration of Human Rights*, (Web Page, 6 September 2024) <un.org/en/about-us/universal-declaration-of-human-rights>.

As an original member of the United Nations, Australia is committed to passing laws to uphold the *Universal Declaration*. Although not part of Australian law, the *Universal Declaration* is an international benchmark by which Australian laws can be evaluated against in terms of their fairness to specific individuals and groups within our society.

At the federal level, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) applies to all new Acts of Parliament. Similarly, at the state level, the *Human Rights Act 2019* (Qld) provides a basis for scrutiny of legislation prior to it being passed. These two Acts haven't been part of our legal framework for very long. Not only are they relevant when prospective legislation is being considered, but in the case of the *Human Rights Act 2019* (Qld), its effect has been given judicial consideration. For example, in *Volkers v the Queen* (2020) QDC 25, His Honour Judge Reid considered the *Human Rights Act 2019* (Qld) s31 when deciding that it was appropriate to grant a permanent stay of proceedings against the defendant.

Universal Declaration of Human Rights (1948)



All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (Article 1, excerpt)

Everyone has the right to life, liberty and security of person. (Article 3)

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. (Article 4)

All are equal before the law and are entitled without any discrimination to equal protection of the law. No one shall be subjected to arbitrary arrest, detention or exile. (Article 7, excerpt)

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. (Article 10)

Universal Declaration of Human Rights (1948) ...

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. (Article 12, excerpt)

Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country. (Article 13(1)(2))

Everyone has the right to seek and to enjoy in other countries asylum from persecution. (Article 14(1))

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. (Article 16, excerpts)

Everyone has the right to own property alone as well as in association with others. (Article 17, excerpt)

Everyone has the right to freedom of thought, conscience and religion... (Article 18, excerpt)

Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association. (Article 20(1)(2))

Everyone has the right to freedom of opinion and expression (Article 19, excerpt)

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. (Article 21, excerpts)

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone has the right to form and to join trade unions for the protection of his interests. (Article 23(1)(2))

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. (Article 24)

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. (Article 25(1)(2))

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (Article 26(1))

Source: United Nations, *United Nations, Universal Declaration of Human Rights*, (Web Page, 6 September 2024) <un.org/en/about-us/universal-declaration-of-human-rights>.



Practical Application

1. Locate the *Universal Declaration*. [S]
2. Divide your class into small groups. As a group decide which are the 10 most important human rights in order from 1 to 10. Explain how your group made its selection. [C]
3. One criticism of the *Universal Declaration* is that it is designed for Western democracies and does not account for countries with different political, cultural and religious systems, or for countries in which improving the living standards of the community is the main priority, not individual freedoms. Do you think that this is a fair assessment? Give your reasons. [A]

12.5 Principal covenants

Key Term

Covenant: an agreement between two or more nation states.

When the international community was developing a set of human rights to be enjoyed by all human beings around the world, they began with the overarching idea to form an ‘*International Bill of Human Rights*’.

The *International Bill of Human Rights* has two parts:

- the *Universal Declaration*, which we have seen is not a legally binding document, and
- two **principal covenants** that would contain legally binding commitments, to which sovereign states that signed as members of the United Nations would be bound, the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

These covenants were drafted and introduced into the United Nations General Assembly in 1954, but it took until 1966 for each of them to be adopted by the United Nations General Assembly.

The United Nations General Assembly passed a resolution adopting the ICCPR and ICESCR. **This left each covenant to be open for other nation States to sign and ratify. A nation State that ratifies a covenant voluntarily agrees to be bound by its terms.**

The purpose of these covenants was to give the nations of the world the opportunity to create a new world order in which nation States would coexist peacefully with each other and solve their disputes within the framework of international law.



International Covenant on Civil and Political Rights (1966) (ICCPR)

The ICCPR is a multilateral treaty that commits nations to respect the civil and political rights of individuals, including:

- the right to life,
- freedom of religion,
- freedom of speech,
- freedom of assembly,
- electoral rights, and
- the right to due process and a fair trial.



Gradually the nations of the world have signed up to the ICCPR. It entered into force in 1976 after 35 countries ratified its terms. Australia became a signatory to this Treaty in 1980, although it has reserved certain rights in relation to some of the provisions. For example, it does not agree with the provision that all juvenile offenders must not be held in custody in adult prisons. By June 2024, 174 countries had ratified the Treaty. There were six signatories awaiting ratification, notably Cuba, and the People's Republic of China.

Key features of the ICCPR

The ICCPR is divided into six parts along with a preamble and conclusion:

Part	Article(s)	Summary
1	1	States that all peoples have the right to self-determination.
2	2-5	Creates an obligation that parties need to legislate to give effect to the provisions within the ICCPR. It also recognises that everyone should be treated equally.
3	6-27	The most important provisions of the ICCPR are contained in Articles 6 to 27 inclusive. These provisions, which are summarised below, are sometimes described as the substantive or core provisions of the ICCPR. • Articles 6-8 cover the right to life, prohibit torture and slavery. • Articles 9-10 prohibit arbitrary arrest and detention, and cover the rights of persons arrested or detained. • Articles 14-16 address the need for procedural fairness so that the rights of the accused are protected and there is a right to a fair trial. • Articles 12-13 and 17-27 address the freedoms of movement, religion, thought, speech, assembly and association.
4	28-45	Establishes the Human Rights Committee (which monitors the ICCPR).
5	46-47	States the ICCPR shall not be interpreted as interfering with the operation of the United Nations.
6	48-53	Concerns issues such as ratification, when the ICCPR is in force and the amendment process.



Practical Application

Locate a copy of the ICCPR and select five civil and political rights of your choice. [S]

For each right:

- Describe the right in your own words. [C]
- Give an example of how the right is observed (or not observed) in Australia and another country. [C]
- Are the examples you have found protected by law, or not? If possible, identify the law which applies in each case. [S] [C]

Optional Protocols

The ICCPR has two optional protocols. These protocols extend the legal obligations contained in the ICCPR in particular ways. One protocol allows the United Nations Human Rights Committee (UNHRC) to hear complaints from individuals who allege that their government has violated their civil and political rights. Findings are communicated by the committee to member states and the complainant, but the UNHRC does not have the power under the protocol to enforce its findings.

Practical Application



Optional Protocol to the International Covenant on Civil and Political Rights

This protocol was adopted on 17 December 1966 and came into force on 23 March 1976 by General Assembly resolution 2200A.

The States Parties to the present Protocol,

... in order further to achieve the purposes of the International Covenant on Civil and Political Rights (the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Source: United Nations, *Human Rights Council*, (Web Page, 17 September 2024) <ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-international-covenant-civil-and-political>.

- Describe the power that each state party has agreed that the UNHRC can exercise. What are the limitations on this power? [C]
- Does the power of the UNHRC to make findings about a complaint by a citizen of one of the members of the United Nations, a sovereign state, impinge on the rights of that state? Explain your answer using legal reasoning. [A]



Case Study

Toonen v Australia (1992)

Facts: Nicolas Toonen, a homosexual man, was the General Manager of the Tasmanian AIDS Council (Inc). He lost his job after the Government threatened to withdraw funding from the organisation unless Toonen was fired. At the time, consensual sex between adult males was a criminal offence (*Criminal Code Act 1924* (Tas) s122(a)(c); s123). Toonen made a complaint to the UNHRC.

Legal Issue: Did Tasmania's criminal law violate Toonen's right to privacy (Article 17 ICCPR)? Did the law discriminate against people based on their sexual orientation (Article 26 ICCPR)?

Decision: The UNHRC found that consensual sexual activity between adult men in private was covered by the concept of 'privacy' and the law continuously and directly interfered with this right. The Committee also found that sexual orientation can be considered within the meaning of 'other status' or 'sex' within Article 26. For these reasons, Australia was in breach of its obligations. The committee agreed with Toonen's remedy that the law should be repealed.

1. What law did Toonen complain about to the UNHRC? [C]
2. What were the grounds of the complaint? How does this relate to the rule of law? [C] [A]
3. Complete research into the responses of the Tasmanian and Federal governments to the Committee's decision? What does this demonstrate about this protocol? [S] [A]

Second Optional Protocol to the International Covenant on Civil and Political Rights (1990)

The purpose of this protocol is to eliminate the death penalty, which, was completely abolished in Australia by 1985. Queensland abolished this form of punishment in 1922. Australia agreed to be bound by this protocol on 2 October 1990. Since then, Australia's foreign policy has been influenced by the fact that many countries in our region have not abolished the death penalty.



What do you think?

In 2010, a group of Australian citizens were sentenced to death. Opposition to the use of capital punishment in Indonesia appeared in the Australian media and was used by certain federal politicians critical of the Indonesian policy. Do you think the fact that Australia agreed to be bound by the *Second Optional Protocol* gives support to the criticism? Justify your viewpoint by reference to international law. [A] [E]

Monitoring the ICCPR

We have seen above that Articles 28-45 of the ICCPR establish a committee called the Human Rights Committee (HRC) which monitors the performance of all countries that are signatories to the ICCPR. The HRC consists of independent experts nominated by State parties, who are elected for a four-year term. Under the terms of the ICCPR countries report to the HRC which responds by commenting on the extent to which the relevant country has implemented the purposes and principles/articles of the ICCPR. In addition, the United Nations Human Rights Council conducts reviews of the human rights record of state parties on a regular basis.



Practical Application

NEW ZEALAND'S HUMAN RIGHTS RECORD TO BE EXAMINED BY UNIVERSAL PERIODIC REVIEW

The human rights record of New Zealand will be examined by the United Nations Human Rights Council's Universal Periodic Review (UPR) Working Group for the fourth time on Monday, 29 April 2024.

New Zealand is one of 14 States to be reviewed by the UPR Working Group during its upcoming session from 29 April. The UPR Working Group is comprised of the 47 Member States of the Human Rights Council. However, each of the 193 UN Member States can participate in a country review.

The documents on which the reviews are based are: 1) national report - information provided by the State under review; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities; 3) information provided by other stakeholders including national human rights institutions, regional organizations, and civil society groups.

The UPR is a peer review of the human rights records of all 193 UN Member States. Since its first meeting was held in April 2008, all 193 UN Member States have been reviewed thrice. During the fourth UPR cycle, States are again expected to spell out steps they have taken to implement recommendations posed during their previous reviews which they committed to follow up on and highlight recent human rights developments in the country.

Source: United Nations, 'New Zealand's human rights record be examined by Universal Periodic Review', (Press Release, 24 April 2024) <ohchr.org/en/press-releases/2024/04/new-zealands-human-rights-record-be-examined-universal-periodic-review>.

1. Describe the process of Universal Periodic Review. [C]

2. Explain the purpose of the UPR process. [C]

3. What principles does it seek to uphold? [C]

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

The *International Covenant on Economic Social and Cultural Rights* (ICESCR) had its origins in the same discussions at the United Nations about human rights, which led to the *Universal Declaration*, and subsequently the ICCPR. During the committee stages when drafting these treaties, the committee members present agreed to divide the various rights under discussion conveniently into the protections for civil and political rights (ICCPR) and the economic, social and cultural rights contained in the ICESCR.

The ICESCR sets out basic economic, social and cultural rights including the right to:

- work;
- fair and just conditions of work;
- social security;
- an adequate standard of living, including adequate food, clothing and housing;
- health; and
- education.

Australia ratified the ICESCR in 1975 but is yet to fully implement its provisions into domestic legislation. No declarations or reservations were made upon ratification. In later chapters we will examine how well Australia’s approach of relying on existing legislation or creating legislation in response to a specific issue protects the economic, social and cultural rights of Australians.

According to the office of the United Nations High Commissioner for Human Rights (UNHCR), as of February 2024, 172 States were party to the ICESCR. Also, countries which have not ratified either of the principal covenants—the ICCPR and ICESCR—include Bangladesh, Burma, the Cook Islands, Fiji, Kiribati, Laos, Malaysia, Pakistan, Papua New Guinea, Samoa, Singapore, Tonga, Tuvalu, and Vanuatu. The United States of America is a signatory to the ICESCR, but has not yet ratified the Treaty, which means it has not yet agreed to incorporate the provisions of the covenant into domestic law.

Part	Article(s)	Summary
1	1	States that all peoples have the right to self-determination.
2	2-5	Establishes that these rights should be recognised without discrimination and that States should take steps to progressively achieve the rights listed in the Covenant.
3	6-15	Lists the economic, social and cultural rights.
4	16-25	Governs the reporting and monitoring of the Covenant.
5	26-31	Concerns issues such as ratification, when the ICESCR is in force and the amendment process.



Practical Application

Locate a copy of the *International Covenant on Economic Social and Cultural Rights* (ICESCR). It can be found on the webpage of the United Nations at ohchr.org/en/instruments.

1. Read Articles 6 to 15. Categorise what rights are economic, social, and cultural. [C]
2. Which category of rights is primarily protected in the ICESCR? Which right do you think would be the most difficult to protect under our law? Explain your answer. [C]
3. Under what circumstances can the economic, social and cultural rights of individuals be limited? [C]
4. How are the limitations of developing countries acknowledged in this treaty? Why do you think this was included in an Article? [C] [A]
5. Read Articles 16 to 25. Explain how the progress of countries which sign this treaty is monitored. [C]

Committee on Economic, Social and Cultural Rights (ECOSOC)

All signatories to ICESCR are required to submit a progress report on the implementation of the Treaty to the Secretary-General of the United Nations (Article 16). The report is transmitted to the Committee on Economic, Social and Cultural Rights (ECOSOC) which was established in 1985. Like the Human Rights Committee discussed earlier, this Committee consists of 18 independent experts, nominated by State parties, who are elected for a four-year term. Its purpose is to:

- monitor the implementation of the covenant by State parties, thereby assisting governments to fulfil their obligations by making specific legislative and policy recommendations; and
- interpret articles.

Research Task

Select a neighbouring country such as New Zealand, Indonesia, Fiji, or Vanuatu. Conduct research into any reports they have provided to the committee in response to their obligations under the ICESCR.

1. Describe the matters which have been reported to the Committee by your chosen country. [C]
2. Does your research support the view that your chosen country is meeting its obligations under the ICESCR, or attempting to do so? [C]
3. Did your research support the view that your chosen country was or had developed policy and/or legislative measures to address the matters on which it reported? [C]



Review

Comprehend

1. **Define** each of the following:

a. Human rights	c. <i>Universal Declaration of Human Rights</i>	
b. State party of the United Nations	d. <i>Optional Protocol</i>	[C]

2. **Describe** and **explain**:

- a. The origins of human rights in the *Universal Declaration*.
- b. The purpose of the United Nations.
- c. The principles in the Charter to which State parties agree as members of the United Nations.
- d. The importance of the *International Bill of Rights*.
- e. The role of the Human Rights Committee in monitoring State parties' compliance with the ICCPR.

[C]

Analyse

Source 1

INCREASING ECONOMIC BENEFITS TO SMALL ISLAND DEVELOPING STATES PARTNERSHIP DIALOGUE

New Zealand is working in partnership with our Pacific neighbours and investing \$54 million to improve sustainable fisheries management and to reduce illegal, unreported and unregulated fishing. For example, we have been working with the Cook Islands on the implementation of a catch quota system and supporting fisheries reforms in Tokelau. Already, Pacific Island countries are implementing rights-based management systems. Vessel Monitoring Systems and full observer coverage on all purse seine vessels have tightened monitoring and compliance.

The rest of the international community, especially the fleets of Asia, the Americas and Europe, needs to agree and implement stronger controls on overfished stocks in the region. New Zealand has long been an advocate of eliminating harmful fisheries subsidies, which create a serious environmental issue and distort the seafood market.

We urge countries to cooperate for the establishment of effective disciplines on harmful subsidies in fisheries at the World Trade Organisation.

Source: United Nations, 'Increasing Economic Benefits to Small Island Developing States Partnership Dialogue', *Review*, (Online, 21 September 2024) <sdgs.un.org/statements/new-zealand-15966>.

1. Is the viewpoint of the State party in the statement consistent with the principles and purposes of the ICESCR? Do you agree with the point of view expressed by the New Zealand Permanent Mission in the statement? Give your reasons. [A]

Human rights

Chapter 13: International law

- 13.1 What is international law?
- 13.2 International conventions
- 13.3 Customary international law
- 13.4 General principles of international law
- 13.5 *International Court of Justice (ICJ)*
- 13.6 *International Criminal Court (ICC)*
- 13.7 The rights of states

Learning objectives

At the conclusion of this chapter, students will be able to:

- explain the:
 - rights of states
 - role of international legal institutions in upholding rights, including those within the *International Court of Justice (ICJ)* and the *International Criminal Court (ICC)*.
- select legal information, then analyse and evaluate Australia's response to international law and human rights.

13.1 What is international law?

Key Term

International law: the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors.

Source: Britannica, 'International Law' (Web Page, 29 September 2024) <[britannica.com/topic/international-law](https://www.britannica.com/topic/international-law)>.

The need for international law

The relationship between nation states needs stability and consistency. This can be seen from the activities that bind them together, such as trade. However, despite nation states entering into agreements to regulate their relationships, they often rely on armed conflict to resolve their disagreements. Concerns about the prevalence and horrors of war have continued through the centuries. A series of international conferences was held during the 19th century to decide collectively on what rules should apply during wartime, especially about the treatment of civilians, wounded soldiers, and soldiers who surrendered or were captured by the opposing side. One of the first of these was the *Geneva Convention*, which established the International Red Cross. This convention was signed by 16 nations. Since then, the international laws of war have expanded.

In 1899, the *Hague Conference* established the Permanent Court of Arbitration for the peaceful resolution of international disputes. But it did not stop World War I (1914-1918) or World War II (1939-1945) from occurring. These events made the desire for the civilised nations of the world to set up a world body to preserve and maintain international peace more pressing. **It led to the establishment of the United Nations (UN) in 1945, to the *International Court of Justice* (ICJ) and to the expansion of international law to go beyond nation states to include individuals.**

Today, the need for international law is even greater. Wars are still occurring, and the presence of nuclear weapons and other technologies increases the scope of destruction and loss of life. Technological innovation and economic globalisation accelerated the need for rapid and extensive interconnection between the nations of the world, as well as for individuals living in those countries. Regulating this interaction requires international, as well as national laws. This extends to protection of the environment, transport, regulation of trade between states, monetary stability, aerospace, communications across the globe including mediums such as the internet.

Key features of international law

International law includes contract, property, and tort law, that are common in many legal systems. Procedural law, due process, and remedies, are also key facets of international law. Some of the topics found in international law include:

- International economic law
- International security law
- International criminal law
- International environmental law
- Diplomatic law
- International humanitarian law
- International human rights law

The most significant development in our lifetime in international law has been the legal concepts, principles, and processes brought into the international legal system by the United Nations.

Existing international law was enhanced by the institutional framework and work of the United Nations which produced the *International Bill of Rights* and formalised the mechanisms to support and grow human rights law. The best statement of how this has happened is found on the web page of the United Nations itself.

Practical Application

INTERNATIONAL HUMAN RIGHTS LAW

The international human rights movement was strengthened when the United Nations General Assembly adopted the *Universal Declaration of Human Rights* (UDHR) on 10 December 1948. Drafted as 'a common standard of achievement for all peoples and nations', the *Declaration* for the first time in human history spelt out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that everyone should respect and protect. The UDHR, together with the *International Covenant on Civil and Political Rights* and its two *Optional Protocols*, and the *International Covenant on Economic, Social and Cultural Rights*, form the so-called *International Bill of Human Rights*.

A series of international human rights treaties and other instruments adopted since 1945 have conferred legal form on inherent human rights and developed the body of international human rights. Most States have also adopted constitutions and other laws which formally protect basic human rights. While international treaties and customary law form the backbone of international human rights law, other instruments such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. Respect for human rights requires the establishment of the rule of law at the national and international levels.

International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.

Source: United Nations, 'What are Human Rights?' (Web Page, 24 September 2024) <[ohchr.org/en/instruments-and-mechanisms/international-human-rights-law](https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law)>.

1. What instruments form the 'backbone' of international human rights law? What other instruments developed by the United Nations contribute to the understanding, implementation and development of human rights law internationally and domestically? [C]
2. Analyse how 'international human rights treaties and other instruments adopted since 1945 have conferred legal form on inherent human rights and developed the body of international human rights'. [A]
3. What happens when a person is subject to human rights abuse in a nation state, and domestic legal proceedings fail to address the issue? Do you think such an arrangement would ensure a nation state meets its treaty obligations? Justify your answer using legal criteria. [C] [E]

At this point we need to look at how the international legal system functions in more detail. We have seen that human rights law is not the only body of law that makes up the international legal system. Treaties between nation States have operated for centuries. It has therefore been no surprise that treaties are mechanisms that have assisted nation States to assume obligations and duties under international law. A useful place to start is to see what we can find out about the sources of international law.

Sources of international law

International law is essentially made up by the actions of the member States of the United Nations international community. The *Statute of the International Court of Justice* (ICJ) Article 38 identifies four sources. These are:

- treaties between States,
- customary international law derived from the practice of States,
- general principles of law recognised by civilised nations; and as subsidiary means for the determination of rules of international law, and
- judicial decisions and the writings of 'the most highly qualified publicists'.

We have established that being a signatory to the *United Nations Charter*, and the *Universal Declaration of Human Rights*, means that a nation State has entered into binding legal obligations to enforce human rights principles. To understand relationships between international law and human rights, we need to explore the sources of international law further.

The Conventions which take place as part of the UN processes, which create agreements in writing between the Member States, are a primary source of international human rights law.

13.2 International conventions

Key Term

Convention: an agreement between two or more nation states.

These are the most important sources of international law. Even before the establishment of the United Nations, the countries of the world were meeting and entering into agreements. Once the United Nations was established, and it developed and adopted covenants pursuant to the *International Bill of Rights*, human rights law became a dominant player in the international legal system. **Under the term convention, comes a range of agreements between two or more nation states, including treaties, covenants, statutes, protocols, charters and agreements.**

Features of conventions

Although there are different types of conventions they have similar features:

- their terms are set out clearly like written contracts,
- there are formalities which must be observed for a convention to be binding,
- it must state the parties to the agreement intend it to be binding according to international law,

- it must state the parties entered into the agreement voluntarily,
- it must be signed by an authorized representative of the nations that are a party to it.

However, unlike a contract, conventions do not require consideration. It is also possible for a nation to indicate it will sign the convention but at the same time make some reservation about its obligations. Protocols are amendments or supplements to an earlier treaty or agreement.

EXAMPLES OF INTERNATIONAL CONVENTIONS

The term 'convention' is found in agreements such as the *Convention on Biological Diversity* (1992) and the *Convention on the Law of the Sea* (1982).

The term 'covenant' is found in agreements such as the *International Covenant on the Elimination of All Forms of Racial Discrimination* (1966).

The term 'statute' is in the *Rome Statute of the International Criminal Court* (2002).

The term 'treaty' is found in the *Timor Sea Treaty* (2003).

An example of a 'protocol' is the *Kyoto Protocol*, which is an amendment to the *United Nations Framework Convention on Climate Change* (1997).

Like all agreements, all international conventions, to be effective law internationally and domestically, need to be binding:

- as between nations,
- by complying with the agreed arrangements of the United Nations, and
- to have been passed into the law of the relevant nation state.

Research Task

Treaties usually consist of a title, a preamble, recitals, a series of numbered articles and a conclusion, which is immediately followed by the signatures of the parties listed above.

1. Locate and select a treaty of your choice. [S]
 - a. Identify where it was signed, and by which nations. [C]
 - b. State the main aim and objective of the treaty. [C]

Tip

Treaties signed by Australia can be found on a *Commonwealth Government Treaty Database* (austlii.edu.au/other/treaties/).

All treaties can be found on the *United Nations Treaty Series* (untreaty.un.org).



Accession, ratification, and reservations

In order for the purposes and principles of the *United Nations Charter* and the *International Bill of Rights* to be developed through the nation States of the United Nations, it was necessary for a process to be established to ensure the human rights covenants adopted by the UN Assembly would become part of international and domestic law.

The best way to approach this topic, is to initially think about it in a similar way to the way in which contract law is applied after an initial contract has been agreed to between the parties.

Where **an additional party seeks to join an existing contract, all of the parties to the existing contract must agree.**

Where one of the parties to a contract seeks to **change the terms of an existing contract**, if the parties all agree to the change, a new contract can be entered into by the parties. Contract law requires these **various processes to ensure the parties are legally bound.**

In the same way, the documents produced at meetings of member nations of the United Nations, needed to have a **system of arrangements that nations could follow**, as they decided to firstly, agree to their terms, and secondly, to make them part of their domestic law. This process is recorded in a United Nations Convention.

Practical Application



Vienna Convention on the Law of Treaties (1969)

Article 12 (2) (b): Signature ad Referendum

A representative may sign a treaty 'ad referendum', i.e., under the condition that the signature is confirmed by the State. In this case, the signature becomes definitive once it is confirmed by the responsible organ.

Articles 10 and 18: Signature Subject to Ratification, Acceptance or Approval

Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses a willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and purpose of the Treaty.

Articles 2 (1) (b), 14 (1) and 16: Ratification

Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accompanied by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.

Articles 2 (1) (b) and 15: Accession

'Accession' is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty is entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions

Practical Application ...



to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the Treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur if the negotiating states were agreed or subsequently all agreed on it in the case of the state in question.

Articles 2 (1) (d) and 19-23: Reservation

A reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the Treaty in their application to that state. A reservation enables a state to accept a multilateral treaty as a whole by giving it a possibility not to apply certain provisions with which it does not want to comply. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to. Reservations must not be incompatible with the object and purpose of the Treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made.

1. Each of the main terms described and explained in the separate paragraphs above is captured in a 'topic' sentence. In each case write down the sentence exactly as it is expressed. Does the sentence you have selected accurately describe the meaning of the term? If not, why not? [C] [A]
2. In Article 12 (2) (b), Signature and Referendum, what do the words 'confirmed by the responsible organ' mean? [C]
3. Suppose that in an Australian contract, under common law, there is an express clause which states, 'Where this contract has been signed by all parties, it shall not be binding until the physical or electronic version of the contract has been countersigned by an authorized representative of each party and delivered to all parties electronically, by facsimile, or physically.' Do you think this is what is intended by the 'Signature Subject to Ratification' article? Why do you think there are further obligations created by the last sentence of the article? [A]
4. Compare the explanation about the possible process in a contract in the previous question to the explanation in the 'Ratification' article about the processes by which a nation member of the United Nations can become bound by ratification. Explain any similarities and differences. [A]
5. How does 'Accession' differ from 'Ratification'? Describe and explain the process by which a state can enter into a treaty after a number of other nations have already negotiated the terms, and where that state is not included as a possible party in the provisions of the treaty. Why do you think these arrangements have been agreed by the members of the United Nations who initially drafted the *Vienna Convention on the Law of Treaties* (1969)? [C] [A]
6. What is the purpose of a state making a 'Reservation'? In what circumstances are reservations allowed to be made? [C]
7. Analyse the processes of accession, ratification, and reservation in the context of the human rights covenants adopted by the UN Assembly with a view to the development of human rights law in the international legal system. [A]

Australia is a signatory to many of United Nations Conventions (Covenants, Treaties, and Protocols). Many of these are studied throughout Unit 4. We will indicate to you the status of each convention, referring to when it has, or has not become part of our domestic law and consequently the Australian legal system. By way of illustration a simplified diagram follows which illustrates the status, in Australia, of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966).



International Covenant on the Elimination of All Forms of Racial Discrimination (1966)

(One of the first human rights treaties to be adopted by the United Nations. Australia becomes a signatory in 1969)

Racial Discrimination Act 1975 (Cth)***7 Ratification of Convention***

Approval is given to ratification by Australia of the Convention.

(Australia ratified this Convention on 30 September 1975, subject to certain reservations)

13.3 Customary international law

You have already studied the common law and customary law as sources of law in the Australian legal system. In fact, one of the features of the Australian legal system was the growing recognition of customary law with reference to the land rights of First Nations Peoples. In the landmark cases of *Mabo* and *Wik* the High Court of Australia made new law. Similarly, the story of how customary international law has been part of the development of human rights law in the international legal system is the story of the United Nations human rights covenants creating new international law.

The statute of the *International Court of Justice (ICJ)*, Article 38 states that one of the sources of international law is the customary law derived from the practices of states.



Practical Application

Professor Christopher Greenwood, in his article *Sources of International Law: An Introduction*, puts it this way:

Customary Law is not a written source. A rule of customary law, e.g., requiring states to grant immunity to a visiting head of state, is said to have two elements. First, there must be widespread and consistent state practice-i.e. states must, in general, have a practice of according immunity to visiting head of state. Secondly, there has to be what is called '*opinio juris*', usually translated as 'a belief in legal obligation'; i.e. states must accord immunity because they believe they have a legal duty to do so. As the ICJ has put it:

not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it... The states concerned must feel that they are conforming to what amounts to a legal obligation (North Sea Continental Shelf cases, ICJ Reps, 1969, p.3 at 44).

Source: Professor Christopher Greenwood, 'Sources of International Law: An Introduction', *Lecture Series, Audiovisual Library of International Law*, <legal.un.org/avl/faculty/Greenwood.html>.

1. What are the two requirements that Professor Greenwood identifies as necessary for a rule of international customary law to be established? [C]



Case Study

North Sea Continental Shelf (Federal Republic of Germany/Netherlands/Denmark) 1969

Facts: These cases concerned the delimitation of the continental shelf of the North Sea between Denmark and the Federal Republic of Germany. The Parties asked the Court to state the principles and rules of international law applicable and undertook to carry out the delimitations on that basis. By an Order of 26 April 1968 the Court, having found Denmark and the Netherlands to have the same interest, joined the proceedings in the two cases.

Legal Issue: What were the principles and rules of international law applicable to delimit the continental shelf boundaries between the parties?

Decision: In its judgment, delivered on 20 February 1969, the Court found that the boundary lines in question were to be drawn by agreement between the Parties and in accordance with equitable principles in such a way as to leave to each Party those areas of the continental shelf which constituted the natural prolongation of its land territory under the sea, and it indicated certain factors to be taken into consideration for that purpose. The Court rejected the contention that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in the *Geneva Convention on the Continental Shelf* (1958). The Court took account of the fact that the Federal Republic had not ratified that Convention and held that the equidistance principle was not inherent in the basic concept of continental shelf rights, and that this principle was not a rule of customary international law.

Research Task

1. Locate and select legal information that explains the 'Law of the Sea'. [S]
2. Is there an international customary law principle to determine the sea boundary between countries? Analyse the legal reasons why the ICJ rejected the principles contained in the *Geneva Convention on the Continental Shelf* (1958). [A]



When a new rule of customary international law is contemplated, both of the elements identified by Professor Greenwood must be satisfied. This is a high threshold for international human rights law to reach, given that most covenants adopted by the United Nations are dated after 1948. Of course, there are many instances in the domestic law of democratic countries where human rights predate the United Nations. These include the right to a fair trial, the right to own property, and the right to be compensated for damage suffered or caused by a third party contractually, or as a consequence of negligence.



The institutions of the United Nations, and academic writers, have begun to record international human rights, arguing that many of these rights should be accorded the status of a rule of customary international human rights law. In future chapters of this book there will be examples of covenants which have been agreed to by the members of the United Nations, which arguably satisfy the requirements to be new rules of customary human rights international law.

In a book titled *The Customary International Law of Human Rights* (Oxford University Press, 2021) William A Schabas concludes that, 'a large number of human rights norms may be described as customary in nature, and that courts should make greater use of custom as a source of international law'. Extracts from the *abstract* of this book are in the following practical application.



Practical Application

THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS

Human rights law was viewed as quintessentially a matter of sovereign concern to States until the mid-twentieth century, when treaties and declarations were adopted by the United Nations and other international bodies. Jurists only began to speak of human rights as customary law in the 1960s. Although its existence is uncontroversial, the content of customary international law in the area of human rights has not previously been analysed in a comprehensive manner. This book discusses the emergence of the customary law of human rights, the debates about how it is to be identified, and the efforts at formulation of customary norms. It examines human rights norms in order to determine whether they may be described as customary, using as a basis the content of the *Universal Declaration of Human Rights*. Much reliance is placed upon relatively new sources of evidence of the two elements for the identification of custom, namely State practice and *opinio juris*, in particular the increasingly universal ratification of major human rights treaties and the materials generated by the Universal Periodic Review mechanism of the Human Rights Council.

Source: William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press, 2021) <academic.oup.com/book/39904>.

1. When did human rights law cease to become solely a matter of sovereign concern to States? [C]
2. When, according to the author, did jurists begin to speak of human rights as customary international law? [C]
3. Describe the author's approach to making a case for determining whether or not current human rights norms can be described as customary. [C]

13.4 General principles of international law

It is generally accepted that the, 'general principles of law recognised by civilised nations', the third source of international law identified in the statute of the ICJ Article 38, are principles of law that are widely accepted and practised in national legal systems.

We have referred to these general principles earlier, in other contexts. For example, the principles governing the extension of a country's borders out to the edge of the continental shelf adjacent to its sea boundary, the immunity of a head of state seeking refuge, and the right to a fair trial.

The question which arises for international human rights law, is when, if at any time, a general principle of international law accepted by international jurists and the ICJ, can be said to be also a principle found in the international law of human rights.

In 1986 the UN Commissioner on Human Rights proposed a definition for a general principle by *Resolution 41/120, December 1986*, which stated that for a general principle to be embedded in international human rights law it must:

- be consistent with the existing body of international human rights law,
- be of a fundamental character and derive from the inherent dignity and worth of the human person,
- be sufficiently precise to give rise to identifiable and practicable rights and obligations,

- provide, where appropriate, realistic and effective implementation machinery, including reporting systems, and
- attract broad international support.

Of course, there are general principles of international law which need not be part of international human rights law. Some general principles of international law which are arguably part of international human rights law include:

- the right to a fair trial,
- the right to asylum as a refugee,
- freedom from torture, cruel or degrading treatment or punishment,
- freedom from slavery and forced labour,
- freedom from arbitrary arrest or detention,
- the right to privacy,
- freedom from discrimination, and
- freedom from racial or religious hatred.



What do you think?

Can you identify additional general principles of international law which are also part of the international human rights legal system? Explain why you have chosen these using legal criteria. Do you think it is important for Nation States to accept the general principles of international law which you have chosen? Why? [A] [E]



13.5 International Court of Justice (ICJ)

The third source of international law identified by Professor Greenwood from the *Statute of the ICJ* is judicial decisions. The extent to which the decisions of the ICJ provide a framework for the development of international human rights law will become apparent as you read on. You should note that the word 'statute' does not carry with it the same meaning as the word 'statute' when used in connection with an Act of Parliament in Australia.

Statute of the International Court of Justice

Article 34

1. Only states may be parties to matters before the court.

Article 38

1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. International conventions, whether general or particular establishing rules expressly recognized by the contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognized by civilized nations;
- d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Applying Article 34, the ICJ does not have jurisdiction to make orders which bind any nation other than the nation parties appearing before it in a dispute which arises under international law. This does not mean that one nation is not able to allege that another nation is **in breach of a right if, which observed, would ensure the human rights of that nation's peoples**. The *Nuclear Test* cases involving France and New Zealand were such cases. Decisions of the ICJ are only binding on the parties that bring the dispute before the court. **The ICJ does not set any precedents which are binding on all nations.**

As States freely submit cases to the ICJ there is a reasonably good record of countries complying with the ICJ's decisions but there are quite a few cases of non-compliance where the decision is ignored. In some cases, a country will withdraw itself from the ICJ jurisdiction, as occurred in the cases set out below.



Case Study

Nuclear Test Cases (Australia v France, New Zealand v France) 1974, ICJ Rep 253

Facts: In 1966, France began atmospheric testing in the Pacific Ocean at its colony of French Polynesia. This was because four years earlier, France's African colony Algeria, which France had used as a nuclear test site, gained its independence and refused to allow nuclear testing to continue. Australia and New Zealand were concerned about the risk to their countries from the high level of radioactive fallout from the recurring above-ground nuclear tests. In 1973 Australia and New Zealand brought their case to the ICJ. Their main ground was that testing is a breach of the customary international law rule that injury should not be caused to another nation. The French Government did not carry out any further such tests.

Legal Issue: Were the atmospheric nuclear tests unlawful under international law?

Decision: The majority decided it would not determine whether atmospheric testing was lawful or not in the South Pacific. They found it was no longer an issue on which the ICJ had to rule. This was because the French President, Foreign Minister and the Ambassador to New Zealand had made a series of public statements to the effect that France now had sufficient data on atmospheric testing and would soon switch to underground tests. The majority held that France was now bound by those statements and was under a legal obligation to stop testing. The majority added that if France did not stop atmospheric testing Australia could reopen the case in the ICJ.

The minority, five judges including Australia's *ad hoc* (appointed) judge for the case, Sir Garfield Barwick, gave a strong dissent. They argued that the ICJ should hear the case on its merits and determine the issue of whether atmospheric nuclear testing by France was lawful in the South Pacific.

(Commentators felt political considerations were important as both France and China were conducting atmospheric tests at the time, and both would have ignored any ICJ ruling of

Case Study ...



illegality of above ground nuclear testing. France withdrew its acceptance of the jurisdiction of the ICJ in 1973, just prior to the case being heard.)

Between 1966 and 1974, France conducted 41 atmospheric tests in the South Pacific and 138 underground tests up to 1992. It stopped testing in 1992 due to its obligations arising under the *Nuclear Non Proliferation Treaty* (1968) which France had just signed.

1. State in your own words the international customary law principle which Australia and New Zealand wished to have enforced against France. You should describe in your answer the harm which Australia and New Zealand claim France is causing to them. Do you agree with the claim? [C] [E]



Case Study



Nuclear Test Case (New Zealand v France) 1995 ICJ Rep 288 (Australia joined this action.)

Facts: Australia and the international community were incensed when French President Jacques Chirac announced in June 1995 that France would lift the moratorium and resume underground nuclear tests in the South Pacific. France proceeded to conduct eight tests between September 1995 and May 1996. New Zealand and Australia were concerned that the testing cracked the atoll where the tests were being carried out and allowed seepage of radioactive material into the ocean. This would harm marine life and could be spread by currents and storms across the Pacific towards New Zealand and Australia. The argument was that the nuclear testing posed increased risks to humans as well as to the environment.

Legal Issue: Given the extent of harm being done to the marine environment, could the ICJ reopen the 1974 case to give a ruling of illegality against French tests in the South Pacific or could it hear a new case on the issue of underground testing? New Zealand also requested the ICJ to conduct an independent environmental impact assessment as part of the decision-making process.

Decision: The majority held that the 1974 case could not be reopened. The 1974 decision referred only to atmospheric testing. New Zealand's argument that it should be read more broadly to cover French Pacific testing generally as both forms create radioactive contamination in the marine environment was rejected by the ICJ. They also ruled that the fact France had removed itself from ICJ jurisdiction prevented a new case being brought to the ICJ.



Case Study ...

The minority argued that there is in international law a 'basic principle, that no nation is entitled by its own activities to cause damage to the environment of any other nation', and that the legality of the testing should be determined by the Court.

While the case was being brought to court there were protests throughout the world demonstrating the international discontent with France's actions. People refused to buy French products in New Zealand, Australia, and Japan.

The result was that France bowed to the negative reaction of the international community and in May 1996 stopped all testing and signed the *Comprehensive Test Ban Treaty* (1996).



What do you think?

Do you agree with the majority or the minority opinion in the above case? Give your reasons. [E]

The ICJ cannot hear cases when one party is an individual, a company or NGO. This means that a potential claim for an alleged breach of a human rights by such a plaintiff will not be heard by the ICJ. On the other hand, it will hear disputes between nations which arise pursuant to an international convention which is about human rights, if the parties consent, or are both bound by the relevant convention because they have ratified or acceded to it. An example of this is found in a case commenced by Georgia against the Russian Federation.



Case Study

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), proceedings instituted 12 August 2008

Claim: The Russian Federation, through its state organs, state agents, and other persons and entities exercising governmental authority, and through the South Ossetian and Abkhaza separatist forces and other agents acting on the instructions of, and under the direction and control of the Russian Federation, is responsible for serious violations of its fundamental obligations under ICERD, including articles 2,3,4,5 and 6.

Decision: Following several preliminary hearings, the Court requested each party to provide submissions in relation to whether or not it should proceed to hear the claim on the merits. Following submissions, the Court concluded that none of the documents or statements provided any basis for a finding that there had been a dispute about racial discrimination. It followed from the general finding of the court and the specific findings made with regard to each document and statement that Georgia had not, in the court's opinion, provided support for its contention that the dispute with Russia over ethnic cleansing was long-standing and legitimate.

Although the ICJ took the matter through various preliminary stages, on the basis that the parties were both signatories and had ratified the ICERD, it did not consider that there was evidence for it to conclude that Russia had breached its obligations under the Convention. The claim was dismissed.

Source: International Court of Justice, *Chapter xiv: International Court of Justice*, (Web Page, Accessed 11 July 2019) <icj-cij.org/en/case/140>.

1. Describe the claim made by Georgia. Did the court make a finding on the facts against Georgia? What does this case illustrate about jurisdiction of the ICJ? Explain the legal basis for the decision of the court. [C] [A]

The ICJ's second role is to give legal advice, known as advisory opinions, when requested by the United Nations and its various specialised agencies. Individual governments and other bodies such as NGOs cannot request such an opinion. In the last 60 years the court has given many advisory opinions, including advice on the legal consequences of the construction of a wall in the occupied Palestinian Territory, admission to UN membership, and reparation (compensation) for injuries suffered in the service of the United Nations.

The ICJ cannot investigate disputes of its own motion. If a party is dissatisfied with the ICJ decision and has no avenue of appeal, but can challenge the scope or meaning of the decision it can apply for a review of the decision. The ICJ is not a criminal court and has no jurisdiction to prosecute any state or individual for criminal acts. Nor does it have power to hear appeals from other international courts or from national courts. It is not a court of last resort like the High Court of Australia.

Research Task

1. Locate the website of the ICJ (icj-cij.org/homepage). [S]
2. Select a contentious case, preferably one which involves a convention on human rights. [S]
3. Create a case summary under the headings, Facts, Legal Issues and Decision. [C]



13.6 International Criminal Court (ICC)

The ICC is a permanent court situated in the Hague. It has the responsibility of prosecuting individuals for offences which arise under international criminal law. These are crimes so heinous that they cannot be left to one nation to prosecute. These crimes include genocide, crimes against humanity and war crimes. This new form of law was recognised after World War II when the atrocities committed by members of Germany's Nazi regime against European Jews, and the annihilation of millions of civilian victims in concentration camps, warranted special trials and punishment.

- **Genocide:** the deliberate and systematic destruction of an ethnic, religious or national group.
- **Crimes against humanity:** a repeated practice of atrocities tolerated or condoned by government or a de-facto authority. Murder, execution, torture, rape, and forms of persecution will only reach the threshold of crimes against humanity if they are a part of a widespread or systematic practice. An isolated incident is not enough and would need to be tried under national laws.
- **War crimes:** crimes that violate the laws of war, such as the killing of men who surrender or the torturing of captured enemy soldiers.
- **Aggression:** The *Rome Conference* (1998) that established the court and its rules, could not agree on the legal definition of aggression, so that jurisdiction remains dormant for now and there will be no prosecutions brought until this issue is settled. The *Rome Statute* which established the ICC became a binding treaty in April 2002, with 60 nations ratifying it. The ICC can only prosecute crimes committed after that date.

It is clearly a breach of the human rights of individuals living in a country where they are part of a group oppressed and persecuted by the de-facto rulers, or even the legitimate rulers of that country. It seems fairly clear that this is what has happened at to the Rohingya citizens of Myanmar. The first trial held by the ICC concluded in October 2012 with the accused Lubanga of the Congo found guilty.



Case Study

The Prosecutor v Thomas Lubanga Dyilo of the Congo

Facts: Lubanga was a military commander in the Congo. He led an ethnic revolt under the banner of the Union of Congolese Patriots (UCP) to demand that Ituri become an autonomous province of the Congo. He used child soldiers in his militia with evidence that 800 children under 15 years of age were recruited or forced to join. He attacked civilians on the basis of their ethnicity and destroyed villages. In 2004, the Congolese Government authorised the ICC to commence investigations.

In 2006, Lubanga became the first person ever arrested under an ICC arrest warrant and charged with a war crime. He was flown to The Hague where he was kept in the ICC detention centre. His trial opened on 26 January 2009.

Legal Issue: Did Lubanga commit the crime of conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities?

Decision: Lubanga was convicted of the offence in 2012. The court found that he was Commander in Chief of the UCP. Lubanga exercised an overall coordinating role of their activities and he had actively supported recruitment initiatives, for instance, by giving speeches to the local population and to the young recruits. He also personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UCP/ FPLC staff members who were below the age of 15. This evidence established beyond reasonable doubt that he had committed the offence.

13.7 The rights of states

Statehood is clearly necessary for a country to qualify as a member of the United Nations (UN), and to be able to enter into legal relationships with other states and with the organisation.

Membership of the United Nations

Membership of the UN is open to all peace-loving States that accept the obligations contained in the *UN Charter* and, in the judgment of the Organisation, are able and willing to carry out these obligations. The admission of any such state to membership of the UN will be effected by decision of the General Assembly upon the recommendation of the Security Council.

Some of the criteria to determine statehood set out in the *Montevideo Convention on the Rights and Duties of States* (1934) include:



Article 1

The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.

What do you think?

Taiwan, as part of the Republic of China, has applied many times for membership of the UN, and been refused. In 2024, it made a further application for membership. Taiwan argues that the nation meets the criteria of the *Montevideo Convention*. Apply the four criteria set out in *Article 1* of the Convention to decide whether it does, or does not, meet the criteria.

Should Taiwan, as part of the Republic of China, be admitted to membership of the UN? Why do you think it has not been accepted as a state by the UN? [A] [E]

Sovereignty

The importance of this concept is that within international law, the extent to which legal relationships are binding as between one state and another, and the extent to which the United Nations can involve itself in the domestic law of a nation, is determined by the *United Nations Charter*.

Practical Application

The United Nations Charter

Chapter 1—Purposes and Principles

Article 2 (1)-(5)

The Organisation and its Members, in the pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

- 1. The Organisation is based on the principle of the sovereign equality of all its Members.*
- 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent the purposes of the United Nations.*
- 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.*

1. Look up the meaning of the word 'sovereign' in your dictionary. What do you think Principle 1 should mean to a Member? [C]
2. Describe and explain in your own words *Principle 4*. What main *Purpose* set out in the *United Nations Charter* does it support? [C]
3. When does *Principle 7* permit the United Nations to intervene in the affairs of a member? When might such an issue arise? [C]

According to Professor James Crawford, who was elected in 2014 as Australia's second only ever judge on the *International Court of Justice*, sovereignty is a:

Flexible legal concept that is adapting to globalization, consistent with a variety of complex internal forms of government and with the evolution of international institutions.

He goes on to say it is a 'description of statehood', identifying a number of legal characteristics including that:

LEGAL CHARACTERISTICS OF A DESCRIPTION OF STATEHOOD

- States have the ability on the international stage to perform acts, and agree to conventions (covenants, treaties etc).
- States have exclusive competence in their internal affairs.
- States are not subject to compulsory international processes, jurisdiction or settlement without the consent, given either generally or in the specific case.
- States are regarded as 'equal' (although this may be formal rather than substantive).

Source: James Crawford, 'Sovereignty and Law', *Pocketbooks of the Hague Academy of International Law* (Online, 2013) <hagueacademy.nl/publications/page/4/?term=&author=&cat=pocketbook>.

The point is that entering into specific and legal arrangements with other states and withdrawing from those arrangements is an attribute of sovereignty. This is reflected in the process necessary to legally bind a member to Conventions as set out earlier in the section on the *Vienna Convention on the Law of Treaties* (1969). Merely signing a convention is not enough, there must be ratification or accession before it is binding, and even then, a member State may withdraw from the agreement.

Territorial disputes

All sovereign nations have borders. These will either be land or maritime (sea) borders. The area within these borders is said by the relevant state to be its territory. In the short history of the United Nations there have been many territorial disputes. Territorial disputes are the subject of Article 2(4) of the *UN Charter*. **This requires matters in dispute to be resolved in accordance with both international law and with the Purposes and Principles of the Charter.**

A territorial dispute is a disagreement over the possession/control of land (or sea) between two or more territorial entities or over possession or control of land (or sea) usually between a new state and the occupying power.



Practical Application

SOUTH CHINA SEA

Rising maritime tensions between China and the Philippines have highlighted the risk of armed conflict in the South China Sea and the dangers it would pose to global trade.

The Philippines controls nine outposts in the Spratlys, a contested group of land and maritime features at the heart of the South China Sea. A submerged reef known as Second Thomas Shoal has become a dangerous flashpoint, with Chinese boats continually trying to block Manila's efforts to resupply the BRP Sierra Madre, a rusting ship housing a handful of

Practical Application ...

soldiers that a former Philippine government purposely grounded in 1999 in a bid to assert sovereignty over the atoll. China, which also claims the shoal, first started interfering with these missions in 2014, but relations between the two countries in the maritime domain have never been as volatile as during the last seven months. Chinese boats have regularly rammed the Philippine supply vessels or doused them with water cannons, occasionally wounding the sailors on board.

Source: Crisis Group, 'South China Sea', (Web Page, 10 October 2024) <crisisgroup.org/asia/south-east-asia/philippines-south-china-sea/philippines-calming-tensions-south-china-sea>.

SOUTH CHINA SEA ARBITRATION RULING: WHAT HAPPENED AND WHAT'S NEXT?

The arbitral tribunal adjudicating the Philippines' case against China in the South China Sea ruled overwhelmingly in favor of the Philippines, determining that major elements of China's claim—including its nine-dash line, recent land reclamation activities, and other activities in Philippine waters—were unlawful. Predictably, China reacted negatively to the ruling, maintaining it was "null and void." China may take assertive and inflammatory steps to defend its position. The extent to which China abides by the ruling in the long term, and to which the international community supports and seeks to enforce the ruling, will have consequences for the utility of international law as a tool to ensure the peaceful, stable, and lawful use of the seas going forward.

The Permanent Court of Arbitration in The Hague released the ruling of the arbitral tribunal constituted under the *UN Convention on the Law of the Sea* (UNCLOS)* on the case initiated by the Philippines in 2013 regarding China's claims and activities in the South China Sea.

Source: Caitlin Campbell and Nargiza Salidjanova, 'South China Sea Arbitration Ruling: What Happened and What's Next?' *U.S. China Economic and Security Review Commission* (Web Page, March 15 2016) <uscc.gov/sites/default/files/Research/USCC%20Staff%20Report%20on%20China%20Countering%20US%20Military%20Presence%20in%20Asia.pdf>.

1. What is the nature of the dispute between China and the Philippines? [C]
2. Describe in your own words what is happening in the South China Sea. [C]
3. Where did China and the Philippines go to seek a ruling which would resolve this dispute? [C]
4. What was the ruling made in this matter by the Permanent Court of Arbitration? [C]
5. Describe China's reaction to the ruling and analyse the issues raised by this reaction for the international community and the rule of international law. [C]
6. Identify the individual human rights in the *Declaration of Human Rights* which might be affected in the future by such disputes. Analyse the importance of maintaining a system of international law to resolve such disputes. [C] [A]



Review

Comprehend

- Define** the following:

a. International law	d. Accession
b. Convention	e. Sovereignty
c. Ratification	f. Customary international law [C]
- Describe** and **explain** the 'rights of nation states'. [C]
- Describe** and **explain** the jurisdiction of the *International Court of Justice*. [C]
- A claim is filed in the *International Court of Justice*. **Explain** where the court finds the sources of law to determine the case. [C]
- Describe** and **explain** the difference between the process of ratification and process of accession. What further steps must be taken by a nation State to make an international treaty domestic law? [C]
- Describe** and **explain** the role of the *International Criminal Court*. [C]

Analyse and evaluate

- Analyse** the process by which a treaty can become international law and domestic law, and the limits on the enforcement of a treaty in the ICJ. [A]
- Decide** the legal issue below. **Justify** your answer. [A] [E]

Facts: Countries A and B are both signatories to the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) (ICERD) and pass domestic laws establishing various rights against discrimination in an Act of Parliament which also ratifies the Convention. Both countries A and B have Indigenous peoples who were killed and displaced from their homes by European colonisation. Country A does not allow the native language of its Indigenous peoples to be taught in the schools which their children attend. This has led to widespread loss of language skills over succeeding generations which is continuing. On the other hand, Country B has taken steps to promote the native languages of its Indigenous peoples.

Country B decides it wants to take legal action at an international level in the *International Court of Justice* to compel Country A to introduce a policy that leads to its Indigenous children being taught their native language as well as English.

There is no clause in the ICERD which says that the parties to this convention are not able to take legal action against any other party to the convention to enforce its terms.

Legal Issue: Should Country B be able to take legal action against Country A to stop it from discriminating against its Indigenous children? If so, would Country B be likely to be successful?

1. Read the following article and describe the issue which it highlights for the international legal system, because international human rights law establishes rules of international law which some nation states are unable to meet. **Analyse** and **evaluate** the point of view of the Dominican State, and make recommendations about the position the UNHCR should take, and approaches it could use, to convince the Dominican State to accept the court's decision. [A] [E]

NATIONAL SOVEREIGNTY v HUMAN RIGHTS

At the end of October, the highest court in the Americas found the Dominican state responsible for denying identity documents to thousands of Dominicans of Haitian descent and arbitrarily depriving them of their nationality.

For years, Dominican human rights organizations have highlighted how discrimination is fuelling abuses against Dominicans of Haitian descent and Haitian migrants in the country.

In an official statement, a spokesman for the President's Office refused to accept the Court's decision on the grounds that it was "out of season, biased and inappropriate" and rejected interpretations of international law that could "affect Dominican sovereignty". A former President said that the decision was "an affront to national sovereignty, a violation of the democratic system and an insult to the Dominican people."

Source: Robin Guittard, 'National Sovereignty v Human Rights,' *Amnesty International*, (Web Page, 11 October 2024) <[amnesty.org/en/latest/campaigns/2014/11/national-sovereignty-vs-human-rights/](https://www.amnesty.org/en/latest/campaigns/2014/11/national-sovereignty-vs-human-rights/)>.

Human rights

Chapter 14: Human rights of children and prisoners

14.1 *Convention on the Rights of the Child*

14.2 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Learning objectives

At the conclusion of this chapter, students will be able to:

- describe the key features of principal treaties including the:
 - *Convention on the Rights of the Child* (1989)
 - *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984)
- explain the role of the United Nations, its agencies and other organisations.

Now that you understand more about the *International Bill of Human Rights*, we will shift our focus to two pivotal instruments designed to protect particularly vulnerable populations, children and those in custody. These populations rely on the actions and decisions of others to uphold their human rights. This chapter will explore the origins, principles and processes relevant to the *Convention on the Rights of the Child* (CRC) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

14.1 Convention on the Rights of the Child (CRC)

*The Convention marks a distinct moment in history that dramatically changed the way children were treated and viewed. **Instead of seeing children as passive and in need of protection, the Convention articulated a view of childhood in which children were empowered and independent.** This had the effect of re-conceptualising the traditional dichotomy between adults and children, so that children were no longer simply subject to adult control.*

Megan Mitchell, Children's Commission, 2019.

Origins and purpose

The *Convention on the Rights of the Child* (CRC) is not just a legal document, but a global commitment to protect and promote the rights and wellbeing of children worldwide.

The Convention was developed with input from various stakeholders, including governments, non-governmental organisations, human rights advocates, lawyers, health specialists, social workers, educators, child development experts and religious leaders.

Although the CRC is the document we will focus on, it is just one of many documents that have sought to identify, recognise and protect children's rights in international law. Many different human rights instruments have recognised the specific rights of children due to their vulnerability and influenced the creation of the CRC, as shown in the timeline below.



TIMELINE OF KEY EVENTS CONCERNING CHILD RIGHTS

1924	The League of Nations adopts the <i>Geneva Declaration on the Rights of the Child</i> .
1946	The United Nations General Assembly establishes the International Children's Emergency Fund (UNICEF).
1948	The United Nations passes the <i>Universal Declaration of Human Rights</i> . Article 25 entitles children (and their mothers) to 'special care and assistance' and 'social protection'.
1966	The <i>International Covenant on Civil and Political Rights</i> and <i>The International Covenant on Economic, Social and Cultural Rights</i> , promises to provide equal rights for all children.
1979	The International Year of the Child declared.
1989	The <i>Convention on the Rights of the Child</i> is adopted.
2000	The United Nations adopts two <i>Optional Protocols</i> . These <i>Optional Protocols</i> obligate State Parties to take key actions to prevent children from taking part in armed conflict and to end the sale, sexual exploitation and abuse of children.
2011	A new <i>Optional Protocol</i> is adopted. This <i>Optional Protocol</i> sets out a procedure to field complaints and undertake investigations of human rights violations against children.

Source: United Nations International Children's Emergency Fund (UNICEF), 'Timeline of child rights', (Web Page, No Date) <unicef.org/child-rights-convention/history-child-rights>.

The CRC was adopted and opened for signature, ratification, and accession by the United Nations General Assembly in 1989. It came into force on 2 September 1990, marking a significant step towards ensuring equal rights for all children. **It is the most widely ratified human rights treaty in history.**

To understand the nature and scope of the CRC, it is essential to examine the definition of a child. According to the CRC (Article 1), a child is defined as being, '*...every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier*'.

This definition is important when looking at the implications of some of our laws.



What do you think?

Prior to 2016, under Queensland law, a 17-year-old sentenced to detention served their sentence in an adult prison. This changed when the Queensland Parliament passed the *Youth Justice and Other Legislation Amendment Act (No. 2) 2016* (Qld), which raised the age to 18.

Considering the definition of a child set out in the *Convention on the Rights of the Child* (Article 1), was a 17-year-old considered a child under the original Queensland law? Explain your reasoning. [A]

Principles and key rights

The CRC acknowledges that children have the same human rights as adults while also noting that young people are vulnerable to exploitation and abuse, as they are dependent on adults to support their health, well-being and development. At its core, the CRC aims to:

- provide every child with equal rights (non-discrimination),
- empower children to express their views on matters affecting them, and
- ensure the best interests of the child are considered in any laws and legal processes that impact them.

The CRC sets out:

- who children are,
- the civil, political, economic, social, and cultural rights children and young people have, and
- the extra responsibilities adults and governments have to ensure that all children can access their rights.

We will look at these key principles and rights now.

Research Task

1. Locate a copy of the *Convention on the Rights of the Child*. The complete version of this document can be found on the UNICEF website (unicef.org/child-rights-convention), which also includes a child-friendly version. [S]
2. Categorise the first 43 articles into the following categories shown in the table below. Leave out those that cannot be categorised. [C]

Civil rights	Health, welfare and developmental rights	Protection from abuse rights	Participation rights

3. Two Optional Protocols were adopted in 2000. The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (OPAC) and the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*. In which category would these two Optional Protocols sit? Why? [C]

Implementation and monitoring

Think back to the list of rights you categorised in the previous activity. Do some of them seem familiar? Have you seen them in an Act of Parliament? By now, you are aware of the complexity and importance of incorporating international agreements, like the CRC, into domestic legislation. Without it, children (or their advocates) will not be able to use our legal system to protect and promote their human rights.

By ratifying the CRC in December 1990, Australia made a significant commitment to ensuring that all Australian children enjoy the rights outlined in the document. **There is no single Act that contains all the rights children should have according to the CRC in one document. Instead, some rights listed in the CRC are included across a number of domestic legislative instruments at both a State and Commonwealth level.** An example of this is found in the *Family Law Act 1975* (Cth).



Inquiry Focus

How effectively does Australian law promote respect for the views of children in family law matters?

Over the years, many amendments have been made to the *Family Law Act 1975* (Cth). These amendments have sought to improve how parenting orders (legally enforceable decisions that outline the responsibilities and rights of parents about their children's care, including arrangements for living, contact and communication) were decided. These amendments are said to reflect some underlying principles of the *Convention on the Rights of the Child* (CRC), that is, that the best interests of the child must be the primary consideration in all actions concerning them and that children have a right to express their views freely in matters affecting them.

Practical Application

Source 1: *Convention on the Rights of the Child*

Article 12

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Source 2: Extract of *Family Law Act 1975* (Cth)

S60CA *Child's best interests paramount consideration in making a parenting order*

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

S60CC *How a court determines what is in a child's best interests*

General considerations

(2) For the purposes of paragraph (1)(a), the court must consider the following matters:

- (b) any views expressed by the child;*

60CD *How the views of a child are expressed*

(1) Paragraph 60CC(2)(b) requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. This section deals with how the court informs itself of views expressed by a child.

(2) The court may inform itself of views expressed by a child:

- (a) by having regard to anything contained in a report given to the court under subsection 62G(2); or*
- (b) by making an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or*
- (c) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.*

Practical Application ...

1. Explain the human right(s) set out in Source 1 in your own words. [C]
2. Identify whether Article 12 is a civil right; health, welfare and developmental right; protection from abuse right or participation right. [C]
3. Describe the nature and scope of this human right. Your response should:
 - a. Identify the purpose and underlying values of the human right (i.e. what does the human right seek to protect?). [C]
 - b. Explain whether there are any internal limitations or qualifications within the human right. [C]
4. How has this right been incorporated into domestic legislation? [A]
5. Examine whether the *Family Law Act 1975* (Cth) limits or protects the human right(s) within Article 12. [A]

But, does the *Family Law Act 1975* (Cth) satisfy our obligations under international law? **The CRC sets out a monitoring mechanism, that being, regular reporting to a specific organisation of the United Nations, the Committee on the Rights of the Child.**

The Committee on the Rights of the Child is a body consisting of 18 independent experts. Australia (as well as other State parties) submits regular reports to the Committee on the progress they have made to implement the CRC. Non-government organisations can also make contributions to the monitoring process.

Practical Application

Source 3: Alternative Report to the United Nations on the Rights of the Child, submitted by the Law Council of Australia

Respect for the view of the child

In certain jurisdictions there also is a lack of Independent Children's Lawyers (ICLs) for family law matters. In 2014 the Productivity Commission observed that the 'gap in independent lawyer services for children [was] especially worrying'...

... The Law Council has argued that it is in the best interests of the child to 'appropriately fund ICLs so that experienced practitioners in private practice are willing to do more of this work'. Increased funding will also allow ICLs to do more for children and to spend more time on each case and to meet with children more often in environments which are 'convenient to the child and not just the ICL'.

Source: Law Council of Australia, 'Alternative Report on the United Nations on the Rights of the Child', *UN Treaty Body Database*, (Report, 1 November 2018) <tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx>.

Source 4: Submission to the Committee on the Rights of the Child by the Australian Human Rights Commission

95. A number of submissions to the NCC [National Children's Commissioner] in 2018 called for more opportunities for children's voices to be heard—especially in the context of the family court, on custody and related matters.

Practical Application ...

98. Further, the *Family Law Act* does not extend to considering the views of children in non-contested matters. In the sections of the *Family Law Act* that refer to 'non-court based family services', there is no obligation for the child's views to be considered.

99. The Commission welcomes the inclusion of the CRC in the *Family Law Act*, however, notes it is not a primary objective of the whole Act but relates to parenting matters only.

Recommendation 16: The Australian Government amends the *Family Law Act 1975* (Cth) to require that children are provided with an opportunity to express their views in all matters that affect their rights or interests. A child should not be compelled to express a view, but should be provided with the opportunity to do so in a manner appropriate to their age and maturity.

Source: Australian Human Rights Commission, 'Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict', *UN Treaty Body Database*, (Report, 1 November 2018) <[tinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx](http://internet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx)>.

Source 5: Combined fifth and sixth periodic reports submitted by Australia under article 44 of the Convention

Legal and administrative decisions

78. Courts in Australia may consider the views of children as a part of their determination of the child's best interests. The courts consider any relevant factors, such as the child's maturity or level of understanding to ensure children's views are given proper weight.

79. In family law courts, children can express their views in a number of ways. The court may be informed of the views of the child through receipt of a report by a consultant or welfare officer, a judge may interview the child, or the court may ascertain the child's views by such other means as the court considers appropriate. The court may also receive hearsay evidence where that evidence is relevant to the welfare of the child.

Source 6: Concluding observations on the combined fifth and sixth periodic reports of Australia

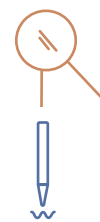
22. With reference to its general comment No. 12 (2009) on the right of the child to be heard, the Committee recalls its previous recommendations on respect for the views of the child (CRC/C/AUS/CO/4, para. 34) and recommends that the State party:

- (a) Amend the *Family Law Act of 1975* (Commonwealth of Australia) to provide all children, in accordance with their age and maturity, the opportunity to have their views heard in all matters concerning them, including in 'non-court-based family services';
- (c) Provide training and support to independent children's lawyers so as to ensure that such lawyers have direct contact with the children they represent in the family courts;



Practical Application ...

1. Identify the two non-government organisations that contributed to the monitoring process of Australia's ratification of the CRC through the submission of their own report. [C]
2. Summarise the issues of concern stated in the report extracts in Source 3 and 4. [C]
3. Compare and contrast what the Australian Government submitted in relation to Article 12 (Source 5) with Source 3, 4 and 6. Examine the viewpoints these sources reflect and their consequences. [A]
4. Imagine you are the Attorney General of Australia. Decide which recommendation identified in Source 3, 4 and 6 you would prioritise, justifying your decision with legal criteria. [E]



Tip

The United Nations has a Research Guide (research.un.org/en/docs/humanrights/treaties) that may assist you to find documents related to a specific body, such as the Committee on the Rights of the Child. This may be useful for future assessment.

Future issues of concern

Many non-government organisations and the Committee on the Rights of the Child raise concerns about how well Australia is developing legislative and policy responses that empower certain groups of children to access their human rights. One particular issue the Committee raised was about the 'disrespect' shown by Australian politicians when commenting on children who participated in climate protests. The Committee stated that climate change will have an undeniable impact on children's rights, and they should be able to express their views on this important issue.

Practical Application

'THE AUSTRALIAN GOVERNMENT IS NOT LISTENING': HOW OUR COUNTRY IS FAILING TO PROTECT ITS CHILDREN

Last month, Australia appeared before the UN Committee on the Rights of the Child in Geneva for a five-year assessment of the government's progress in protecting the rights of children. The hearing included submissions from the Australian government, the Australian Human Rights Commission and civil society organisations on everything from youth justice issues to children's health and well-being.

The committee was extremely critical of the Australian government on a range of issues. These included the high numbers of children in care in the criminal justice system, the continued forced sterilisation of children with disabilities, the government's treatment of refugee and asylum-seeking children, and the lack of meaningful opportunities for children to participate in decision-making on policies that affect their lives.

Source: Faith Gordon and Noam Peieg, 'The Australian Government is not listening': How our country is failing to protect its children,' *The Conversation* (Online, 8 October 2019) <theconversation.com/the-australian-government-is-not-listening-how-our-country-is-failing-to-protect-its-children-124779>.



Practical Application ...

1. How many years have passed since Australia last appeared before the UN committee on the Rights of the Child? [C]
2. Where did the Committee on the Rights of the Child meet? [C]
3. List the issues the UN was critical about in its assessment of the Australian government's actions. [C]

14.2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Over the last 40 years, this **landmark document has proven fundamental** in the global struggle against torture and the fight for justice and reparation for victims, providing not only a basis for the work of the Committee against Torture, but also for other UN anti-torture mechanisms, civil society, and, most importantly, for States parties to the Convention.

Office of the High Commissioner of Human Rights, 2024 <ohchr.org/en/treaty-bodies/cat/40th-anniversary-convention-against-torture>.

Origins and purpose

2024 marked the 40th anniversary of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). This milestone is significant as it underscores the enduring impact and relevance of CAT, a pivotal international human rights instrument that grew out of conflicts such as World War II and the Cold War. It was not the first international legal document that sought to combat torture and cruel, inhumane and degrading treatment and punishment.

Foundational human rights treaties, the *Universal Declaration of Human Rights* (Article 5) and *International Covenant on Civil and Political Rights* (Article 7) both provide that, 'no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.' In 1949, the *Geneva Convention on the Treatment of Prisoners of War* was adopted. In 1975, the United Nations adopted the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Less than a decade after advocacy by human rights organisations, and legal experts and States aiming to strengthen international human rights frameworks, CAT was adopted and opened for signature, ratification, and accession by the General Assembly on 10 December 1984.

The key objective of CAT is the desire to, 'make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.' It hopes to achieve this by:

- establishing a clear and absolute ban on torture and other cruel, inhuman, or degrading treatment or punishment,
- preventing torture and other acts of cruel, inhuman, or degrading treatment or punishment around the world,
- forbidding States from transporting persons to another State where there are substantial

grounds to believe they will be tortured,

- criminalising all acts of torture under its criminal law, ensuring a sense of justice for victims and a deterrent for perpetrators,
- holding States accountable for their actions through a monitoring process including country reviews and addressing individual complaints, instilling a sense of responsibility in the international community.

The Australian Government ratified CAT in 1989. As of 2024, 174 State parties have ratified CAT.

What do you think?

Human rights are an area of law that engages us intellectually, emotionally and ethically. The issue of punishment can be contentious and complex, as it involves balancing various interests and values.

1. Are there particular moments, images, or stories in the last twelve months that stand out to you that might involve torture and other cruel, inhuman, or degrading treatment or punishment occurring in Australia or overseas? How do these make you feel? [C]
2. What questions about fairness, equity, or justice does CAT raise for you? [C]



Key rights

CAT is divided into three parts, with a preamble and 33 articles. CAT:

- provides a comprehensive definition of torture,
- bans the use of torture and cruel and degrading treatment and refoulement (the extradition of individuals at risk to countries where they may face torture),
- requires governments to actively prevent torture, to investigate torture allegations, to provide remedy to torture victims, and
- establishes an appropriate UN committee to deal with issues of redress, monitoring and investigation.

We will now explore these principles and key rights through some learning activities.





Practical Application

Source 1: International law

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Article 1

1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Source 2: Commonwealth criminal law

Criminal Code Act 1995 (Cth)

274.2 Torture

- (1) A person (the **perpetrator**) commits an offence if the perpetrator:
 - (a) engages in conduct that inflicts severe physical or mental pain or suffering on a person (the **victim**); and
 - (b) the conduct is engaged in:
 - (i) for the purpose of obtaining from the victim or from a third person information or a confession; or
 - (ii) for the purpose of punishing the victim for an act which the victim or a third person has committed or is suspected of having committed; or
 - (iii) for the purpose of intimidating or coercing the victim or a third person; or
 - (iv) for a purpose related to a purpose mentioned in subparagraph (i), (ii) or (iii); and
 - (c) the perpetrator engages in the conduct:
 - (i) in the capacity of a public official; or
 - (ii) acting in an official capacity; or
 - (iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Source 3: Queensland criminal law

The criminal offence of torture was inserted into the *Criminal Code 1899* (Qld) in 1997. Many criminal offences were added this year to 'update and streamline' the Code.



Practical Application ...

Criminal Code 1899 (Qld)

320A Torture

- (1) A person who tortures another person commits a crime.
Maximum penalty—14 years imprisonment.
- (1A) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.
- (1B) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.
- (2) In this section—
 - pain or suffering** includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent.
 - torture** means the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion.

1. Compare and contrast the criminal offence of torture under Queensland and Commonwealth law (Source 2 and 3) with international law (Source 1). What similarities and differences exist? [A]
2. Decide whether Australia and Queensland law has provided a foundation to take effective legislative measure to prevent acts of torture. Justify your response with legal criteria. [E]

Research Task

Some key rights listed in CAT include the:

1. Right to Complain
2. Right to Fair Trial
3. Right to Medical Treatment
4. Right to Be Free from Incommunicado Detention
5. Right to Effective Monitoring.

1. Locate the primary source, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). [S]
2. For each human right listed above:
 - a. Identify and select the Article(s) that reflects the particular human right. [S]
 - b. Describe the legal principles (the guiding intentions that underlie the legal system) and main features (the elements) of this human right. [C]
 - c. Identify any limitations that may be mentioned in the Article. [C]



Implementation and monitoring

Part 2, Article 17 of CAT established the independent Committee against Torture (the Committee). This Committee is tasked with monitoring treaty implementation, promoting treaty implementation and investigating torture allegations. All parties to the CAT are required to submit periodic reviews to this body for examination and recommendations. The Committee is also provided information by non-government organisations and statutory bodies.

Tip

Remember that submissions to UN bodies are a good source of primary and secondary legal information. They can highlight viewpoints, issues of concern and make recommendations that might be useful for assessment.



Practical Application

UN COMMITTEE AGAINST TORTURE PUBLISHES FINDINGS ON AUSTRALIA, CHAD, EL SALVADOR, MALAWI, NICARAGUA, SOMALIA AND UGANDA

The Committee was concerned that detention continues to be mandatory under the Migration Act 1958 for all unauthorized arrivals, including children, and that the law does not provide a maximum period of detention. It requested that Australia repeal the legal provisions establishing the mandatory and indefinite detention of persons entering the country irregularly, and ensure that detention is only applied as a last resort and for the shortest possible period of time, and guarantee that children and families with children are not detained solely because of their immigration status.

The Committee expressed serious concern about the minimum age of criminal responsibility being set at ten and about children in detention being frequently subjected to verbal abuse, racist remarks and solitary confinement. It recommended that Australia raise the minimum age of criminal responsibility according to international standards, prohibit the use of physical restraints to discipline children under supervision, and immediately end the practice of solitary confinement for children across all jurisdictions.

Source: United Nations, 'UN Committee against Torture publishes findings on Australia, Chad, El Salvador, Malawi, Nicaragua, Somalia and Uganda,' *Media Centre* (Press Release, 25 November 2022) <ohchr.org/en/press-releases/2022/11/un-committee-against-torture-publishes-findings-australia-chad-el-salvador>.

1. Identify the name of the Committee highlighted in the article. [C]
2. Explain the role the Committee has regarding CAT. You are encouraged to directly quote from the article to support your response. [C]
3. List the issues of concern raised by the Committee in this article. Had you heard them mentioned previously? [C]

Also aligned with CAT is an *Optional Protocol to the Convention against Torture* (OPCAT). It was adopted in 2002 and entered into force in 2006. OPCAT provided for the 'establishment of a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty to prevent torture and other cruel, inhuman or degrading treatment or punishment.' The bodies conducting these inspections are the National Preventative Mechanism (NPM) and the United Nations Subcommittee on the Prevention of Torture (SPT).

Australia signed OPCAT in 2009 and lodged an instrument of ratification with the United Nations in 2017, but later requested and was granted a delay in fulfilling its requirements under OPCAT. The SPT suspended its visit to Australia after it was prevented from visiting sites in Australia. In a news article published by the ABC, Amnesty International Australia Impact Director Tim O'Connor was quoted as saying, 'preventing the SPT from doing its job raises grave concerns about the conditions of people in detention.' When a new deadline to implement the Optional Protocol passed in early 2023, Lorraine Finlay, Australia's Human Rights Commissioner stated publicly:

Australia has a long way to go to meet our minimum OPCAT obligations.

What do you think?

Analyse a viewpoint and its consequences in relation to our failure to meet our minimum OPCAT obligations. [A]



Review

Comprehend

1. **Describe** the main features of the *Convention of the Rights of the Child* (CRC). In your response:
 - **Explain** the origins of the CRC.
 - **Describe** the purpose of the CRC.
 - **State** the key principles and rights within the CRC.

[C]
2. **Describe** how a child is defined under the *Convention on the Rights of the Child* and explain one reason children are awarded special protection under international law. In your response:
 - **State** the definition of a child under the *Convention on the Rights of the Child*.
 - **Identify** and **explain** why children are awarded special protection under international law.

[C]
3. **Explain** the role of the Committee on the Rights of the Child. In your response:
 - **Identify** and explain the role of the Committee.
 - **Describe** a way the Committee achieves its role.
 - **Describe** who is supported by the work of the Committee.

[C]
4. **Describe** the main features of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). In your response:
 - **Explain** the origins of the CAT.

- **Describe** the purpose of the CAT.
- **State** the key principles and rights within the CAT.

[C]

5. **Identify** the body that is tasked with monitoring Australia's compliance with CAT and OPCAT. [C]

Analyse

AUSTRALIANS WANT SOCIAL MEDIA AGE RESTRICTIONS TIGHTENED

As the federal government investigates tightening the rules on social media, surveys continue to show Australians want raised age restrictions and a broader crackdown.

Survey results from market research firm Ideally suggest more than half of Australians think social media is doing more harm than good.

Even the United Nations' Committee on the Rights of the Child notes children have the right to 'meaningful access to digital technologies' as part of their civil, cultural, economic, political and social rights.

Source: Blair Jackson, 'Australians want social media age restrictions tightened', *News.com.au* (Online, 5 September 2024) <news.com.au/technology/online/social/more-harm-than-good-survey-shows-australians-want-social-media-age-restrictions-tightened/news-story/dfd92c53e965b07438ecd22a8a4c6131>.

1. **Examine** the viewpoint raised by the UN Committee on the Rights of the Child and their consequences on the legal issue of social media age restrictions for Australian children. [A]

EXPERTS URGE AUSTRALIA TO PAY COMPENSATION OWED TO VICTIMS OF WAR CRIMES IN AFGHANISTAN

A group of independent experts* today called on Australia to immediately fulfil its commitment to compensate the families of 39 murdered victims of war crimes committed by the Australian military in Afghanistan.

In 2020, a military inquiry found that Australian soldiers killed 39 unarmed prisoners in Afghanistan, when deployed in the NATO-led International Security Assistance Force. Some victims were tortured before being killed.

The experts acknowledged that the Australian Government is making genuine, albeit slow, efforts to criminally investigate and prosecute the perpetrators and has pledged to compensate the victims.

Source: United Nations, 'Experts urge Australia to pay compensation owed to victims of war crimes in Afghanistan', *Media Centre* (Press Release, 7 August 2024) <ohchr.org/en/press-releases/2024/08/experts-urge-australia-pay-compensation-owed-victims-war-crimes-afghanistan>.

1. **Analyse** the article above to determine the nature and scope of the legal issue, and examine two viewpoints and their consequences. [A]

Human rights

Chapter 15: Human rights and discrimination

15.1 What is discrimination?

15.2 *International Convention on the Elimination of All Forms of Racial Discrimination*

15.3 *Convention on the Elimination of all Forms of Discrimination Against Women*

15.4 *Convention on the Rights of Persons with Disabilities*

15.5 Discrimination legislation in Australia

Learning objectives

At the conclusion of this chapter, students will be able to:

- describe the key features of principal treaties including the:
 - *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) (ICERD),
 - *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) (CEDAW), and
 - *Convention on the Rights of Persons with Disabilities* (2006) (CPRD),
- explain the process by which treaty obligations translate into domestic law through accession or ratification,
- explain the role of the United Nations, its agencies and other organisations,
- describe and explain the role of the *Australian Constitution* (including the external affairs power within s 51) in protecting express and implied human rights in Australia,
- describe key human rights initiated or promoted in the following important legal documents:
 - *Racial Discrimination Act 1975* (Cth),
 - *Sex Discrimination Act 1984* (Cth),
 - *Disability Discrimination Act 1992* (Cth), and
 - *Age Discrimination Act 2004* (Cth).

15.1 What is discrimination?

The *Universal Declaration of Human Rights* (1948) declares in Article 1 that: ‘All human beings are born free and equal in dignity and rights.’

Discrimination denies individuals this right— according to the Human Rights Commission **discrimination occurs when an individual or group, ‘...is treated less favourably than another person or group because of their background or certain personal characteristics.’**

Discrimination can be against the law if it is based on a following personal characteristic:

- sex,
- age,
- political belief or activity,
- relationship status,
- race,
- trade union activity,
- pregnancy,
- impairment,
- lawful sexual activity,
- parental status,
- religious belief or religious activity,
- gender identity, or
- breastfeeding,
- family responsibilities.

Throughout this chapter, you will discover that international human rights instruments and domestic laws support an individual's right not to be discriminated against and to be treated equally. We will also examine the organisations tasked with monitoring compliance with our international commitments. **However, it's crucial to acknowledge that, despite these legal safeguards, discrimination remains a serious and urgent concern in Australia.**

15.2 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Racial discrimination remains a barrier to the full realization of human rights. Despite progress in some areas, exclusions and restrictions based on race, colour, descent, national or ethnic origin continue to cause conflict, suffering and loss of life.

Office of the High Commissioner of Human Rights, 2024, <ohchr.org/en/treaty-bodies/cerd>.

Key Term

Ratification: when a state indicates its consent to be bound to a treaty.

Source: United Nations, n.d., <treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml>

One of the fundamental aims of the United Nations is to create a world free from racial segregation and discrimination, which breeds hatred and division. The atrocities of World War II, particularly the extreme anti-Semitism of this period, played a crucial role in shaping the current system of international law. This, along with the impact of colonialism, widespread racial discrimination, and the rise of civil rights movements, underscored a need for the international community to define and establish a framework to promote equality and address discrimination on a global scale.

In this context, a United Nations General Assembly *Resolution 1510 (XV)* made in December 1960 condemned, ‘*all manifestations and practices of racial, religious and national hatred.*’ It called on governments worldwide to, ‘*take all necessary measures to prevent all manifestations of racial, religious and national hatred.*’

The idea behind this resolution would influence the creation of a legally binding international human rights instrument, the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). ICERD was adopted by the United Nations General Assembly in 1965 and came into force in 1969. Australia signed ICERD in 1966 and ratified it on 30 September 1975.

According to the Office of the High Commissioner for Human Rights, ‘[I]CERD works to take action against the injustice of racial discrimination, and the dangers it represents.’ It seeks to provide State Members with the knowledge and tools to eliminate racial discrimination and to promote understanding of all races. It does this by:

- prohibiting racial discrimination in all its forms,
- promoting equality by emphasising that all individuals should enjoy equal rights and should be provided equal protection against discrimination, and
- monitoring implementation.

Principles and key rights

The overarching purpose of ICERD is to eliminate all forms of racial discrimination. Therefore, principles on which ICERD is based include:

- non-discrimination,
- equality, and
- social justice.

As you examine ICERD in more depth, think about how each part and article relate to these principles. **ICERD is made up of 25 Articles across 3 parts.** It is headed by a preamble that begins by affirming the core aspirations of equality:

...everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin...all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.

This principle, as well as the principle of non-discrimination based on race is one of the foundations of the *United Nations Charter*, Article 1(3) and *Universal Declaration of Human Rights* (1948), Article 2.

A summary of some of ICERD's main provisions are found below:

- **Article 1** defines racial discrimination as being, '...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'
- **Article 2** condemns racial discrimination, obliges parties to pursue a policy that eliminates racial discrimination and promote understanding among all races.
- **Article 3** condemns apartheid and racial segregation and asks State Parties to '...undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'.
- **Article 4** prohibits incitement of racial hatred.
- **Article 5** concerns equality before the law. The article describes a number of specific political, civil, social, economic and cultural rights.
- **Article 6** obliges parties to provide effective protection and remedies for any act of racial discrimination
- **Article 7** asks parties to adopt measures that encourage understanding and tolerance.
- **Articles 11-13** establish dispute resolution mechanisms between parties.
- **Article 14** establishes an individual complaints mechanism.
- **Article 22** allows disputes over the interpretation or application of ICERD to be referred to the *International Court of Justice*.



Research Task

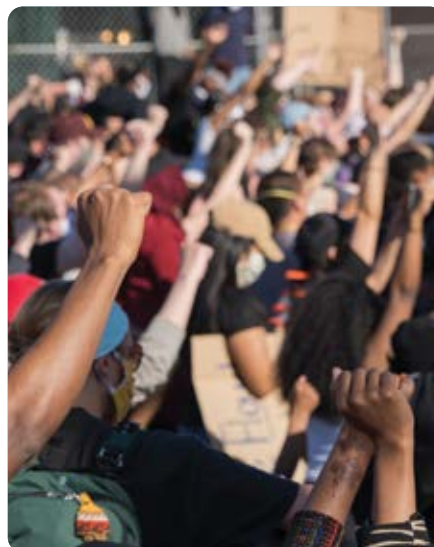
1. Locate a copy of ICERD, selecting information from this primary source to answer the following questions below. [S]
 - a. ICERD creates a distinction between different groups. What are they? [C]
 - b. List three key rights protected under ICERD. [C]
 - c. Describe how ICERD addresses the issue of hate speech. [C]
 - d. Explain the principle of non-discrimination as outlined in ICERD. [C]
 - e. What responsibilities do Member States have under ICERD to combat racial discrimination? [C]
 - f. What is an individual complaint called? [C]
 - g. True or False: ICERD allows for racial discrimination in specific circumstances if deemed necessary by the State. [C]
 - h. True or False: ICERD does not address the cultural rights of different racial or ethnic groups. [C]

Monitoring

The Committee on the Elimination of Racial Discrimination Committee (CERD Committee) plays a crucial role in monitoring Australia's compliance under ICERD, Article 8. The CERD Committee is composed of 18 independent experts from various countries.

The CERD Committee usually meets twice a year in Geneva. **Every country that has ratified ICERD must submit a report at regular intervals (around every two years) about, 'the legislative, judicial, administrative or other measures which they have adopted, and which give effect to the provisions of ICERD.'**

The CERD Committee examines each report and publishes concluding observations that make recommendations on what improvements a State party can make. This process of review, and the potential for open criticism by an international organisation, ensures that Australia and other State parties are held accountable for the decisions they make surrounding the implementation of ICERD.



Practical Application

STATE REPORTING AND ITS IMPACT

Since 1999, Australia has submitted reports in 1999, 2003, 2010, and 2016. There has been an average delay of just under 18 months. Australia appeared before the CERD Committee in 2000, 2005, 2010 and 2017.

In 2000 the government accused the Committee of a 'blatantly political and partisan' approach, particularly in light of its criticism of Australian native title laws and began to push strongly for 'reform' of the treaty body system. Australia's appearance in 2005 was also fractious. Relations have improved since that very low point.

The CERD Committees Concluding Observations on Australia focus on topics such as the ongoing discrepancies in almost all life outcomes (including life expectancy, education, health and incarceration rates) between indigenous and non-indigenous Australians, Islamophobia, racism against international students and the mandatory immigration detention regime.

Source: Sarah Joseph, Adam Fletcher and Anna Lochhead-Sperline, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level in Australia' in Christof Heyns, Frans Jacobus Viljoen and Rachel Murray (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On* (Brill, 2nd ed, 2024) <brill.com/edcollchap-0a/book/9789004377653/BP000002.xml?language=en#ref_FN000091>.

1. How many reports has Australia submitted to the CERD Committee since 1999? [C]
2. How many times has Australia appeared before the CERD Committee since 1999? [C]
3. Looking at your responses to Questions 1 and 2, how seriously is Australia taking its reporting obligations under ICERD? [C]
4. How do the authors' view Australia's relationship with the CERD Committee? [C]
5. Identify three areas in which Australia needs to improve its efforts to combat racial discrimination. [C]

The CERD Committee also has processes and procedures to deal with:

- potential violations,
- State-to-State complaints, and
- complaints made by individuals or groups that have exhausted the complaints procedure within their own country.

Like other committees the CERD Committee also publishes general recommendations on the content of human rights provisions, publishes concerns about the actions of State parties and contacts State parties about a specific issue if required (as seen in the example below).

Practical Application

UN COMMITTEE FINDS AUSTRALIAN AND WA GOVERNMENTS POTENTIALLY BREACHED RACIAL DISCRIMINATION CONVENTION

A prominent United Nations committee has made serious findings against the Australian and Western Australian governments in relation to their handling of Indigenous cultural heritage issues and related legal reforms.

The United Nations Committee on the Elimination of Racial Discrimination (CERD) wrote to Australia's UN Representative in Geneva in late April saying the committee had found the Australian and Western Australian governments had:

- failed to seek free, prior and informed consent from Indigenous people in relation to changes to Indigenous cultural heritage legislation; and
- failed to adequately protect Indigenous cultural heritage;
- potentially breached the International Convention on the Elimination of Racial Discrimination.

Source: Environmental Defenders Office, 'The committee concluded by 'insisting' that all work that negatively impacted Indigenous cultural heritage in Western Australia 'cease and desist,' *Environmental Defenders Office* (Online, 28 May 2024) <edo.org.au/2024/05/28/un-committee-finds-australian-and-wa-governments-potentially-breached-racial-discrimination-convention/>.

1. What country and state did the CERD Committee make findings against? [C]
2. Identify the specific group that the government's decisions are impacting. [C]
3. Outline the CERD Committee's concerns. [C]

Recent areas of concern identified by the CERD Committee

In 2010, in response to Australia's report, the CERD Committee published 21 actions for the government to complete. These included the recognition of Aboriginal and Torres Strait Islanders as First Nations Peoples, addressing the disproportionate outcomes suffered by Indigenous peoples in the criminal justice system, providing greater support for the Australian Human Rights Commission to increase its effectiveness, appointing a Race Discrimination Commissioner and reviewing its mandatory detention regime.

Research Task

Locate information to help you discover the identity of our current Race Discrimination Commissioner. What is his role and responsibilities? [C] [S]

In 2017, the CERD Committee expressed concerns about an increase in expressions of racism, racial discrimination and xenophobia in the public sphere; the low number of racial discrimination cases brought before the courts (with cost and the burden of proof attributing to this number); offshore processing continuing to exist and; the number of unresolved claims to land of Indigenous peoples.

15.3 Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)...is often described as an international bill of rights for women.

United Nations Entity for Gender Equality and the Empowerment of Women, 2007, <un.org/womenwatch/daw/cedaw>.

Origins and purpose

In 1946, the United Nations established the Commission on the Status of Women to monitor and promote women's rights. The Commission's work in uncovering areas in which women were treated unequally to men was instrumental in developing the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). This international treaty reaffirms the fundamental ideals at the centre of all international human rights instruments—that all people should be treated equally and without discrimination. **CEDAW's essential purpose is to set out steps crucial to eliminating discrimination against women.**

CEDAW was adopted by the United Nations General Assembly in 1979 and entered into force in 1981. Australia signed CEDAW in 1980 at a ceremony held at the UN World Conference for the Decade of Women. At the time, the Hon. Robert Ellicott and the Hon. Andrew Peacock (the then Minister for Foreign Affairs) said that the signing evidenced 'Australia's policy of equality for women and the elimination of discrimination.' Australia ratified the Convention in 1983.

When Australia signed CEDAW, it did so with two reservations. These reservations pertained to maternity leave, particularly access to paid parental leave, and women's eligibility for combat roles in the Defence Force. However, these reservations have since become obsolete due to significant changes in laws and policies. Today, women in Australia are entitled to a minimum of 18 weeks of paid maternity leave at the minimum wage, due to the passage of the *Paid Parental Leave Act 2010* (Cth). Furthermore, all gender restrictions on combat roles have been lifted.





What do you think?

Women in combat roles has been a contentious issue in the past. In 2016 the Australian Defence Force (ADF) lifted restrictions on all employment categories, including combat roles. Do you agree with Australia's initial reservation, or should women be given equal opportunity to men to serve in combat roles? Justify your position with legal criteria. [E]

Principles and key rights

The structure of CEDAW is like other treaties we have discussed previously. It begins with a preamble proclaiming that:

...all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.

CEDAW has 6 parts and 30 articles, which you will now investigate.



Practical Application

Part	Articles	Summary
1	1-6	Sets out the scope of the treaty, including key terms, condemnation of discrimination and the commitments undertaken by States.
2	7-9	
3	10-14	
4	15-16	
5	17-22	Establishes the Committee on the Elimination of Discrimination against Women and reporting procedures.
6	23-30	Describes CEDAW's effect on other treaties.

1. Locate a copy of CEDAW. In the table above, complete the boxes left intentionally blank by broadly identifying the category of rights each part concerns (i.e. political, economic social, cultural or legal rights) and summarise the rights found within each part. [C] [S]
2. How does the CEDAW define discrimination? Why does such a broad definition exist? What may be the implications of this definition? [C] [S] [A]

Optional Protocol

The *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* was accepted by the UN General Assembly in 1999 before being opened for ratification by those who were already a party to CEDAW.

The overarching purpose behind the *Optional Protocol* is to strengthen the enforcement mechanisms available for women who have their human rights breached. It allows individuals to complain to a committee (which we will identify soon) about a situation where

they believe their rights have been violated. But, like other supporting treaties, before an individual can file a complaint with the Committee, they must show that they have exhausted all avenues of complaint at a domestic level.

It also gives the Committee the power to investigate claims by conducting an inquiry. **Australia took some time to accede to the *Optional Protocol*, which entered into force in Australia in 2009.**

Monitoring

The implementation of CEDAW is monitored by the Committee on the Elimination of Discrimination against Women, which was established in Article 17. This article also establishes the rules, purpose and procedures relevant to the Committee. The Committee has 23 independent elected members, who are elected by the countries who have signed the treaty. According to Australian lawyers Maria Nawaz and Tess Deegan, the key functions of the Committee include:

- ‘examining State parties’ implementation of rights under the convention;
- making recommendations detailing how State parties can improve compliance with the convention; and
- accepting individual complaints about violations of rights under the convention.

Practical Application

UN SET TO REVIEW AUSTRALIA’S RECORD ON WOMEN’S RIGHTS – AND MAY FIND IT WANTING

Australia’s record on women’s rights is being reviewed by the United Nations Committee on the Elimination of Discrimination against Women in Geneva on July 2-3. The committee will review Australia’s compliance with our obligations under the women’s rights treaty - the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).

Every state party to CEDAW is required to submit a report every four years on how it is complying with its obligations under the convention. Australia was due to lodge its report in 2014, but only lodged it in December 2016, delaying the reporting cycle. The committee reviews these reports, then reports on the issues to which the government must respond.

Australia has a seat on the UN Human Rights Council. It was elected on a bid built on five pillars, including gender equality and Indigenous people’s rights.

However, we’re seeing little improvement on women’s rights and a concerning deterioration in some areas.

Source: Maria Nawaz and Anna Cody, UN set to review Australia’s record on women’s rights – and may find it wanting, *The Conversation*, (Online, 28 June 2018) <theconversation.com/un-set-to-review-australias-record-on-womens-rights-and-may-find-it-wanting-98552>.

1. How often does a State party submit a report? [C]
2. To whom does Australia submit a report? [C]
3. Where does the Committee meet? [C]
4. What does the author believe is happening about women’s rights? What areas do you think the Committee might be concerned about? [C]



The Australian Government provided its 8th report to the Committee in 2016. In its concluding remarks the Committee welcomed amendments to the:

- *Marriage Act 1961* (Cth) to guarantee the right to marry all couples, regardless of gender;
- *Crimes (Domestic and Personal Violence) Act 2007* (NSW) to give police additional powers to respond to gender-based violence;
- *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) that criminalise forced marriage;
- *Paid Parental Leave and Other Legislation Amendment Act 2012* (Cth);
- *Family Law Act 1975* (Cth) that addresses family violence; and
- *Workplace Gender Equality Act 2012* (Cth).

However, the Committee noted several areas of concern, including:

- the absence of a charter of human rights;
- denouncing funding cuts to the Australian Human Rights Commission;
- the lack of harmonisation of anti-discrimination legislation;
- the prevalence of sexual harassment;
- the endemic nature of violence against women; and
- gaps in the effectiveness of the *Sex Discrimination Act 1984* (Cth).

In early September 2024, the Department of Prime Minister and Cabinet asked for feedback on Australia's 9th periodic report draft.

Further investigation

In recent times there have been many inquiries into issues impacting women you may wish to read if this topic is of interest to you. Some include:

- Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020)
- Victorian Department of Treasury and Finance, *Inquiry into economic equity for Victorian Women* (2022)
- House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into family, domestic and sexual violence* (2023) Cth
- Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into the rights of women and children* (2023)
- Prime Minister and Cabinet, Office for Women, *Status of Women Report Card* (2024)



15.4 Convention on the Rights of Persons with Disabilities

What the Convention endeavors to do is to elaborate in detail the rights of persons with disabilities and set out a code of implementation.

Don MacKay, Chairman, CPRD Working Group

Origins and purpose

While the *International Bill of Human Rights* contains the broad principles of equality and non-discrimination, it is largely silent on the specific needs of persons with a disability.

Over time, the desire for a specific human rights instrument to highlight and address the discrimination, barriers, and challenges faced by people with disabilities began to grow as advocates in the disability space pushed for change. In the early 21st century, the United Nations General Assembly, in collaboration with experts and persons with disabilities, began drafting a new instrument to specifically address the needs of persons with a disability. This drafting process involved extensive consultation, ensuring that the voices of those directly affected were heard. The result was the *Convention on the Rights of Persons with Disabilities* (CRPD), adopted on 13 December 2006. The CRPD also included an *Optional Protocol to the Convention on the Rights of Persons with Disabilities* that allows individuals or groups to bring complaints to the UN Committee on the Rights of Persons with Disabilities.

Practical Application

UN: RIGHTS OF PERSONS WITH DISABILITIES IN FORCE

The United Nations *Convention on the Rights of Persons with Disabilities* entered into force today, one month after the required twentieth country ratified the landmark treaty which guarantees the rights of some 650 million people worldwide. The *Convention* – which Secretary-General Ban Ki-moon has called ‘a powerful tool to eradicate the obstacles faced by persons with disabilities’ – was adopted by the General Assembly on 13 December 2006 and was opened for signature and ratification on 30 March 2007.

The *Convention* does not create any new rights but aims to ensure that the benefits of existing rights are fully extended and guaranteed.

‘It had been argued that persons with disabilities were covered by existing human rights treaties, but the reality was very different,’ says Akiko Ito, the UN Focal Point on Disability. ‘Persons with disabilities have routinely suffered discrimination in the job market, in schools and in receiving public services. This *Convention* will make sure that these people will no longer be ignored.’

Source: United Nations, ‘UN: Rights of persons with disabilities in force’, *Scoop* (Media Release, 3 May 2008) <scoop.co.nz/stories/WO0805/S00048.htm>.

1. How many persons worldwide are estimated to have a disability? [C]
2. When was the CRPD opened for signature and ratification? [C]
3. What is the CRPD’s purpose according to Ban Ki-moon and Akiko Ito? [C]



The CPRD was the first binding international human rights instrument to specifically focus on disability. It was also the first comprehensive human rights treaty of the 21st century. The purpose of the CRPD is to, *'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'* This reveals a shift in approach for people with a disability, which seeks to use human rights as a vehicle for empowerment and greater participation in decision-making in issues that impact them.

Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009. As of 2024, 185 UN Member States have ratified the CRPD. The Australian Federation of Disability Organisations and the CRPD Ratification Task Force recommended Australia sign the CRPD, with the latter outlining that the CRPD had the following benefits:

- ratification would have significant positive economic, environmental, social and cultural impacts;
- there are no disadvantages or negative impacts;
- there is no significant barrier to Australia ratifying the CRPD arising from any fundamental inconsistency between Australian laws, policies and programs; and
- finally, there was overwhelming support from the disability sector for ratification of CRPD, demonstrating the widespread acceptance of this important international document.

The Australian Government made interpretive declarations on Articles 12, 17, and 18 when it signed the CRPD, but these have not changed its legal effect.



What do you think?

Michelle Bachelet (former UN High Commissioner for Human Rights) stated the Convention's *'...principles and provisions benefit the entirety of the human family because it strengthens our responses against exclusion and segregation.'* Do you agree or disagree with her statement? When considering your response, examine the consequences of your perspective. [A]

Principles and key rights

The CRPD has a preamble and 50 articles. Articles 3 to 9 set out a number of general obligations and principles that Member States have to abide by. Articles 10 to 30 identify a number of specific rights and freedoms. These include civil, political, economic, social and cultural rights and freedoms in various contexts such as employment, education, health, transport and access to justice. The remaining articles concern implementation, monitoring and reporting processes.





Practical Application

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Article 1 – Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 3 – General principles

The principles of the present Convention shall be:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

1. What is the key purpose of the CRPD? [C]
2. How is disability defined? [C]
3. If you could summarise the core ideal of Article 3 in one or two words, what would you choose? [C]
4. How is gender dealt with in Article 3? [C]

Research Task

As a class (or you can complete these individually):

1. Locate a copy of the CRPD, a primary source of legal information. [S]
2. Select an Article from Article 5 to 30 (you want each one to be researched). List the human right(s) contained within it, as an Article may contain many rights. [S]





Research Task ...

3. Categorise these human rights using the following headings:

- a. General principles
- b. Access
- c. Equality and non-discrimination
- d. Civil and political
- e. Social, economic and cultural

Monitoring

The Committee on the Rights of Persons with Disabilities monitors the implementation of CRPD by Member States, who are required to submit regular reports to the Committee on how the rights enshrined in the *Convention* are being implemented. The Committee consists of 18 persons, each elected to serve a 4 year term.

Australia last received feedback in 2019. In its concluding observations the Committee provided positive feedback on the:

- adoption of the *National Disability Insurance Scheme Act 2013* (Cth), a disability inclusion strategy, a National Disability Employment Framework and the Australian Government Plan to Improve Outcomes for Aboriginal and Torres Strait Island People with Disability;
- establishment of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and National Disability and Carers Advisory Council*;
- commitment to introduce a 7 per cent employment target for persons with disabilities in the public service; and
- endorsement of a new national disability data set.

The Committee had many areas of concern, some of which include:

- weak mechanisms and limited funding available under the National Disability Insurance Scheme;
- the lack of early intervention mechanisms for children with disabilities;
- the over-representation of convicted young persons with disabilities in the youth justice system;
- the use of medications, physical restraints and seclusion under the guise of 'behaviour modification'; and
- the significant increase in students with disabilities experiencing a segregated education, seclusion, isolation and a lack of age-appropriate settings.

As well as monitoring how the rights enshrined in the CRPD are being implemented by Member States, the Committee also:

- **examines individual complaints** (like the case study below) and
- **undertakes inquiries in cases of reliable evidence of grave and systemic violations of the CRPD.**



Case Study

Fiona Given v Australia (2018)

Facts: Fiona Given has cerebral palsy. On 7 September 2013 Given wanted to vote by secret ballot in a federal election. However, due to her limited muscle control and dexterity she was unable to mark a ballot paper, fold it and place it in the ballot box without assistance. An Australian Electoral Commission (AEC) officer was 'too busy' to assist Given to vote and directed her to ask her carer to assist her — an option Given did not want to undertake as she didn't wish her carer to know whom she was voting for. Electronic voting systems were available but were only able to be used by persons with a visual impairment.

Legal Issue: Did the *Commonwealth Electoral Act 1918* (Cth) and the AEC's actions violate Article 29(a)(i),(ii) and (iii) alone and in conjunction with Article 4(1)(a),(b),(d),(e) and (g), Article 5(2)(3) and Article 9?

Decision: The Committee found that Australia had failed to fulfil its obligations. The Committee stated that Australia should provide Given with compensation for her legal costs and ensure Given was given access to voting procedures and facilities that assisted her to be able to cast a secret ballot. As a general measure to prevent similar violations the Committee recommended that the Commonwealth Government amend the *Electoral Act 1918* (Cth).

1. What was the nature of Fiona Given's complaint to the Committee? [C]
2. Locate a copy of the CRPD. Explain which articles Given argued Australia violated. [C] [S]
3. How does this case study demonstrate the *Optional Protocol* in action? [A]
4. Locate and select legal information that explains the process an individual follows to make a complaint to the Committee? [C] [S]
5. Do you agree or disagree with the Committee findings? Provide reasons to support your opinion. [E]
6. Has Australia amended the law, as recommended by the Committee? What does this demonstrate about the power the Committee has? [S] [A]

15.5 Discrimination legislation in Australia

The relationship between the *Constitution* and international law

One of our country's most important legal documents, the *Commonwealth of Australia Constitution Act 1901* (Cth), **gives the Commonwealth Parliament the exclusive power to make law that implements Australia's obligations under international treaties and conventions.** This power, found in Section 51 (xxix), is commonly called the 'external affairs' power and was a central feature of the *Tasmanian Dam Case*, which you explored earlier. In this case a **majority of the High Court of Australia held that the 'external affairs' power allowed the Australian Parliament to legislate on matters related to international treaties.** It demonstrates the vital role the *Constitution* plays in protecting human rights, which you will learn more about as we continue to investigate how human rights issues are addressed in various Australian contexts.

We will now look at several Acts related to the conventions we have covered in this chapter.

Racial Discrimination Act 1975 (Cth)

The *Racial Discrimination Act 1975* (Cth) incorporates some of Australia's treaty obligations into domestic legislation.

The main aims of the Act are to:

- promote equality before the law for all persons, regardless of their race, colour or national or ethnic origin;
- make discrimination on the basis of race, colour, descent or national or ethnic origin, unlawful; and
- provide protection against racial hatred.

The Act makes it unlawful to insult, humiliate, offend or intimidate a person on the basis of their race, colour, descent, national or ethnic origin (s9, s18C). The Act prohibits discrimination in the following areas:

- access to places and facilities (s11);
- land, housing and other accommodation (s12);
- provision of goods and services (s13);
- trade union membership (s14);
- employment (s15); and
- advertisement (s16).

We will now explore how effective the Act is at achieving its aims.

Inquiry Focus

Do complainants alleging racial discrimination have access to justice?

Number of racial discrimination complaints

In Australia complaints concerning racial discrimination are made to the Australian Human Rights Commission. According to the Commission's complaint statistics in 2021-22:

- 464 complaints were lodged under the *Racial Discrimination Act 1975* (Cth).
- The highest ground of complaint was race (33%), followed by ethnic origin (19%) and national origin (18%).
- The most complaints received by area concerned the provision of goods and services (27%), other (26%) and employment (24%).
- Out of complaints finalised that year, 30% were conciliated and 24% were discontinued. The remainder were withdrawn or terminated.

Source: Australian Human Rights Commission, *2021-22 Complaint statistics*, (Report, n.d) <humanrights.gov.au/sites/default/files/ahrc_ar_2021-2022_complaint_stats_0.pdf>.

But, an individual can also apply to a federal court to have their allegations heard and determined. This embodies ICERD, Article 6, which asserts that everyone has the opportunity to access effective protection from discrimination and seek adequate reparation or satisfaction from tribunals for any damage suffered.

A significant legal issue facing this area of law is the difficulty for complainants to successfully bring about cases of racial discrimination.

Case Study

Source 1: Case law

Sharma v Legal Aid Queensland [2001] FCA 1699; 112 IR 124

Facts: Mr Sharma, a person with Indian ethnicity, was employed with Legal Aid Queensland, initially in a casual position. He applied for two other positions in the organisation, but was not offered either position. With regard to the first position, it was advertised twice. Mr Sharma was encouraged to re-apply when the position was re-advertised, but withdrew his application when he became aware the person acting in the position had applied. The successful applicant had deficiency in the area of family law. In the second position the successful applicant was scored 57.33 and Mr Sharma scored 53.16. Mr Sharma had acted in the position during the appointment process.

Legal Issue: Was Mr Sharma discriminated against on the account of his race?

Decision: The court held that Mr Sharma was not discriminated against. The successful applicants for both positions were judged to have met the selection criteria better than Mr Sharma. Justice Kiefel accepted that statistical evidence 'may be able to convey something about the likelihood of people not being advanced because of factors such as race or gender,' but noted that ultimately it is 'a question of fact in each case'. This was upheld on appeal before the Full Court.

1. What did Mr Sharma allege occurred? [C]
2. Based on the facts provided, why was Mr Sharma not the successful applicant for both positions? [C]
3. Associate Professor Beth Gaze wrote in a draft paper that, 'Courts have insisted that the complainant must prove the racial motivation, which is virtually impossible.' Can you provide an example of direct evidence that would prove someone has been discriminated against? Do you think it would be hard for a person to get this type of evidence? [A]

Murugesu v Australian Postal Corporation & Anor [2015] FCCA 2852

Facts: Mr Murugesu is Tamil. He was contracted to work for Australia Post as a delivery driver. Mr Murugesu alleged he was subjected to racial and offensive remarks from a manager. He reported his manager's behaviour, but his complaints were never investigated.

Legal Issues: Was Mr Murugesu subject to racial discrimination? Could Australia Post be held liable for failing to act on a complaint?





Case Study ...

Decision: Mr Murugesu was awarded \$40,000 in compensation and Australia Post was held to be vicariously liable for the behaviour of its employees. Although the Court found the company had policies in place to respond to allegations of racial discrimination, had publicly stated the company would not tolerate racism and had sound workplace training in place, it failed to take all reasonable steps to investigate or respond to the manager's behaviour.

1. Summarise Mr Murugesu allegations. [C]
2. Explain why Australia Post was found vicariously liable for the actions of their employee. [C]
3. Applying this decision to a future context, outline the actions a business should take to avoid being held liable for the actions of their employees. [A]
4. Do you feel the compensation awarded to Mr Murugesu was fair and just? Does it adequately reflect the impact of racial discrimination on an individual's well-being? [E]

Source 2: Academic article extracts

Practical Application

SKIN-DEEP: PROOF AND INFERENCES OF RACIAL DISCRIMINATION IN EMPLOYMENT

The burden of proof in all discrimination cases lies with the complainant, other than where a defence or exemption is relied upon by a respondent. The standard of proof is the civil standard — the balance of probabilities, for which a decision-maker must reach 'reasonable satisfaction' that the case has been proved. The difficulty faced by complainants in producing direct evidence to support their case makes inferences to be drawn from the surrounding circumstances all the more important for a complainant. Australian courts and tribunals have, however, been reluctant to draw inferences of racism or racial discrimination, despite acknowledging its often-systemic nature.

Source: Jonathan Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review*, 535, <classic.austlii.edu.au/au/journals/SydLawRw/2003/24.html>.

1. Who has the burden of proof in these types of cases? [C]
2. What difficulties do complainants face according to the author? What could be a counter-argument to explain the lack of successful cases? [C] [A]

THE STANDARD OF PROOF IN DISCRIMINATION CLAIMS: THE FULL COURT LIGHTENS THE LOAD, A LITTLE.

We all know that prejudices are prevalent within our society. We also know that such prejudices often translate into discrimination. And yet, proving discrimination is notoriously difficult.

...

Practical Application ...

Stemming primarily from the 1988 decision of the Victorian Supreme Court in *Department of Health v Arumugam* [1988] VR 319 courts have frequently observed that discrimination is a 'serious matter, not lightly to be inferred'...

...

This [*Qantas Airways v Gama* [2008] FCAFC 69] is a sensible correction of the creeping trend in many courts of treating discrimination claims as somehow uniquely and inherently serious compared with other civil claims. In relation to the drawing of inferences of discrimination, Branson J also noted that a relevant matter in assessing the evidence was:

...the long standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict...

The onus of proving why the respondent acted as it did is carried by the applicant, yet is often wholly within the knowledge and domain of the respondent. The courts have long acknowledged this inherent difficulty for applicants in establishing a claim of discrimination. The above observation by Branson J is therefore a useful reminder that, whilst respondent do not carry the onus, respondents who fail to credibly establish a non-discriminatory causal basis for their conduct do so at their own peril.

Source: Brook Hely, 'The standard of proof in discrimination claims: the Full Court lightens the load, a little' (2008) *Balance: Journal of the Law Society Northern Territory*, 18 <classic.austlii.edu.au/au/journals/BalJINTLawSoc/2008/69.html >.

1. Locate the case *Qantas Airways v Gama* [2008] FCAFC 69. Create a case note that summarises the facts of the case, issue(s) in dispute and the decision handed down. [C] [S]
2. How are discrimination cases treated differently according to the author of the article? [C]
3. State the common law rule regarding evidence that is used in discrimination cases. How did the case of *Gama* change this? [C] [A]

Source 3: CERD Committee Report extract

Practical Application

CONCLUDING OBSERVATIONS ON THE EIGHTEENTH TO TWENTIETH PERIODIC REPORTS OF AUSTRALIA

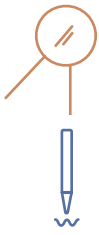
Complaints of racial discrimination

15. The Committee is concerned about the limited number of racial discrimination cases brought before the courts, which is reportedly attributed to the costs of court proceedings and burden of proof requirements...

16. Recalling its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee calls on the State party to:

- a) Remove persistent barriers to access to justice by victims of racial discrimination, including by reversing the burden of proof in civil proceedings involving racial discrimination...

Source: Committee on the Elimination of Racial Discrimination, 'Concluding observations on the 18th to 20th periodic reports of Australia,' UN, (Report, 2017) <digitallibrary.un.org/record/3843103?ln=en>.



Practical Application ...

1. What is the CERD Committee concerned about? What reasons are causing this issue to occur? [C]
2. With regard to the first recommendation (16a), what benefits and limitations could adopting this recommendation have? [A]

Sex Discrimination Act 1984 (Cth)

When Australia signed CEDAW we demonstrated that we wished to put the convention's articles into action. Australia committed to:

- incorporate the principle of equality in the legal system, abolish discriminatory laws and establish new laws prohibiting discrimination,
- establish formal processes to protect women against discrimination, and
- eliminate discrimination by individuals and organisations.

The *Sex Discrimination Act 1984* (Cth) is a key piece of federal domestic legislation that makes discrimination against individuals on the basis of sex unlawful. But all states and territories also have anti-discrimination legislation. **The *Sex Discrimination Act 1984* (Cth) gives partial effect to Australia's obligations under CEDAW.** The Act's connection to CEDAW is best demonstrated by reading s3 [emphasis added]:

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.*

CEDAW is also found as a Schedule in the Act. According to the Australian Human Rights Commission the objectives of the Act are to:

- promote equality between men and women,
- eliminate discrimination, and
- eliminate sexual harassment at work.

This Act prohibits sex discrimination on several grounds, including sexual orientation (s5A), gender identity (s5B), intersex status (s5C), marital or relationship status (s6), pregnancy or potential pregnancy (s7), breastfeeding (s7AA) and family responsibilities (s7A) in a number of areas. These areas include employment (s14), education (s21), goods, services and facilities (s22), accommodation (s23), land (s24), clubs (s25), administration of Commonwealth laws and programs (s26) or requests for information (s27).

It is important to note that the Act contains a wide range of exemptions (s30), for example, religious institutions can discriminate based on sex in areas involving the ordination or appointment of priests or ministers of religion (s37).

Disability Discrimination Act 1992 (Cth)

The *Disability Discrimination Act 1992* (Cth) is a key piece of legislation that aims to eliminate discrimination against people with disabilities, ensuring they have equal rights and opportunities in areas such as employment, education, and public services. Like the CRPD, the Act's definition of 'disability' is wide-ranging, as shown below:

Disability Discrimination Act 1992 (Cth)

4 Interpretation

disability, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
 - (b) total or partial loss of a part of the body; or
 - (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness; or
 - (e) the malfunction, malformation or disfigurement of a part of the person's body; or
 - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
 - (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future (including because of a genetic predisposition to that disability); or
 - (k) is imputed to a person.

To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

The Act makes it unlawful to discriminate against someone for having a disability in the following areas: employment (s15-21B), education (s22), access to infrastructure such as government buildings, hospitals, shops and libraries (s23), provision of goods, services and facilities (s24), accommodation (s25), land (s26), membership of clubs and incorporated associations (s27), sport (s28), and the administration of Commonwealth laws and programs (s29).

The Act is administered by the Australian Human Rights Commission (AHRC), who can investigate and conciliate discrimination complaints. It also has the ability to grant exemptions (s55) for individuals, organisations and governments to not follow the provisions of the Act. In 2018 the Queensland Government sought an exemption for its new train fleet, which was denied.





Practical Application

HUMAN RIGHTS COMMISSION DENIES NEW QLD TRAINS EXEMPTION FOR DISABILITY ACCESS FAULTS

The Human Rights Commission has refused a Queensland Government request to exempt their defective new \$4.4 billion trains from disability laws, just weeks out from the Commonwealth Games which will rely heavily on the rail network.

Queensland Rail asked for an expedited exemption from The *Disability Discrimination Act* because eight of the nine new trains are needed to help transport hundreds of thousands of people to the Gold Coast Commonwealth Games next month.

But in the commission's preliminary view, it has ruled to refuse almost all of the exemption requests on the basis of disability discrimination. The commission questioned the Government's decision to purchase 'non-compliant' trains.

The *Disability Discrimination Act* has made it unlawful for public transport providers to discriminate on the ground of disability since 1993. It is believed without an exemption, the defects put Queensland Rail at risk of lawsuits from people with disabilities unable to fully access the trains.

The Government also applied for overall exemption of up to three years to fix the issues, which was preliminarily rejected.

The commission said it did not have the power to order the trains be removed, but the decision confirms the use of the trains is in breach of the *Disability Discrimination Act*.

It has been frequently expressed by the commission that exemptions to disability laws should not be granted lightly.

Source: Isobel Roe, 'Human Rights Commission denies Qld trains exemption for disability access faults,' *ABC News*, (Online, 2 March 2018) <abc.net.au/news/2018-03-03/qld-rail-train-not-granted-exemption-disability/9502556>.

1. What was the Queensland Government seeking an exemption for? [C]
2. What was the preliminary view of the Human Rights Commission? [C]
3. The ability for the Human Rights Commission to grant exemptions may appear contrary to the objectives of the Act. Why do you think these provisions were introduced? Do you think they should remain in the Act or be repealed? [A] [E]
4. What consequences could occur if the Queensland Government is not granted an exemption? [C] [A]

Age Discrimination Act 2004 (Cth)

Despite existing state and territory laws, age discrimination is an increasingly significant problem for our society.

The Hon Daryl Williams AM, KC (Attorney-General), 2003.



What do you think?

How common do you think age discrimination is? Explain your point of view. [A]



The *Age Discrimination Act 2004* (Cth) prohibits discrimination on the basis of age (whether that be younger or older Australians), reiterating the ideal of equality that has been the central focus of all the Acts we have covered in this chapter. When drafting the legislation, the Department of Justice and Attorney-General consulted with over 90 organisations, wrote to 180 organisations to seek their input, and established a consultation group of key stakeholders. The Act's primary focus is on promoting equality and eliminating discrimination in the workplace (s18), but it also applies to other areas, including:

- education (s26),
- access to premises (s27),
- goods, services and facilities (s28),
- accommodation (s29),
- land (s30),
- the administration of Commonwealth law and programs (s31), and
- requests for information (s32).

The Act also makes it unlawful to harass or bully another person because of their age (s51). **As with all anti-discrimination Acts, there are exemptions that allow for unlawful discrimination in particular situations or circumstances.** These exemptions can justify an employer's actions or decisions.

If a person feels they have been unlawfully discriminated against because of their age they can:

- use an informal method of responding to the issue, such as talking to the person or organisation involved;
- file a formal complaint with the Australian Human Rights Commission (AHRC), which may encourage the use of an alternative dispute resolution approach, such as conciliation if the complaint is valid; or
- pursue a legal remedy through the courts, although, like other civil actions, a party must show they have attempted to resolve the issue in different ways.

We will now apply these key concepts to a practical example.

Hypothetical

Maria, a 22 year old university graduate, applies for a marketing position at a well-known company. During her interview, the hiring manager expresses concerns about her 'lack of experience' and 'youthfulness', suggesting that the company typically hires older, more experienced candidates for the role. Maria feels that her age is being unfairly considered a disadvantage, even though she believes her qualifications and enthusiasm make her well-suited for the job.

Is Maria being unlawfully discriminated against? When responding to this question you should:

1. Identify and explain the relevant legal provisions of the *Age Discrimination Act 2004* (Cth). [C] [S]
2. Discuss whether you believe specific 'stereotypes' about age may have been present in this situation. [C]
3. Apply the legal concepts set out in the Act to determine the nature and scope of the legal issue. [A]
4. Make a recommendation about what Maria should do. Justify your decision using legal criteria, then discuss the implications of the course of action. [E]

Discrimination and Queensland law

Although not a focus of Topic 1: Human rights, it is important to mention that there is Queensland legislation related to discrimination, namely:

- *Human Rights Act 2019* (Qld) s15–Recognition and equality before the law
- *Anti-Discrimination Act 1991* (Qld) s7–Discrimination on the basis of certain attributes prohibited

These Acts can provide additional avenues for individuals to assert their human rights in the context of discrimination.

Review

Comprehend

1. **Describe** the main features of each of the following Conventions:

- *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)
- *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)
- *Convention on the Rights of Persons with Disabilities* (CRPD)

In your response about each *Convention*:

- a. **Explain** the origins of the *Convention*.

- b. **Describe** the purpose of the *Convention*.
- c. **State** the key principles and rights within the *Convention*. [C]

2. **Explain** the role of each of the following UN Committees:

- Committee on the Elimination Racial Discrimination Committee (CERD Committee)
- Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee)
- Committee on the Rights of Persons with Disabilities (CRPD Committee)

In your response:

- a. **Identify** and **explain** the role of each Committee.
 - b. **Describe** a way each Committee achieves its role.
 - c. **Describe** who is supported by the work of each Committee. [C]
3. **Describe** two key human rights promoted by the *Racial Discrimination Act 1975* (Cth).
In your response:
- a. **Identify** the human right promoted by the Act.
 - b. **Describe** the human right promoted by the Act. [C]
4. **Describe** two key human rights promoted by the *Sex Discrimination Act 1984* (Cth).
In your response:
- a. **Identify** the human right promoted by the Act.
 - b. **Describe** the human right promoted by the Act. [C]
5. **Describe** one key human right promoted by the *Disability Discrimination Act 1992* (Cth).
In your response:
- a. **Identify** the human right promoted by the Act.
 - b. **Describe** the human right promoted by the Act. [C]
6. **Describe** and explain the role of the *Commonwealth of Australian Constitution Act 1901* (Cth) s51(xxix) (external affairs power) has in the protection of human rights. In your response:
- a. **Identify** the relevant Act and sub-section. What is the purpose of this section?
 - b. **Describe** the 'external affairs' power.
 - c. **Describe** the case that decided its application in an international law context and its significance.
 - d. **Explain** how it protects an individuals' human rights. [C]

Topic 2

Australia's legal response to international law and human rights

Topic 2 explores how Australia actively defends human rights on the global stage.

Chapter 16: Monitoring human rights

Chapter 17: The role of international institutions in upholding rights

Chapter 18: Refugees, abduction of children, conduct of war

Australia's legal response to international law and human rights

Chapter 16: Monitoring human rights

16.1 Introduction

16.2 Periodic reporting

16.3 Special Rapporteurs

16.4 Inter-State complaints

16.5 Individual complaints

Learning objectives

At the conclusion of this chapter, students will be able to:

- explain how human rights are monitored, including the reporting system, United Nations Special Rapporteurs and Inter-State complaints, ancillary bodies and individuals.
- select legal information, then analyse and evaluate Australia's response to international law and human rights.

16.1 Introduction

Now that you have a clear understanding of the nature and scope of international law, we will shift our focus to examine Australia's response to contemporary legal issues, particularly in the context of human rights. To begin, we will describe and assess whether the monitoring and reporting process (commonly undertaken by international organisations such as the United Nations, government, and non-government organisations) holds Australia and other countries to account and ensures governments uphold the human rights of its citizens and the human rights of the broader global community.

16.2 Periodic reporting

By now, you know that Australia is a party to the 7 core international human rights treaties. These treaties not only contain a set of human rights standards, **they also have mechanisms to monitor a party's progress in implementing these standards into its domestic policy, processes and law.** These bodies are called 'treaty bodies'. The origins of these treaty bodies are contained in the treaties themselves, which a State Party formally agrees to. Like other agreements, the obligations of the parties are found in its terms. One of these terms involves a State Party submitting a 'periodic report' to a specific treaty body.

Let's see this in action with one of the Conventions you explored earlier, the *Convention on the Rights of Persons with Disabilities*.



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Convention on the Rights of Persons with Disabilities

Article 35 – Reports by States Parties

1. *Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.*
2. *Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.*

1. Identify the Article number that concerns the reporting procedure for the *Convention on the Rights of Persons with Disabilities*. [C]
2. Identify the timeline for State Parties to submit their first report to the Committee under the *Convention*, and how often subsequent reports are required. [C]
3. Identify who is responsible for receiving and transmitting the reports from State Parties to the Committee, as outlined in the *Convention*. [C]

These periodic reports involve the Australian Government regularly writing and submitting a report (as well as appearing) before a treaty body. **Treaty bodies have responsibility for monitoring and promoting compliance with a particular human rights treaty and are the primary method we use to monitor the implementation of a specific treaty.** The process also allows other non-government organisations (NGOs) to submit 'shadow reports'. An example of this is illustrated below.

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REPORT SHOWS AUSTRALIA STILL FALLS SHORT ON DISABILITY RIGHTS

A new report has highlighted the discrimination and hardship people with disability face, with over 60 percent of survey respondents unable to afford to get access to the disability support they require.

Disability Rights Now 2019: Shadow Report to the United Nations Committee on the Convention on the Rights of Persons with Disabilities (CRPD) has been a collaborative effort by Disabled People's Organisations, disability representatives and advocacy organisations from around Australia.

The report, which has been endorsed by over 80 organisations from around the country, includes the findings from a survey of almost 900 Australians with disability and reviews the country's progress in implementing the CRPD, which focuses on upholding the rights of people with disability.

Executive Director of Women with Disabilities Australia, Carolyn Frohmader, says the report was an opportunity for people with disability across Australia to tell the United Nations about the widespread hardship, discrimination, violence and poverty they face every day.

Source: Nicole Pope, 'Report shows Australia still falls short on disability rights', *Disability Support Guide—News*, (Web Page, 2019) <disabilitysupportguide.com.au/talking-disability/report-shows-australia-still-falls-short-on-disability-rights>.



1. Identify the authors of the *Disability Rights Now 2019* Shadow Report. [C]
2. Identify the audience of the *Disability Rights Now 2019* Shadow Report. [C]
3. Describe the process the authors used to gain information for the Shadow Report. [C]
4. Explain the purpose of the Shadow Report. [C]
5. Explain the benefits of a Shadow Report. In your response consider the viewpoints of the Australian Government, the United Nations and persons with a disability. [C]

After a State Party submits its report, the Committee reviews the report, sometimes asking for further clarification, additional data, or elaboration on certain issues.

From this, a Committee:

- makes concluding observations on a State's progress in implementing a treaty, (this can be positive or negative),
- raises concerns about specific area(s) that require attention or urge a State Party to take specific action to address gaps in the implementation of the treaty, and
- makes recommendations.

It is also important to note that these reports are made public, so anyone can view and read them. This also assists in holding governments to account, and aids openness and transparency around human rights.



Research Task

1. Locate 'Concluding observations' on one of the 7 core human rights treaties to which we are a party:
 - *International Covenant on Civil and Political Rights* (ICCPR)
 - *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
 - *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)
 - *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)
 - *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)
 - *Convention on the Rights of the Child* (CRC)
 - *Convention on the Rights of Persons with Disabilities* (CRPD).

[S]
2. Select information from the 'Concluding observations' that identifies:
 - a. A positive aspect
 - b. A principal area of concern
 - c. A recommendation

[C] [S]
3. Justify, using legal criteria, a recommendation made by the Committee which you believe should be introduced. [E]

16.3 Special Rapporteurs

The system of Special Rapporteurs is a central element of the UN human rights machinery...

Melbourne Law School, n.d. <law.unimelb.edu.au/centres/mls-hr-program/opportunities/volunteering-internships/united-nations-special-rapporteurs>.

United Nations Human Rights Council

Before we delve into the concept of 'Special Rapporteurs', it is vital to understand where they sit within the United Nations Human Rights Council (UNHRC) framework.

The UNHRC promotes and protects human rights. The nature of the UNHRC's role requires the organisation to appoint independent experts who possess the knowledge, skills and expertise to investigate and report on specific issues. These staff are called Special Rapporteurs. A Special Rapporteur has a 'mandate' that guides their work.

As of November 2024, there were:

- 14 country mandates, with examples including places such as Afghanistan, Myanmar and Somalia, and

- 46 thematic mandates, with examples including contemporary forms of slavery, violence against women and girls, human rights of internally displaced persons and human rights to safe drinking water and sanitation.

Tip

The thematic mandates may be a useful source of legal information for assessment, as they often reflect contemporary and current human rights issues.

About Special Rapporteurs

Special Rapporteurs:

- are independent (they are not members of UNHRC),
- are non-paid and elected for a period of time (that can be renewed),
- are appointed by the UNHRC,
- have expertise in a specific area,
- are given a specific term of reference, and
- conduct fact-finding missions using various methods, including field visits, consultations and written correspondence.

Special Rapporteurs share their findings and recommendations in a report to the UNHRC (although they can also report to other UN bodies such as the General Assembly or Office of the High Commissioner for Human Rights). These reports can lead to:

- legislative or policy reform,
- human rights standard setting,
- preventing and ceasing violations,
- raising human rights awareness, and
- improving access to mechanisms of redress.

Tip

The reports or findings produced by Special Rapporteurs may be an additional source of ideas for law reform that you can use in an assignment.

A good starting point is the United Nations Office of the High Commissioner website [ohchr.org/en/special-procedures-human-rights-council](https://www.ohchr.org/en/special-procedures-human-rights-council).

Australia has a standing invitation for all Special Rapporteurs with thematic mandates to visit the country. The Australian Human Rights Commission (AHRC) supports Special Rapporteurs' visits. We will now explore a recent human rights issue that involved a Special Rapporteur and Australia.

Special Rapporteur on contemporary forms of slavery (2007 onwards)

How we think about the concept of slavery has changed over time. According to the Australian Government, modern slavery ‘describes situations where offenders use coercion, threats or deception to exploit victims and undermine their freedom.’

On the global stage Australia has:

- made statements on human trafficking and slavery or co-sponsored related resolutions at the United Nations General Assembly (UNGA) and United Nations Human Rights Council (UNHRC),
- launched principles to guide government action to combat human trafficking alongside Canada, New Zealand, the United Kingdom and the United States, and
- co-convened the Financial Sector Commission on Modern Slavery and Human Trafficking.

Reaffirming the *Universal Declaration of Human Rights*, which states that no one shall be held in slavery or servitude, the Special Rapporteur on contemporary forms of slavery was established in 2007 by the UNHRC *resolution 6/14*.

The Special Rapporteur, appointed in 2020, Professor Tomoya Obokata (Japan), was mandated to:

- promote the effective application of relevant international norms and standards on slavery,
- request, receive and exchange information on contemporary forms of slavery, and
- recommend action and measures applicable at the national, regional and international levels to eliminate slavery practices wherever they occur.

We will now explore how the Special Rapporteur engaged with Australia on a recent visit through an inquiry.

Inquiry Focus

How did the UN Special Rapporteur on contemporary forms of slavery engage with Australia during their most recent visit, and what recommendations or actions were proposed to address modern slavery?

As we stated previously, Australia, as a member of the United Nations and a signatory to many treaties, consents to, and takes part in, human rights monitoring processes. This includes visits from Special Rapporteurs.

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UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF SLAVERY, INCLUDING ITS CAUSES AND CONSEQUENCES

Introduction

The United Nations Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata, conducted an official visit to Australia from 14 to 27 November 2024 at the invitation of the Federal Government. The purpose of his visit was to understand the nature and extent of contemporary forms of slavery in the

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country and analyse the efforts of Australia to address these practices at local, regional and federal levels.

The Special Rapporteur wishes to thank the Federal Government, state/territorial and local authorities for their openness and full cooperation before and during the visit. He also offers his deep gratitude to the Australian Human Rights Commission, Anti-Slavery Commissioner for New South Wales, civil society/community based organisations, workers' organisations, legal professionals, academic experts, as well as workers and victims/survivors of contemporary forms of slavery, who supported and engaged with him during his visit.

In addition to Canberra, the Special Rapporteur visited Sydney, Riverina region, Melbourne, and Brisbane. He also held virtual meetings with some state/territorial authorities and other stakeholders before and during his visit.

Source: Professor Tomoya Obokata, 'United Nations Special Rapporteur on contemporary forms of slavery, including its causes and consequences,' *United Nations Office of the High Commissioner*, (Online, 27 November 2024) <ohchr.org/en/press-releases/2024/11/australia-un-expert-urges-strengthen-due-diligence-among-businesses-and>.

1. Identify the Special Rapporteur on contemporary forms of slavery. [C]
2. Identify when he visited Australia and the purpose of his visit. [C]
3. Select a relevant quote from the text that supports the view that the Australian Government supported and allowed the visit. [S]
4. Identify the various methods the Special Rapporteur used to collect information and evidence on slavery in Australia. [C]

Once a visit is complete, the Special Rapporteur will release a statement, and a report.

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TEMPORARY MIGRANT WORKERS IN AUSTRALIA FACING 'DISTURBING' PATTERNS OF EXPLOITATION FROM SOME EMPLOYERS, UN OFFICIAL SAYS

Professor Obokata said he was 'seriously concerned' by the treatment of temporary migrant workers in Australia. He said he was particularly concerned about the welfare of workers under the Pacific Australia Labour Mobility (PALM) scheme, the Domestic Worker (diplomatic or consular) stream, and those on the Temporary Skill Shortage Visa, Working Holiday Visa, and Student Visa.

He said workers in those visa pathways were commonly employed in high-risk sectors such as agriculture, horticulture, food processing, aged care, accommodation, domestic work (for both diplomats and private homes), hospitality, cleaning and security.

'The main issue among these schemes is that they create a significant power imbalance between employers and workers, since employees are either tied to a single employer, and mobility is reported to be extremely difficult, and/or dependent on their employer for extension of contracts or nomination for permanent residency,' he wrote in his interim report.

'The power imbalance undoubtedly leads to under-reporting among workers, which in turn results in impunity among employers, labour hire companies or immigration agents,' he wrote.

He said an issue requiring 'urgent attention' was the inspection regime. He said the Department of Employment and Workplace Relations (DEWR) was the lead agency for

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monitoring employer compliance in the country, and they carried out 'targeted assurance activities' such as monitoring visits, and the Office of the Fair Work Ombudsman also carried out intelligence gathering and unannounced visits. 'However, according to a large number of stakeholders, inspection of workplaces remains insufficient, particularly in rural or remote areas, because it still very much depends on reporting by workers,' he wrote.

Australian Disability Enterprises (ADEs) 'should be abolished'

Professor Obokata is a scholar of international law and human rights, specialising in transnational organised crime, human trafficking and modern slavery. He currently serves as Professor of International Human Rights Law at York Law School in the United Kingdom.

'In Australia, persons with disabilities can be employed in sheltered workshops, referred to as Australian Disability Enterprises (ADEs), where they engage in manual labour work, such as warehousing, 'picking and packing,' cleaning and laundry services, sometimes against their will,' he wrote.

'Disturbingly, they are paid a sub-minimum wage as low as \$3 per hour for their work when the national minimum wage ... is \$24.10. 'Although ADEs are supposed to be transitional arrangements into the open market, the Special Rapporteur was informed that many are stuck with segregated employment for a long time. Furthermore, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability noted that persons with disability who work in segregated workplaces may be at a heightened risk of violence, abuse, neglect and exploitation.

'The Special Rapporteur regards ADEs to be discriminatory and therefore they should be abolished,' he wrote.

Source: Gareth Hutchens, 'Temporary migrant workers in Australia facing 'disturbing' patterns of exploitation from some employers, UN official says,' *ABC News*, (Online, 27 November 2024) <abc.net.au/news/2024-11-27/slavery-in-australia-un-report-special-rapporteur/104652556>.

1. Describe the background of the Special Rapporteur. [C]
2. Identify the two groups of workers the Special Rapporteur raised concerns about after his visit. [C]
3. Identify the industries these employees typically work in. [C]
4. Explain the deficiencies in our monitoring process of employee's treatment, as raised by the Special Rapporteur. [C]

Research Task

1. Locate a copy of the statement or report written by the UN Special Rapporteur on contemporary forms of slavery. If the statement is no longer available it may be found here <ohchr.org/sites/default/files/documents/issues/slavery/sr/statements/2024-11-27-eom-australia-sr-slavery-en.pdf>. A good place to visit may also be the Special Rapporteur homepage <ohchr.org/en/special-procedures/sr-slavery>. [S]
2. Identify and select two legal alternatives the Special Rapporteur recommended Australia should consider implementing. [C] [S]
3. Select one recommendation, justifying its introduction using legal criteria. [E]

What do you think?

According to the international, independent organisation Medecins Sans Frontieres (Doctors Without Borders), Special Rapporteurs are, '*...seen as an essential tool in the UN's response to...violations particularly in promoting accountability and combatting impunity*'. Did the Special Rapporteurs visit to Australia achieve this purpose? Explain your point of view. [C]

16.4 Inter-State complaints

Inter-State complaints involving treaty bodies

Certain treaties permit one State party to lodge a complaint against another State party, referred to as an 'Inter-State complaint.' They can also be referred to as 'Inter-State communications.' The process for submitting these complaints can vary between treaties, with each having its own specific processes and procedures. Some treaties encourage negotiation or communication between the State parties, while others permit the relevant Committee to review the matter before the International Court of Justice can become involved as a last resort. Some examples include:

Treaty	Article	Summary of Inter-State complaints process
<i>International Covenant on Civil and Political Rights (ICCPR)</i>	Article 41, Article 42 and Article 43	Committee < ad hoc Conciliation Commission
<i>Optional Protocol to the International Covenant on Economic, Social and Cultural Rights</i>	Article 10	State Party < Committee
<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</i>	Article 21 and Article 30	Committee < Arbitration < International Court of Justice
<i>International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</i>	Article 11, Article 12, Article 13 and Article 22	Committee < ad hoc Conciliation Commission < International Court of Justice
<i>Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</i>	Article 29	Negotiation < Arbitration < International Court of Justice
<i>Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure</i>	Article 12	Committee

Inter-State complaints involving a treaty body are rare. The Committee on the Elimination of Racial Discrimination has only received three Inter-State complaints, the first one occurring in 2018. One of the most recent is the *State of Palestine v Israel*, which we will now explore.

Inquiry Focus

How did the Inter-State complaint mechanism operate in the case State of Palestine v Israel?

In 2018 the State of Palestine made an Inter-State complaint against Israel before the Committee on the Elimination of Racial Discrimination. In the complaint the State of Palestine alleged that Israel's policies and practices in the occupied Palestinian territories violated the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).

To understand the legal basis for this mechanism, let's look at ICERD.

Research Task

State of Palestine v Israel involved the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) Committee.

1. Locate the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). [S]
2. Select Article 11, Article 12, Article 13 and Article 22. [S]
3. Create a flow chart that illustrates the Inter-State complaint process in simple terms. In your flow chart ensure you identify the relevant article. [C]

The process this case followed is further outlined in the Press Release below.

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UN COMMITTEE CALLS FOR STRONGER GLOBAL ENGAGEMENT TO ADDRESS RACIAL DISCRIMINATION IN THE PALESTINE-ISRAEL DISPUTE

The UN Committee on the Elimination of Racial Discrimination (CERD) today published the report of the ad hoc Conciliation Commission in the *State of Palestine v Israel* case. The report details the conclusions and recommendations made by the ad hoc Commission for settling the dispute between the two state parties over the issues of racial discrimination.

'The State of Palestine and Israel, as parties to the Convention, have the utmost responsibility to implement the recommendations made by the Commission,' said Michal Balcerzak, Chair of the Committee. 'And all States parties share the significant responsibility of assisting them in that endeavour,' he added.

The ad hoc Conciliation Commission was set up in 2022 under Article 12(1) b of the *International Convention on the Elimination of All Forms of Racial Discrimination* and was composed of five human rights experts from the Committee.

The Commission emphasised that concrete steps toward a mutually agreed and lasting delimitation of borders between the States parties and ending the de facto policy of colonisation and segregation in the occupied territories are necessary for the protection of the rights of both Palestinians and Israelis under the Convention.

Practical Application ...

The Commission stressed the shared responsibility of all States parties to the Convention in eliminating racial discrimination. It underlined that respecting the rule of law and combatting impunity in cases of racial discrimination are key elements in the process toward a solution to the dispute between the State of Palestine and Israel.

The release of the Commission's report marks the final stage of the inter-state procedure initiated by the State of Palestine in 2018 under Article 11 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

Source: Office of the High Commissioner, 'UN Committee calls for stronger global engagement to address racial discrimination in the Palestine-Israel dispute,' Press Release (Online, 22 August 2024) <ohchr.org/en/press-releases/2024/08/un-committee-calls-stronger-global-engagement-address-racial-discrimination>.



1. Identify the *Convention* the State of Palestine and Israel are a party to. [C]
2. Identify the year the ad hoc Conciliation Commission was set up. Explain who sat on the Commission. [C]
3. In the Press Release, the Commission uses the words 'mutually agree', 'all State parties share the significant responsibility...' and 'shared responsibility'. Infer why these words were chosen by the Commission. [A]
4. Decide whether the process followed in this case supported the overall purpose of the Committee, which is to monitor the implementation of the *Convention*. Justify your answer. [E]

As we stated previously, filing a complaint to be heard by a Committee is rare, with most disputes being heard in an international court, whether that be the *International Court of Justice* (ICJ), the *International Criminal Court* (ICC) or a regional court, such as the *European Court of Human Rights* (ECOHHR).

What do you think?

In the *Inter-State communication submitted by the State of the Palestine against Israel* the Committee wrote in 3.41, 'The Committee also notes that the Inter-state mechanism under the Convention provides a unique instrument to settle Inter-State disputes, set up for the common good of all States parties. The Committee observes the mechanism's special nature which is conciliatory, opposite to adversarial'.

Decide whether you agree or disagree that using a conciliatory approach is better than an adversarial approach. Justify your decision with legal criteria. [E]

Inter-State complaints involving the International Courts

It is more common for State parties to use either the *International Court of Justice* (ICJ) or *International Criminal Court* (ICC) to hold each other accountable. You have seen examples of Australia being a party in an action against another State party (such as when Australia challenged Japan's whaling in the Antarctic) and defending itself (such as when Timor-Leste commenced a case in the *International Court of Justice*).

We will now look at another case involving East Timor.



Case Study

East Timor (Portugal v Australia) [1995] ICJ Rep 90

Facts: East Timor was colonised by Portugal in the 16th century, but was invaded by the Indonesian Army in 1974. In 1989 Australia and Indonesia created a Zone of Co-Operation in a maritime area between the 'Indonesian Province of East Timor and Northern Australia'. The area (known as Timor Gap) had oil and mineral resources. At the time Portugal was the administering Power of East Timor.

Issue: Did Australia fail in its obligations with respect to the duties and powers of Portugal as the Administering Power of East Timor and the rights of the people of East Timor to self-determination?

Judgment: The *International Court of Justice* ruled that it did not have the jurisdiction to hear the case as East Timor was under Indonesian control and was not a party to the case.



Responses to Inter-State complaints process

It is important to highlight that certain treaties grant a State party the option to declare that it does not consider itself obligated to adhere to the Inter-State complaints process and procedures. Additionally, a State party can refuse to recognise any recommendations or decision made through that process. This flexibility allows a State party to maintain sovereignty over their legal obligations, but can impact the effectiveness of the complaint mechanism, as it may limit the ability of a State to hold another State accountable for violations.

16.5 Individual complaints

As part of their terms some treaties (either in the treaty or an optional protocol) have created an opportunity for an individual (or applicant) to bring a complaint (also referred to as a communication) alleging a State has violated their human rights. This complaint can be brought to a committee, and/or to an international court once certain conditions are met.

This complaints mechanism is available to Australians in 5 of the 7 core United Nations human rights treaties Australia is a party to, as shown below:

Treaty	Complaints mechanism	Is Australia a party to the complaints mechanism?	Name of treaty body to which complaints may be made
<i>International Covenant on Civil and Political Rights (ICCPR)</i>	<i>First Optional Protocol to International Covenant on Civil and Political Rights</i>	Yes	Human Rights Committee
<i>International Covenant on Economic Social and Cultural Rights (ICESCR)</i>	<i>Optional Protocol to International Covenant on Economic Social and Cultural Rights</i>	No	Committee on Economic, Social and Cultural Rights
<i>International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)</i>	<i>Convention on the Elimination of All Forms of Racial Discrimination, Article 14</i>	Yes	Committee on the Elimination of Racial Discrimination
<i>Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</i>	<i>Optional Protocol to Convention on the Elimination of All Forms of Discrimination against Women</i>	Yes	Committee on the Elimination of Discrimination against Women
<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</i>	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 22</i>	Yes	Committee against Torture
<i>Convention on the Rights of the Child (CRC)</i>	<i>Optional Protocol to the Convention on the Rights of the Child on communications procedure</i>	No	Committee on the Rights of the Child
<i>Convention on the Rights of Persons with Disabilities (CRPD)</i>	<i>Optional Protocol to Convention on the Rights of Persons with Disabilities</i>	Yes	Committee on the Rights of Persons with Disabilities

Source: Australian Government, 'Complaints mechanisms under human rights treaties: Public sector guidance sheet,' Attorney-General's Department, (Website, 2024) <[ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/complaints-mechanisms-under-human-rights-treaties](https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/complaints-mechanisms-under-human-rights-treaties)>.

There are many conditions and procedural steps an individual must take before they can make a complaint.

Firstly, there must be a complaints mechanism within the treaty. For example:

First Optional Protocol to International Covenant on Civil and Political Rights

Article 1

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation, and by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 1 shows:

- the complaint must be based on a violation of one or more of the rights outlined in the *International Covenant on Civil and Political Rights* (ICCPR), and
- the violation must involve a State that has ratified the Covenant, and
- the complainant must establish that he or she has been a personal victim of the violation, and
- a specific committee will receive the complaint.

Secondly, before an individual brings a complaint, he or she must have exhausted all domestic remedies.

First Optional Protocol to International Covenant on Civil and Political Rights

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

In this sense, the **United Nations acts as a last resort** by giving States the opportunity to address human rights complaints before an individual can bring a case to an international body for resolution.

If these initial conditions are met, the applicant can submit a complaint (called a communication). This document must include:

- a description of the alleged violation,
- information about the domestic legal remedies pursued (and any outcomes),
- an explanation about why the case should be considered, and
- the contact details of the applicant.

Once received, the treaty body or international court:

- confirms whether the case meets the procedural requirements, for example, that the alleged human rights violation is within their jurisdiction, and
- whether the communication is admissible.

From here, the State has the opportunity to respond to the complaint before findings are made by the treaty body or court.

First Optional Protocol to International Covenant on Civil and Political Rights

Article 4

1. *Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.*

....

Article 5

1. *The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.*
2. *The Committee shall not consider any communication from an individual unless it has ascertained that:*
 - a. *The same matter is not being examined under another procedure of international investigation or settlement;*
 - b. *The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.*
3. *The Committee shall hold closed meetings when examining communications under the present Protocol.*
4. *The Committee shall forward its views to the State Party concerned and to the individual.*

These steps were followed by a group of Torres Strait Islander Peoples against Australia in the case *Daniel Billy et al. v Australia* detailed below.

Case Study

Daniel Billy et al. v Australia, Communication No. 3624/2019

Facts: The applicants are 8 Torres Strait Islanders. In 2019, they filed an official communication with the United Nations Human Rights Committee.

In their communication they shared that:

- low-lying islands (such as those found in the Torres Strait) are particularly threatened by rising sea levels, flooding, erosion and higher temperatures;
- the life, livelihoods and unique culture of Torres Strait Islanders are at enormous risk once marine and coastal ecosystems and resources are destroyed;





Case Study ...

- climate change has an impact on their physical, economic and mental wellbeing; and
- if they had to leave the Torres Strait Islands, a complete extinction of their Indigenous culture might be a long-term consequence.

The Torres Strait Islanders also provided examples of their interactions with national authorities. For example, the Australian and Queensland Governments had promised to build a sea wall, but only one wall had been built with no more funds being provided to continue the project; and that a request for then Prime Minister Scott Morrison to visit the islands was refused.

Issue: Had Australia violated the applicants' rights (specifically those listed in Article 2, 6, 17, 24(1) and 27) under the *International Covenant on Civil and Political Rights* (ICCPR)?

Decision: In 2022 the Committee found that Australia had violated the applicants' rights under the *International Covenant on Civil and Political Rights* (ICCPR), as Australia had failed to adopt adequate measures to protect the Torres Strait Islands and Torres Strait Islanders from the adverse impacts of climate change.

1. Identify the body that engaged with the complaint (communication). [C]
2. Explain the legal basis of their claim. [C]
3. Locate, select and explain the specific human rights the applicant's allege had been violated by Australia. [C] [S]
4. Using the information provided in the Case Study and the paragraphs prior to this that explain the key steps of the individual complaint process, create a flow chart of the key steps followed by the applicants in this case. [C]
5. Explain how the process followed in this case demonstrates a way human rights are monitored. [C]

It is important to note that the views bodies such as the United Nations Human Rights Committee made in relation to a complaint are not legally binding on State parties (like Australia). After a view is made, a treaty or ancillary body may request a follow-up report. In this case the Australian Government did respond to the views of the Committee.

RESPONSE OF AUSTRALIA TO THE VIEWS OF THE HUMAN RIGHTS COMMITTEE IN COMMUNICATION NO. 3624/2019 (DANIEL BILLY ET AL. v AUSTRALIA)

The Australian Government acknowledges the impact of climate change on First Nations people. First Nations people have much to lose from unchecked climate change due to their rich and meaningful connection with Country. The Australian Government also acknowledges the visible and tangible impacts from rising sea levels and natural disasters impacting on the people of the Torres Strait Islands, and acknowledges the deeply meaningful impacts on culture and ritual, and the increasing difficulty of living on Country.

...

The Committee has recommended that the Australian Government: provide adequate compensation to the authors for the harm suffered; engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the

effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The Committee has also stated that Australia is under an obligation to take steps to prevent similar violations in the future.

Source: Attorney-General's Department, 'Billy et al v Australia (3624/2019) Australian Government Response,' *Australian Government*, (Web Page, 30 March 2023) <ag.gov.au/rights-and-protections/publications/billy-et-al-v-australia-36242019-australian-government-response>.

In an article published in *The Italian Review of International and Comparative Law* (3 (2), 2023) the author wrote, '[t]he case stands out as the first in which an international (quasi-) judicial body has found human rights violations in relation to climate change on the basis of an individual complaint.' Its possible implications are discussed in the article below.

Practical Application

TORRES STRAIT ISLANDERS LEADING THE CHARGE ON THE HUMAN RIGHTS IMPLICATIONS OF CLIMATE CHANGE: *DANIEL BILLY ET AL V AUSTRALIA*

Globally, the decision is significant in terms of climate litigation, and in terms of the rights of Indigenous peoples. The explicit linking of climate harms and human rights obligations is significant, particularly given that international climate change law is yet to incorporate explicit human rights obligations. The International Network for Economic, Social and Cultural Rights welcomed the Committee's views as representing several significant 'firsts', namely; the first successful human rights complaint against a State by inhabitants of low-lying territory; the first such finding that climate change impacts pose risks to the cultures of Indigenous peoples, and:



It also represents the first time that a United Nations body has found a State violated international human rights law through inadequate climate policy, establishing that human rights law applies to climate harm.

The Committee's views do not have precedential value in the sense of binding international or domestic courts or tribunals but they have been greeted as having such precedential value in the sense of informing future climate litigation in the human rights field. Although, we also note its limitations.

Returning to Australia's track record, States' compliance with the non-binding views of treaty bodies varies, and so we must question why these relatively ineffective mechanisms are used to tackle such an egregious global issue? One response is that international human rights law is one of the few options left to ameliorate action on tackling climate change, given the slow progress and ineffectiveness of international climate change law. Discussing the Paris Agreement, Bodansky suggests it is 'a Goldilocks solution that is neither too strong (and hence unacceptable to key states) nor too weak (and hence ineffective)', And so while new climate-related treaties remain hampered by State interests, we argue that the existing

Practical Application ...

and widely ratified human rights treaties are being used as a Trojan Horse for climate change concerns. Çali argues that despite their limitations, UN human rights complaints mechanisms present distinct opportunities for impact. First, they enable civil society, media and academia to engage with UN human rights treaties and to consider a human story which may focus the attention of domestic compliance constituents to the effective implementation of UN human rights treaties than a more abstract engagement. Second, UN human rights treaty body decisions offer a unique opportunity for judicial impact which can take place directly, through the domestic courts, regional courts, and other UN treaty bodies engaging with individual remedies required in a case; or indirectly, by courts considering the case law of UN treaty bodies in comparable cases.

Source: Fiona McGaughey, Amy Maguire and Sasha Purcell, 'Torres Strait Islanders Leading the Charge on the Human Rights Implications of Climate Change: *Daniel Billy et al v Australia*,' (2024) 51(1) *University of Western Australia Law Review*, 95-97.

1. Explain why the authors believe this decision is a significant one. [C]
2. Examine the viewpoints on the legal issue of climate change, human rights and monitoring mechanisms and their consequences. [A]
3. The authors write that, '...UN human rights complaints mechanisms present distinct opportunities for impact.' Using this case as evidence, decide whether this mechanism is an effective way to monitor human rights, justifying your response. [E]

As of late 2024, there have been 65 cases in which human rights violations by Australia have been found.

Practical Application

	CAT	CRPD	ICCPR	ICERD	TOTAL
Unremedied	7	6	30	0	43
Partially remedied	0	3	13	0	16
Remedied	0	0	5	1	6
Total	7	9	48	1	65

Source: Remedy Australia, 'Complaints upheld against Australia', (Web Page, accessed 8 December 2024), <remedy.org.au/cases/>.

1. Identify the percentage of cases that were remedied. [C]
2. Identify the percentage of cases that were partially remedied. [C]
3. Identify the treaty that has seen the highest percentage of complaints filed. Infer why. [C]
4. Did the figures surprise you? Why or why not? [C]

Review

Comprehend

1. **Explain** the periodic reporting process a United Nation's committee follows to monitor Australia's progress in implementing one of the 7 core human right treaties to which we are a party. In your response use an example to illustrate your understanding. [C]
2. **Describe** the format, purpose and processes used by United Nations Special Rapporteurs to monitor human rights issues. [C]
3. **Explain** the Australian Human Rights Commission's role in supporting Special Rapporteurs. [C]
4. **Explain** the Inter-State complaint process as outlined in the *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 11. [C]
5. **Describe** the key steps an individual must follow to make a complaint to a treaty or ancillary body. [C]

Comprehend, analyse and evaluate

Source 1

AUSTRALIA FAILING ITS OWN CITIZENS HELD IN 'SORDID' CAMPS IN SYRIA, UN EXPERTS SAY

United Nations experts have accused Australia of failing to prevent the 'sheer obliteration of the rights' of its own citizens including children who are held in 'sordid' conditions in camps in north-eastern Syria.

In a move that humanitarian groups hope will intensify pressure on Australia to act, 12 UN special rapporteurs have written jointly to the government to raise concerns about 46 Australian citizens, including 30 children, held in the camps.

The letter raises deep concerns about conditions in al-Hawl and Roj camps, 'where most of these individuals are held and are deprived of their liberty without any judicial process'. It warns that children have been suffering from 'malnourishment' and 'dire housing and sanitary conditions' and are showing signs of trauma. The UN special rapporteurs say they believe the conditions 'constitute a violation of a number of human rights, and meet the standard of torture or other cruel inhuman or degrading treatment or punishment'.

The letter renews calls for the Australian government to repatriate its citizens, saying this is 'the only legal and humane response to the complex and precarious human rights, humanitarian and security situation'. The Australian government has repeatedly raised concerns about the conditions in the camps but has maintained it will only consider repatriations on a case-by-case basis and is focused on protecting 'the Australian community'.

Source: Daniel Hurst, 'Australia failing its own citizens held in 'sordid' camps in Syria, UN experts say,' *The Guardian*, (Online, 18 April 2022) <theguardian.com/australia-news/2022/apr/18/australia-failing-its-own-citizens-held-in-sordid-camps-in-syria-un-experts-say>.

1. **Explain** the situation that caused the United Nations to write a letter to the Australian Government. Where is the conflict, who is impacted and what is its connection to Australia? [C]

- Using Source 1 **examine** two different viewpoints to **analyse** a legal issue raised in the letter to the Australian Government. **Justify** a decision about the extent to which Special Rapporteurs monitor and protect human rights and hold State Parties accountable. [A] [E]

Source 2

Human Rights Council

Fifty-seventh session

9 September-9 October 2024

Agenda item 3

Visit to Australia

Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Marcos Orellana*

37. The exercise of the right to freedom of peaceful assembly is essential for public participation. In this regard, the Special Rapporteur notes with concern the strict restrictions on peaceful protest, including the passage of laws imposing harsh penalties on protesters in New South Wales, Queensland, Tasmania and Victoria. The Special Rapporteur also notes the decision of the New South Wales Supreme Court which held that parts of the anti-protest legislation were unconstitutional, following a legal challenge brought by protestors in 2023.

...

Legal framework and environmental governance

109. The Special Rapporteur recommends that the Government of Australia...

(g) Protect the right to freedom of assembly against excesses in restrictions to the legitimate right to peaceful protest;

Source: Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, 'Visit to Australia,' (Report, 18 July 2024) <documents.un.org/doc/undoc/gen/g24/110/20/pdf/g2411020.pdf>.

- Identify** the mandate of the Special Rapporteur. **Explain** the connection of this mandate to the right to protest. [C]
- Using Source 2 **examine** two viewpoints to **analyse** the legal issue of freedom of protest in Australia. **Justify** a decision about the extent to which Special Rapporteurs monitor and protect human rights and hold State Parties accountable. [A] [E]

Australia's legal response to international law and human rights

Chapter 17: The role of international legal institutions in upholding rights

17.1 Introduction

17.2 *International Court of Justice (ICJ)*

17.3 *International Criminal Court (ICC)*

Learning objectives

At the conclusion of this chapter, students will be able to:

- explain the role of international legal institutions in upholding rights, including those within the *International Court of Justice (ICJ)* and the *International Criminal Court (ICC)*
- select legal information, then analyse and evaluate Australia's response to international law and human rights.

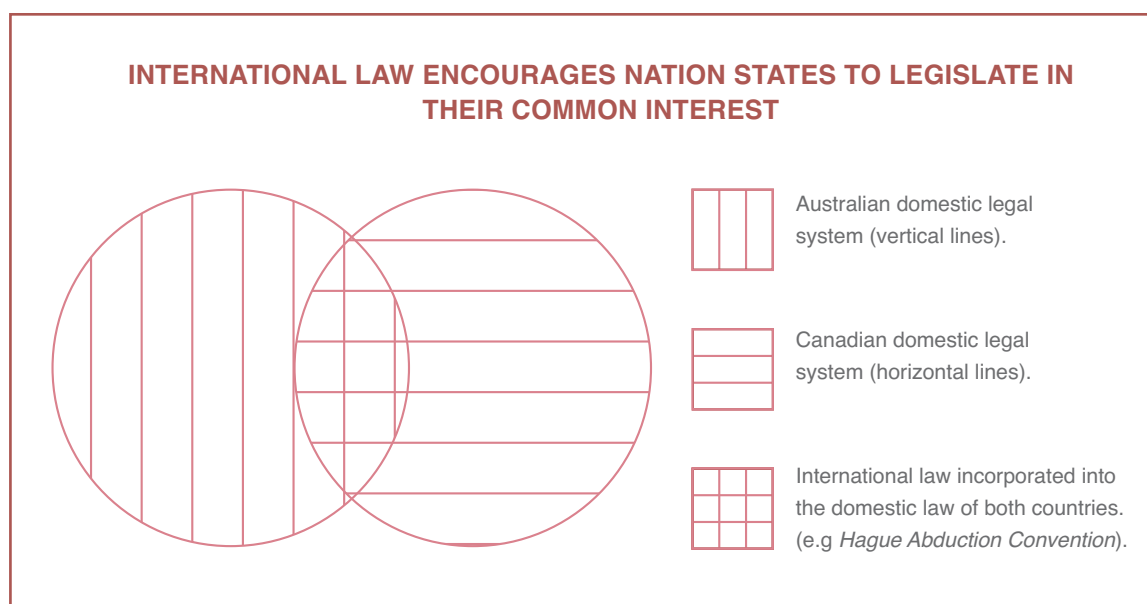
17.1 Introduction

An **institution** is an organisation or establishment for the promotion of a particular object, usually one for some public, educational, charitable or similar purpose (Macquarie Dictionary, 2nd ed., 1991).

It follows that a legal institution is one which exercises a legal purpose.

We have seen that the United Nations has many institutions which exercise functions that have legal ramifications or are of legal character. In a legal system the institutions that make decisions based on the law are the courts.

Courts make decisions in the jurisdiction in which they operate. Sometimes these decisions will affect rights in another jurisdiction. A good example of this is the operation of the *Hague Abduction Convention* which determines whether or not children abducted by a parent from Australia (or another signatory nation) to another country must be returned to Australia (or to another country) for the issues between the parties to be decided.



Another example of these circumstances is seen when a person is charged with an offence (in the United States for example) but has sought and obtained asylum in a country outside the United States. This happened when an Australian citizen, Julian Assange, opposed his extradition from Great Britain for many years. Tony Mokbel, an Australian citizen, fled to Greece after he was charged with the offence of murder. Australia and Greece have signed an extradition treaty. Tony Mokbel was extradited to Victoria, convicted, and is now in jail.

The situations above demonstrate the circumstance whereby the domestic law of one nation state interacts with the domestic law of another nation state. It is international law that governs this relationship. In the process, the courts are upholding the rights of the parties involved.

Additionally, when international human rights law is incorporated, by the treaty process, into domestic law, it becomes part of the domestic law of a nation state. This means domestic courts have a role in protecting and enforcing human rights.

Regional court systems

Globally there are several international institutions (unions) to which member states of the United Nations have joined on a regional basis. These groups of states have agreed to the terms of a convention, treaty or charter to allow them to have disputes and issues determined on a regional basis.

The most significant of these are in Africa, Europe and America. Other regional areas, including the Asia Pacific have not established regional courts able to hear disputes between the nation states within that geographic location.

Arguably, it is the courts at the regional level (Africa, Europe and America), and the domestic courts in nation states (such as Australia) which have the greatest impact on the protection and enforcement of human rights.

What do you think?

Do you think it would be an advantage for Australia, New Zealand, Papua New Guinea, and other island states of the South Pacific to join together to draft a treaty which could form the basis of a regional human rights court to which citizens and organisations of these countries could go to have disputes heard? Are there any countries in our region that would find it difficult to sign up to such a treaty? Can you think of examples of issues or matters which might be brought before such a court? [A]

Europe

There are several regional courts in Europe including the:

- Court of Justice of the European Union
- Court on Conciliation and Arbitration, Organisation for Security and Cooperation in Europe
- European Court of Human Rights
- European Free Trade Agreement Court

European Court of Human Rights (ECOHR)

We have already referred to this court, its origins and jurisdiction in Chapter 16. Some observers have said that the Court has been a victim of its own success, because it covers all the Member States of the European Union and allows legitimate claims to be made by anyone almost without restriction. Since the court began operating in 1959, it has delivered more than 10,000 judgments regarding alleged violations of the *European Convention on Human Rights*, a convention based on the *Universal Declaration*.

Justices of the High Court of Australia have referred to decisions of the ECOHR. As the Commonwealth and State Parliaments introduce more legislation consistent with Australia's human rights obligations, such as the *Human Rights Act 2019* (Qld), the influence of the ECOHR and other international legal developments will be maintained and potentially grow.





Research Task

The High Court of Australia has referred to decisions of the ECOHR in *Roach v Electoral Commissioner* (2007) 233 CLR 162, *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, and *Dietrich v The Queen* (1992) 177 CLR 292.

1. Select and locate one of the cases listed above. [S]
2. In the judgment locate the reference(s) to the ECOHR. [S]
3. Explain how the judiciary used the ECOHR decision to support their own decision. [C]

Tip

Australia's legal response to international law and human rights includes responses at the High Court of Australia level, which have been the subject of an article by the Hon Justice Michael Kirby AC CMG. You may like to locate and read the article *Australia's growing debt to the European Court of Human Rights* (2008) on AustLii.edu.au.

Africa and America

Australian judges have not looked to the regional human rights courts in Africa and America in the same way that they seem to be attracted to the ECOHR. This may be because we do not share the same historical connections with them as we do with Europe. This does not mean that there are not flourishing regional human rights court systems in Africa and America, which complement and reinforce the functions of the *African Commission on Human and Peoples Rights* and interpret and apply the *American Convention on Human Rights*.

Courts with global jurisdiction

There are two main courts which have global jurisdiction within the international court system. The *International Court of Justice* (ICJ) and the *International Criminal Court* (ICC). The origins and jurisdiction of each of the ICJ and ICC have been discussed in Chapters 13.

The *International Court of Justice* (ICJ) is a permanent court that hears civil complaints or cases (called contentious cases):

- made by one state against another, and
- where a nation state has shown leadership in enforcing rights on behalf of a group of treaty parties, or indeed on behalf of the 'international community as a whole' (which is the pursuit of 'collective interests').

The ICJ gives an **advisory opinion** on legal issues referred to it by the United Nations.

The *International Criminal Court* (ICC) is also a permanent court that **investigates** and **prosecutes** people suspected of committing:

- genocide,
- crimes against humanity,
- war crimes, and

- the crime of aggression (since 2018) in situations where national authorities are unable or unwilling to act genuinely.

Australia is a long-time supporter of the ICC and is a signatory to the *Rome Statute of the International Criminal Court* (adopted Rome Conference 17 July 1998).

17.2 International Court of Justice

Australia has long been a supporter of the ICJ and has been directly involved in one way or another in many of its activities as seen in the following:

AUSTRALIA'S INVOLVEMENT IN THE ICJ	
1958 to 1967	Provided a judge, Sir Percy Claude Spender, who also served as ICJ President from 1964 to 1967.
1973 to 1974	Australia was an applicant in the <i>Nuclear Tests</i> case against France (<i>Nuclear Tests (Australia v France)</i> ICJ Rep 1973).
1992	Australia was a respondent to Nauru's case about phosphate issues (<i>Certain Phosphate Lands in Nauru (Nauru v Australia)</i> ICJ Rep 1992).
1995	Australia was a respondent to Portugal's case about East Timor (<i>East Timor (Portugal v Australia)</i> ICJ Rep 1995).
1995	Australia was an applicant to intervene in the New Zealand application to reopen (<i>Nuclear Tests</i> case against France (<i>New Zealand v France</i>) ICJ Rep 1995).
2024	There is a <i>Declaration of Intervention by Australia in Ukraine v Russian Federation</i> case.

Australia has also made submissions as a State in requests for advisory opinions including in 2024 to 2025 following a referral by the United Nations General Assembly in April 2023 in respect of the adverse effects of climate change on small island states in the Pacific.

Australia has generally had a bipartisan approach to the settlement of international disputes as is reflected in a statement in 1986 by Mr Hayden, then Foreign Minister:

The Australian government has consistently advocated that United Nations systems, including the International Court of Justice, should be maintained as a force for peace and stability. The government has not proposed any multilateral alternatives and believes that what is required is for all states to observe the existing obligations. The government has also encouraged resort to the International Court as a forum for the peaceful settlement of international legal disputes. It has done so by example, through acceptance of the compulsory jurisdiction of the court, and also by actually seeking to make the International

Court a forum for settling legal disputes between the parties to multilateral treaties if such disputes cannot be resolved by negotiation or other peaceful means

Source: House of Representatives, *Debates*, 5 June 1986. p 4878.

The *International Court of Justice* (ICJ) is the principal judicial arm of the United Nations. It deals with two types of cases. The more important of these types is cases involving international legal disputes between countries, which are called **contentious cases**. A contentious case begins when two countries seek to settle a dispute through adversarial proceedings. Both parties present their case to the ICJ and after deliberation the ICJ issues a majority opinion. In this situation the ICJ produces a binding ruling between the countries that agree to submit to the ruling of the ICJ. The ICJ, however, has jurisdiction only when the parties to the dispute consent to the jurisdiction of the ICJ.

The major criticism of the ICJ is that the jurisdiction is limited to cases where both parties have agreed to submit to the decision. As a result, even Member States don't necessarily have to accept the jurisdiction of the ICJ in any particular case. It is only the consent of each country that gives the ICJ the necessary jurisdiction. This is not so surprising when a fundamental principle of international law is the **independence (sovereignty) of states**.

Two contentious cases which involve Australia are found below:



Case Study

Whaling in the Antarctic, Australia and New Zealand (Intervening) v Japan (31 March 2014) [2014] ICJ Rep 226) Oxio 144

Facts: Australia's claim against Japan in the *Whaling* case, is framed as a collective, rather than individual state interest. The case was based on the interest of every party to the *International Convention on the Regulation of Whaling*, to ensure compliance by every other party. Japan and Australia and other countries had entered into international obligations under the *International Convention on the Regulation of Whaling* (ICRW). The purpose of such a convention was the preservation of marine animals and of the marine environment. Proceedings were instituted in 2010 by Australia. Australia accused Japan of pursuing a 'large scale program of whaling' under the Second Phase of its Japanese Whale Research Program. Australia asked the ICJ to make a finding that by authorising and implementing the Japanese Whale Research Program under a Special Permit in the Antarctic, Japan was in breach of its international obligations under the ICRW and more specifically in breach of various limitations set out in the schedule to the ICRW. Article VIII of the ICRW contained an exception to these limitations whereby a country may:

...grant to any of its nationals a special permit authorising that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the contracting government thinks fit, and the killing, taking and treating of whales in accordance with the provisions of this article shall be exempt from the operation of the convention.

Japan argued that this special permit was for the purpose of scientific research and therefore was exempted from the operation of the Convention. Australia asked the ICJ to make a finding that such program was not for the purpose of scientific research and therefore the permits issued by Japan were not an exemption authorised under the Convention.

Legal Issue: Was the granting by the Japanese of a special permit for the purpose of scientific research or not?



Decision: After hearing evidence as to what the permit allowed, the ICJ concluded that the permit granted by Japan to one of its nationals could broadly be described as a scientific research program. The ICJ, however, found that the design and implementation of the scientific research program was such that it was not granted for the **'purposes of scientific research'**. The ICJ, having found that the permits granted were not for the purposes of scientific research, agreed that **Japan had breached provisions of the Convention**, namely the moratorium on commercial whaling, the moratorium on the use of factory ships to process whales, and the prohibition of commercial whaling in the Southern Ocean Sanctuary. The ICJ ordered Japan to revoke any authorisations, permits or licences to kill, take or treat whales and to refrain from granting any further permits under Article VIII of the Convention in pursuance of that program.

1. What was the name of the International Treaty which Japan and Australia had entered into and the interpretation of which was the subject of this case? [C]
2. What is the relevance to the case of the expression for the 'purposes of scientific research'? [C]
3. What three provisions of the Convention were breached by Japan? [C]

Practical Application

JAPAN'S NEW WHALING 'MOTHERSHIP' BEING BUILT TO TRAVEL AS FAR AS ANTARCTICA

A Japanese company is building a new whaling ship designed to travel as far as Antarctica, sparking fears commercial operations could resume in the Southern Ocean.

Australia's environment minister, Tanya Plibersek, reaffirmed the Albanese government's commitment to a global moratorium on commercial whaling, while Greenpeace condemned the practice as 'brutal and unnecessary'.

The term 'mother-ship method' refers to a process in which smaller, more agile vessels are used to hunt whales, before the carcasses are returned to the mother ship for freezing





Practical Application ...

and storage. The company's president, Hideki Tokoro, told reporters the ship was intended to pass on 'whaling culture'. 'We want to contribute to Japan's food security,' he said. 'We designed the ship to be able to travel as far as the Antarctic Ocean, in the hope it will be useful in times of food crisis.'

Commercial whaling was banned under an International Whaling Commission moratorium in 1986 but with a clause that allowed Japan to continue to hunt whales legally in the Southern Ocean for what it claims to be 'scientific research'.

The international court of justice ordered Japan to end its annual hunt in 2014, which it did after pulling out of the IWC in 2019. At the time of its withdrawal, the Japanese government announced that it would limit its commercial whaling to within its own waters.

Source: Mostafa Rachwani, 'Japan's new whaling 'mothership' being built to travel as far as Antarctica', *The Guardian*, (Online, 17 February 2023) <[guardian.com/environment/2023/feb/17/japans-new-whaling-mother-ship-being-built-to-travel-as-far-as-antarctica](https://www.guardian.com/environment/2023/feb/17/japans-new-whaling-mother-ship-being-built-to-travel-as-far-as-antarctica)>.

1. When did Japan withdraw from the IWC? Why? [C]
2. What is Japan's current position in relation to commercial whaling in the Southern Ocean? Does this comply with international law? [C]
3. How does the construction of a new 'mothership' suggest that Japan may change its current policy with respect to commercial whaling? [A]
4. What is Australia's current point of view with respect to commercial whaling in the Southern Ocean? Analyse how Australia could use the ICJ to oppose commercial whaling in the Southern Ocean. [C] [A]

Australia and Timor-Leste (East Timor)

East Timor was formerly a province of Indonesia. After becoming independent in 2004, East Timor began negotiating territorial borders with Australia. This was important because of the valuable oil and gas reserves that existed between East Timor and Australia.

What is now known as the Australian-East Timor scandal began in 2004 when the Australian Secret Intelligence Service (ASIS) planted covert listening devices in the Timor-Leste Cabinet Office at Dili. This enabled the ASIS to obtain top secret information from the treaty negotiations led by the Prime Minister of East Timor. It provided the Australian negotiators with an advantage during the treaty discussions. In particular, the listening devices revealed Timor-Leste's bottom line in negotiation, its negotiating tactics, and the different views of the members of the East Timor delegation. As a result of these negotiations, the *Treaty on Certain Maritime Arrangements in the Timor Sea* (2014) (CMATS) was executed by the Australian Foreign Affairs Minister Alexander Downer and his East Timorese counterpart José Ramos-Horta. The Treaty gave Australia a 50/50 split of the greater Sunrise Fields where the oil and gas reserves lay.

In 2012, a former senior ASIS Intelligence Officer revealed that the Australian Government had accessed the top-secret cabinet discussions in Dili by spying. As a result, Timor-Leste rejected the Treaty and the matter was referred to the *Permanent Court of Arbitration* located in the Hague. Mr Bernard Collaery, an Australian lawyer, represented the Timor-Leste Government, alleging that Australia's actions rendered the Treaty void because of the fraud.

After East Timor began its case, the *Australian Security Intelligence Organisation* (ASIO) raided the Canberra office of Mr Collaery, seizing electronic and paper files. This led to East Timor applying to the *International Court of Justice* for an order to prevent Australia relying upon the documents it seized from their legal representative. Australia resisted this application. Timor-Leste was successful in obtaining provisional orders, pending the full hearing of the case, against Australia. An order was made on 3 March 2014 in the following terms:



1. Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded.
2. Australia shall keep under seal the seized documents or electronic data and any copies thereof until further decision of the Court.
3. Australia shall not interfere in any way in communications between Timor-Leste and its legal advisors in connection with the pending *Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and Australia*, with any future bilateral negotiations concerning maritime boundaries limitation or with any other related procedure between the two states including the present case before the Court.

The Court concluded that much of the seized material contained sensitive and confidential information relating to the pending arbitration case and that it was essential to ensure that the content of the seized material would not be divulged at any time to any person or persons who could use it to the disadvantage of Timor-Leste in its relations with Australia over the Timor Sea. The Court also found that it was appropriate to require Australia not to interfere in any way in communications between Timor-Leste and its legal advisors. It is not at all surprising that such orders were made, given that it is a well established legal principle that communications between a litigant and his or her lawyers must be kept confidential and must never be made available to the other side in those proceedings.

Subsequently, the old agreement was abandoned by consent between the parties and a new Timor Sea Treaty was signed between Australia and Timor-Leste in 2018. This made the finalisation of the arbitration case in the Hague unnecessary. Similarly, the case in the ICJ was resolved by Australia agreeing to return the seized documents and data to Timor-Leste. The case was concluded by Timor-Leste discontinuing the proceedings by way of correspondence dated 2 June 2015 in which it stated:

'Following the return of the seized documents and data by Australia on 12 May 2015 Timor-Leste, successfully achieved the purpose of its Application to the Court namely the return of Timor-Leste's rightful property and therefore implicit recognition by Australia that its actions were in violation of Timor-Leste's sovereign rights.'

Practical Application

Analyse the role of the ICJ in the resolution of the dispute between Australia and East Timor. [A]





Australia and *Ukraine v Russian Federation*

The following excerpts from Australia's intervention in the Ukraine case illustrate Australia's ongoing support for the rule of international law and the judicial role of the ICJ. This is Australia's legal response to the Ukraine war.

Case Study

DECLARATION OF INTERVENTION OF THE GOVERNMENT OF AUSTRALIA

In the case of Allegations of Genocide under the *Convention on the Prevention and Punishment of the Crime of Genocide*

Ukraine v Russian Federation

To the Registrar of the *International Court of Justice*, the undersigned being duly authorised by the Government of Australia:

1. On behalf of the Government of Australia, I have the honour to submit to the Court this *Declaration of Intervention* pursuant to Article 63(2) of the *Statute of the International Court of Justice* (the Statute) in the case of Allegations of Genocide under the *Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. By this Declaration, Australia seeks to avail itself of its right to intervene in the merits phase of the proceedings on questions of construction of the relevant provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide* (the *Genocide Convention*, or the *Convention*).

PRELIMINARY OBSERVATIONS

5. Australia is profoundly concerned by the unilateral use of force by the Russian Federation in Ukraine and shares the sentiment and observations made by the Court in its Provisional Measures Order:

On 24 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, declared that he had decided to conduct a "special military operation" against Ukraine. Since then, there has been intense fighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement and has resulted in widespread damage.

The Court is acutely aware of the extent of the human tragedy that is taking place in Ukraine and is deeply concerned about the continuing loss of life and human suffering. The Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law. [...] It deems it necessary to emphasize that all States must act in conformity with their obligations under the *United Nations Charter* and other rules of international law, including international humanitarian law.

Australia also shares the deep concerns expressed by the United Nations General Assembly in its resolutions titled the 'Aggression against Ukraine' (A/RES/ES-1 I/1)3 and the 'Humanitarian consequences of the aggression against Ukraine' (A/RES/ES- 11/2).

6. Australia stresses its continued commitment to the rules-based international order that is critical for maintaining international peace and security.
 7. Australia has a long history of supporting efforts to promote the *Genocide Convention*. It played an active role in negotiating the text of the *Convention* and supporting its adoption.
 8. Australia was one of the first countries to ratify the *Genocide Convention* in 1949. Since then, Australia has been a steadfast supporter of the establishment and mandate
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Case Study ...

of international courts and tribunals with jurisdiction over genocide and other serious international crimes.

9. The proper construction of the *Genocide Convention* is of paramount concern to all State Parties, who, as the Court has observed “do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the *Convention*”.

10. Consistent with this concern and with Australia’s ongoing support for the *Genocide Convention*, Australia intervened in the preliminary objections phase of the present proceedings in the exercise of its right under Article 63(2) of the *Statute*.

11. Reflecting the terms of the right conferred by Article 63(2), Australia’s intervention was and will remain limited to matters regarding the construction of the provisions of the *Convention* at issue in this case. Australia recognises that, having availed itself of the right to intervene, the construction of the Convention given by the judgment of the Court will be binding upon it. Nevertheless, as the Court has recognised in this case, Australia does not thereby become a party to the dispute, and as such its intervention cannot affect the equality of the parties.

Practical Application

Refer to the above excerpt from the *Ukraine v Russian Federation*, and answer the following questions about the Australian *Declaration of Intervention*.

1. Describe and explain the purpose of the Australian *Declaration of Intervention*. [C]
2. Describe the principles referred to in the *Declaration of Intervention* which Australia supports. What is Australia’s historical connection to these principles? [C]
3. What are the legal limits that the ICJ statute places on Australia’s intervention in the court case, and what consequences will the court’s judgment have for Australia? [C]
4. Analyse the importance for the ICJ of countries like Australia intervening to support the process of decision-making in cases like the *Ukraine* case. [A]

Australia, the ICJ, the ECOHR, and climate change

Practical Application

LANDMARK EUROPEAN COURT OF HUMAN RIGHTS RULING THAT CLIMATE INACTION VIOLATES HUMAN RIGHTS: WHAT HAPPENS NOW

On 9 April 2024, the European Court of Human Rights (ECOHR) handed down three rulings on significant climate cases...setting an important precedent that binds all European Courts and is expected to have a global impact on climate litigation.

In *KlimaSeniorinnen Schweiz and Others v Switzerland*, the Court ruled in favour of more than 2,000 Swiss women who brought a case against the Swiss government, the first of its kind to be before the ECOHR. The group of elderly women argued that their government put them at risk of dying during heatwaves that were caused by climate inaction, and that the risk to their health was exacerbated by their age and gender. The verdict, which cannot be appealed, was delivered by a 17-judge panel in Strasbourg.



Practical Application ...

The Court found that the Swiss Government violated article 8 of the *European Convention on Human Rights* (ECHR), the right to respect for private and family life. The Court found that article 8 'encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life'.

Other international developments on human rights and climate change

In April 2023, the United Nations General Assembly asked the International Court of Justice (ICJ) to give an advisory opinion on States' obligations under international law, including international human rights law, regarding the protection of the climate system. The Court has also been asked to advise on the legal consequences flowing from a failure to fulfil such obligations, with respect to States and people, and in particular small island States and future generations which are particularly vulnerable to the adverse effects of climate change. The request is being led by Vanuatu and is supported by 105 other States, including Australia. The ICJ is likely to commence public hearings in the second half of 2024, with an opinion given in the first half of 2025. Although the Court's decision will not be legally binding, it will likely influence the Australian Government's approach to assisting its small island neighbours adapt to climate change. The Australian Government is already considering various initiatives to financially assist the Indo-Pacific through its proposed sustainable finance strategy and sovereign green bond framework.

Source: Claire Smith, Emily Tranter, Caitlin McConnel, Darcy Bradley and Jennifer Williams, 'Landmark European Court of Human Rights ruling that climate inaction violates human rights: what happens now', *Clayton Utz*, (Online, 17 April 2024) <[claytonutz.com/insights/2024/april/landmark-european-court-of-human-rights-ruling-that-climate-inaction-violates-human-rights-what-happens-no](https://claytonutz.com/insights/2024/april/landmark-european-court-of-human-rights-ruling-that-climate-inaction-violates-human-rights-what-happens-now)>.

1. What human right did the women in the *Schweiz* case claim in the ECOHR was violated by the Switzerland government? [C]
2. What did the ECOHR decide? [C]
3. What impact do you think the decision of the ECOHR might have on courts in other jurisdictions globally? [A]
4. Set out the position you think the Australian Government should take in any submissions to the ICJ for it to consider when deciding its advisory opinion on States' obligations under international law, including international human rights law, regarding the protection of the climate system. [A]

17.3 International Criminal Court

Introduction

If we measure human rights violations by the number of individual persons whose rights have been affected, then it is the crimes against humanity and genocide that would be at the top of the list. International criminal law deals with crimes so awful that they cannot be left to one nation to prosecute. After World War II the atrocities committed by members of the Nazi regime against European Jews, and the annihilation of millions of civilian victims in concentration camps, warranted special trials and punishment. The International Military Tribunal based in Europe was the first international tribunal to apply international criminal law to a specific event.

The legal basis for the *International Criminal Court (ICC)*

The *Rome Statute of the International Criminal Court (Rome Statute)* is the international treaty that founded the ICC. Comprising a Preamble and 13 Parts, it establishes the governing framework for the ICC. Adopted at the Rome Conference on 17 July 1998, it entered into force on 1 July 2002.

The statute sets out the ICC's jurisdiction over **genocide, crimes against humanity, war crimes and the crime of aggression**. It also addresses other matters including, for example, admissibility and applicable law, the composition and administration of the Court and its procedures.

Australia is a signatory to the *Rome Statute* and is a State Party to the treaty. The USA is not a signatory to the *Rome Statute* and is not a State Party to the treaty. It is an issue for the ICC that the USA does not support it, as it is the support of States Parties like Australia that will ensure that the ICC has a future.

The ICC is based in The Hague in the Netherlands. It is the first permanent international court capable of investigating and prosecuting the most serious crimes of international concern.

Australia's engagement with the ICC

As a State Party to the *Rome Statute*, Australia has a general obligation to cooperate fully with the Court's investigations and prosecutions.

Australia actively participates in the Assembly of States Parties to the *Rome Statute*. This assembly is the Court's management oversight and legislative body. It meets at least once a year and sets the general policies for the administration of the Court and reviews its activities. It also elects the judges and key officials such as the prosecutor and deputy-prosecutor.

The Department of the Attorney General and the Department of Foreign Affairs and Trade represent Australia at these meetings. Australia provides consistent financial support to the Court, in addition to providing voluntary funding to key initiatives.

The *International Criminal Court Act 2002 (Cth)*

The Act establishes mechanisms to facilitate Australia's compliance with the *Rome Statute*. The Act includes a requirement for Australia to provide investigative assistance and the arrest and surrender of suspects.

Each year the Department of the Attorney General must publish, as an appendix to its annual report, a report on the operation of the *International Criminal Court Act 2002 (Cth)*, the operations of the Court and the impact of the Court's operations on the Australian legal system.

Research Task

Locate the website of the ICC at (icc-cpi.int/about/how-the-court-works) and select information that responds to the following headings:

- The crimes it prosecutes.
- The jurisdiction of the court.
- The court process.

[C] [S]



Investigating war crimes in Afghanistan

There is currently an ICC investigation into war crimes in Afghanistan which covers the period from 2003 to 2024. Due to the various changes to the Australian Government over the period, the investigation lapsed. The reason for the resumption of the investigation in 2021, was because the ICC was not satisfied that the Afghanistan Government, the Taliban, was making a serious attempt to investigate any war crimes during the period.

Human Rights Watch covered the resumption of the ICC investigation in a news item on 31 October 2022. It said that the ICC, ‘...should address grave international crimes committed by all sides when it continues its investigation into the situation in Afghanistan’. Furthermore, it stated that:

The investigation covers serious crimes committed in the country since May 2003, when Afghanistan first joined the ICC. The crimes within the court’s jurisdiction include alleged crimes against humanity and war crimes by the Taliban and affiliated forces and Afghan National Security Forces. The mandate also includes alleged crimes in other ICC member countries since July 1, 2002, that have a nexus to the ongoing armed conflict and are sufficiently linked to the situation in Afghanistan. So, it also would include such alleged crimes by the US armed forces and the Central Intelligence Agency (CIA) both in Afghanistan and in clandestine CIA detention facilities in Poland, Romania, and Lithuania, as well as all ICC members

Source: Human Rights Watch, ‘Afghanistan Enquiry Can Resume’, News, (Webpage, 31 October 2022) <[hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume](https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume)>.

Practical Application

THE INTERNATIONAL CRIMINAL COURT IS UNLIKELY TO PROSECUTE ALLEGED AUSTRALIAN WAR CRIMES - HERE’S WHY

For the first time, Australians have been referred to the International Criminal Court (ICC) for investigation into alleged Afghan war crimes.... Senator Jacqui Lambie has instigated this process...Lambie’s ICC referral focuses on the legal responsibility of Australian Defence Force (ADF) commanders who knew, or should have known, about alleged war crimes committed by their forces in Afghanistan.

This move by Lambie may not lead to any formal action by the ICC, but it does shine a spotlight on how Australia is responding to these claims.

The ICC was only ever intended as a court of last resort in these matters. That means it will only investigate and prosecute people for alleged war crimes when a country is unwilling or unable to do so itself.

The court has jurisdiction with respect to war crimes committed by the nationals of state parties, such as Australia. Its jurisdiction extends to “grave breaches” of the laws of war, which sets a high threshold for the most serious and egregious acts.

Presently, the ICC prosecutor is already investigating alleged crimes against humanity and war crimes committed by various sides in the Afghan conflict including Australian, UK and Taliban forces and the Islamic State - dating back to the early 2000s. The US is not a member of the court and does not respect its jurisdiction.

Australia has been an enthusiastic supporter of the ICC, but its recognition of ICC jurisdiction was contingent on a formal declaration in 2002 made by the Howard government which provided, in part, that: *no person will be surrendered to the court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes.*

Practical Application ...

Additionally, Australia would only surrender a person to the ICC for prosecution following the Commonwealth attorney-general issuing a certificate.

The government response to the Brereton Report – with its establishment of the Office of the Special Investigator – means it is taking the lead in prosecuting war crimes allegations. As such, an Australian soldier or commander would only be handed over to the ICC in the most exceptional of cases.

Source: Professor Donald Rothwell, 'The International Criminal Court is unlikely to prosecute alleged Australian war crimes-here's why', *The Conversation*, (Online, 21 June 2023) <theconversation.com/the-international-criminal-court-is-unlikely-to-prosecute-alleged-australian-war-crimes-heres-why-208180>.

1. Describe the purpose of Senator Lambie's referral of Australian soldiers to the ICC. [C]
2. Is the ICC prosecution currently investigating war crimes committed in Afghanistan? If so, describe the scope of this investigation. [C]
3. Describe the viewpoint reflected in the article. Do you agree or disagree with the writer? Justify your position using legal criteria. [A] [E]

Review

Comprehend

1. **Describe** the meaning of:

a. Regional court systems	c. Contentious cases	e. Advisory opinions
b. Global jurisdiction	d. Declaration of intervention	

[C]
2. **Explain** the following:

a. The jurisdiction of the ICJ	c. The role of the ECOHR
b. The jurisdiction of the ICC	

[C]

Analyse

1. Australia and Japan had different points of view about whaling in the Southern Ocean which led to a dispute that was heard in the ICJ. **Analyse** the role of the ICJ in the resolution of this dispute. [A]
2. **Describe** and **analyse** the position that Australia and the USA have with respect to supporting the ICC and its implications. [A]

Select and evaluate

1. Australia is a longtime supporter of both the ICJ and the ICC since their inception. **Select** and outline information which illustrates this support. Using legal criteria, **evaluate** Australia's contribution to the international rule of law and the international law of human rights by its support for the ICJ and the ICC. [E]

Australia's legal response to international law and human rights

Chapter 18: Refugees, abduction of children and conduct of war

18.1 Legal implications of signing international treaties and conventions

18.2 *Protocol Relating to the Status of Refugees*

18.3 *Hague Convention on the Civil Aspects of International Child Abduction*

18.4 *Geneva Conventions and Hague Conventions*

Learning objectives

At the conclusion of this chapter, students will be able to:

- analyse the legal implications of becoming a signatory to:
 - *Protocol Relating to the Status of Refugees* (1967)
 - *Hague Convention on the Civil Aspects of International Child Abduction* (1980)
 - *Geneva Conventions* (1949)
 - *Hague Conventions* (1899) and (1907).

18.1 Legal implications of signing international treaties and conventions

Treaties and conventions are agreements between nation States, or nation States and international organisations, which can be enforced in accordance with their terms. For example, such an agreement might contain a term which says:

All disputes under this agreement shall be heard and decided in a court exercising the jurisdiction of the State of Queensland, and the law of Queensland shall apply to this agreement.

Most treaties and conventions have been adopted by the United Nations General Assembly for the purpose of enabling its members to accept the purposes, principles, and processes set out in the *United Nations Charter*, and the *International Bill of Human Rights*. The Member States of the United Nations that sign these treaties and conventions accept the responsibilities and obligations of membership, and if they ratify and accede to these agreements, they are bound by their terms. Additionally, if these treaties and conventions are signed into the domestic law of a nation State, the rights and obligations contained within them can be enforced in the domestic law of that State.

The legal implications for each nation State will vary according to the particular treaty or convention it has signed, and whether or not it has ratified or acceded to it, and whether or not it has been signed into the domestic law of the nation State. The legal system of each nation State has implications for the application of a particular treaty within its borders. By and large, you will be concerned with Australia's legal response as a signatory.

18.2 Protocol Relating to the Status of Refugees

Australia acceded to the *Protocol Relating to the Status of Refugees* (1967 Protocol) in 1973. The legal implications of Australia signing the 1967 Protocol are found in the document itself. In its *resolution 1186 (XLI)* of 18 November 1966, the General Assembly requested the Secretary General to transmit the text of the protocol to the member states that had signed the *Convention Relating to the Status of Refugees* (1951) (1951 Refugee Convention).





Practical Application

PROTOCOL RELATING TO THE STATUS OF REFUGEES (1967) (EXCERPTS)

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

have agreed as follows:

Article 1 - General provision

1. *The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.*
2. *For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.*
3. *The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (1) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.*

Article 2 - Co-operation of the national authorities with the United Nations

1. *The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.*
2. *In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:*
 - (a) *The condition of refugees;*
 - (b) *The implementation of the present Protocol;*
 - (c) *Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.*

Article 3 - Information on national legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Source: United Nations (Webpage, n.d) <ohchr.org/en/instruments-mechanisms/instruments/protocol-relating-status-refugees>.

1. What was the purpose of the *1967 Protocol*? [C]
2. What changes did the *1967 Protocol* make to the *1951 Refugee Convention*? [C]
3. What were the legal implications for a State party that signed the *1967 Protocol* that had also signed the *1951 Refugee Convention*? Explain your answer using legal criteria. [A]

Australia's international obligations to refugees

It should be clear from the above that when Australia signed the *1967 Protocol*, its obligations under the original *1951 Refugee Convention* changed. Australia became responsible under the amended *1951 Refugee Convention* for all refugees, not only those who became refugees 'as a result of events occurring before 1 January 1951.' Otherwise, the obligations Australia signed up for in the *1951 Refugee Convention* remained unchanged. The legal implications became radically different.

Practical Application

CONVENTION RELATING TO THE STATUS OF REFUGEES (1951)

Article 1 - Definition of the term "refugee"

For the purposes of the present Convention, the term "refugee" shall apply to any person who:

- (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily re-acquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Source: UNHCR, 'Convention Relating to the Status of Refugees', (Web page, n.d) <unhcr.org/media/convention-and-protocol-relating-status-refugees>.

1. Describe in your own words who the *1951 Refugee Convention* defines as a 'refugee'. [C]
2. When does the *1951 Refugee Convention* cease to protect a person? [C]
3. Do you agree that it is appropriate that the circumstances set out in Article 1F should be applied to exclude a refugee from the protection of the *1951 Refugee Convention*? Justify your answer using legal criteria. [E]

Before Australia signed the *1967 Protocol* it was already committed to the purposes and principles of the *United Nations Charter* and the *International Bill of Rights*. This includes the right of a refugee to seek asylum in accordance with the *Universal Declaration*. The *Universal Declaration* states:

Article 14

Everyone has the right to seek and enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Source: United Nations, (Webpage, n.d) <un.org> about us> universal-declaration-of>.

Once Australia had signed the *1951 Refugee Convention* and then the *1967 Protocol* it was **bound by international law to respect the legal obligations relating to the treatment and protection of refugees and to implement domestic laws which give effect to their rights**. One of the fundamental rights of a refugee is the principle of **non-refoulement**, which is enshrined in **Article 33** of the *1951 Refugee Convention*. ***This prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.***

There are many other rights and responsibilities set out in the *1951 Refugee Convention* which are the responsibility of the Australian government to observe and practice, and where appropriate, legally implement by passing laws. Some of these rights and responsibilities are set out in the table below.



Practical Application

SUMMARY OF SOME RIGHTS AND RESPONSIBILITIES CONTAINED IN THE 1951 REFUGEE CONVENTION		
States shall:	States shall not:	Refugees shall be treated at least like nationals or non-nationals in areas of:
• Respect a refugees' personal status and their associated rights (Article 12). • Provide free access to courts (Article 16). • Provide administrative assistance (Article 25). • Provide identity papers (Article 27). • Provide travel documents (Article 28). • Allow refugees to transfer their assets (Article 30). • Provide the possibility of assimilation and naturalisation (Article 34). • Cooperate with the UNHCR (Article 35).	• Discriminate against refugees (Article 3). • Expect refugees to pay taxes and fiscal charges that are different (Article 29). • Impose penalties on refugees who entered illegally in search of asylum if they present themselves without delay (Article 31). • Expel refugees (Article 32). • Forcibly return refugees (Article 33).	• Freedom to practice their religion (Article 4). • The respect and protection of artistic rights and industrial property (Article 14). • Rationing (Article 20). • Elementary education (Article 22). • Public relief and assistance (Article 23). • Labour legislation and social security (Article 24). • Right to work (Article 17). • Right to housing (Article 21).

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1. You are an illegal refugee. You have landed on a remote beach in the Northern Territory. You are familiar with the content of the *1951 Refugee Convention* which you read carefully before leaving for Australia. Describe what you expect to happen to you, consistent with the Australian Government's best practice under the *1951 Refugee Convention*. [C]

The global refugee crisis

Practical Application

GLOBAL REFUGEE CRISIS GROWING WORSE, WITH AID WORKERS NEAR BREAKING POINT, LITTLE RESPECT FOR BASIC RULES OF WAR, HIGH COMMISSIONER WARNS SECURITY COUNCIL

The United Nations High Commissioner for Refugees told the Security Council in a briefing today that 2024 is even worse than last year in terms of the number of refugees and internally displaced people worldwide.

Filippo Grandi, the High Commissioner for Refugees, reported that last year, 114 million people were displaced by war, violence and persecution. "Next month we will update this figure. It will be higher," he said, adding that humanitarians are near a breaking point and that respect for the basic rules of war is almost non-existent. Among the many haunting images from the conflict in Gaza is that of desperate people trapped and often killed inside a war zone.

Turning to Syria, he highlighted the presence of 5.6 million Syrian refugees and proposals by some European countries to send them back to so-called "safe areas" in the country.

In Myanmar, over 3 million people have been displaced by fighting, and humanitarians operate in a high-risk environment.

In Ukraine, international humanitarian law gets violated every day and displacement continues to increase. And in Sudan, 9 million people are displaced inside the country or refugees in neighbouring countries

Source: United Nations, 'Global refugee crisis growing worse with aid workers near breaking point, little respect for basic rules of war, High Commissioner warns Security Council' (Webpage, n.d) <press.un.org/en/2024/sc15713.doc.htm>.



1. Describe the global refugee crisis. [C]
2. What appears to be the main cause of the refugee crisis? [C]



Practical Application

IS AUSTRALIA'S RESPONSE TO REFUGEES GENEROUS? AN ANALYSIS OF UNHCR GLOBAL TRENDS STATISTICS FROM 2013 TO 2022

24 November 2023

This Refugee Council of Australia (RCOA) briefing looks at 10 years of statistics released by the UN refugee agency UNHCR, noting changes in the numbers of refugees and people seeking asylum between 2013 and 2022 and assessing how Australia compares.

Key points

- The number of refugees under UNHCR's mandate has grown dramatically over the past decade, from 11.7 million in 2013 to 29.4 million in 2022.
- Asylum applications also increased, from 3.4 million in 2013 to 6.9 million in 2022. The number of pending asylum applications increased from 1.17 million at the end of 2013 to 5.33 million at December 2022.
- In refugee resettlement, over 10 years Australia was third overall and second on a per capita basis, receiving 13.1% (132,180) of the 1,008,934 refugees resettled.
- However, of the 22.98 million people given refugee status over 10 years, Australia recognised only 0.21%, just 48,523.

The scale of Australia's international contribution can best be seen when refugee recognition and resettlement are considered together. Over the 10 years to December 2022, Australia recognised or resettled 180,073 refugees, 0.75% of the global total of 23.99 million refugees recognised or resettled in that period. On this measure, Australia was ranked 30th overall, 41st on a per capita basis and 77th relative to national Gross Domestic Product (GDP).

Source: Refugee Council of Australia, 'Is Australia's response to refugees generous?' (Online, 24 November 2023) <Refugeecouncil.org.au/is-australias-response-to-refugees-generous/>.

1. Describe Australia's position in the world rankings for refugee resettlement. [C]
2. Why do you think Australia recognises a smaller proportion of persons given the status of refugees than other countries? Give your reasons. [A]
3. Is it fair to assess Australia's international contribution by combining refugee recognition and resettlement into the one category statistically? Give your reasons. [A]

Migration Act 1958 (Cth)

When Australia became a signatory to the *1967 Protocol* and the *1951 Refugee Convention*, it made a commitment to comply with the provisions from these instruments in good faith, and in the long-term, incorporate them into domestic law.

The law in Australia which applies to refugees is found in the *Migration Act 1958* (Cth) as amended. There are some sections of the *Migration Act* which we can usefully look at to see what Australian governments have incorporated from the *1951 Refugee Convention*.





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MIGRATION ACT 1958 (CTH)

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality--is outside the country of his or her nationality and, owing to a well - founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality--is outside the country of his or her former habitual residence and owing to a well - founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of well - founded fear of persecution, see section 5J.

(2) Subsection (1) does not apply if the Minister has serious reasons for considering that:

- (a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
- (b) the person committed a serious non - political crime before entering Australia; or
- (c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

5J Meaning of well - founded fear of persecution

(1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well - **founded fear of persecution** if:

- (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
- (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
- (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.

501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate--natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

(2) The Minister may cancel a visa that has been granted to a person if:

- (a) the Minister reasonably suspects that the person does not pass the character test; and
- (b) the person does not satisfy the Minister that the person passes the character test.

Character test

(6) For the purposes of this section, a person does not pass the character test if:

- (a) the person has a substantial criminal record); or
- (aa) the person has been convicted of an offence...or



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(b) *the Minister reasonably suspects:*

- (i) *that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and*
- (ii) *that the group, organisation or person has been or is involved in criminal conduct...*

1. Using the *Migration Act*:

- a. Define the meaning of refugee. [C]
- b. Explain the circumstances in which a person who establishes 'a well-founded fear of persecution' can be disqualified from holding a Visa by the 'character test'. [C]

2. Using your answers from Question 1 a and b:

- a. Compare the definition of a refugee in Australian law to the definition of a refugee contained in *1951 Refugee Convention*, Article 1. [A]
- b. Analyse whether or not our domestic law sufficiently complies with international law. [A]

Incorporating international instruments into domestic law allows people to access the rights in the international instruments in domestic courts. It also allows the courts to assist people to enforce those rights if necessary. In contrast, failing to incorporate international agreements into Australian law does not create rights in domestic law and makes it difficult for the courts to decide whether or not Australia is in breach of its international obligations.

However, even when international instruments have not been directly incorporated into domestic law, courts can still refer to international obligations when making a decision to see if a government's actions are consistent with our international commitments. In *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) HCA 20, the High Court of Australia confirmed that the legislation central to this case should be interpreted in a way that ensures, as far as possible, that it is consistent with Australia's international obligations, because '*Parliament, prima facie, intends to give effect to Australia's obligations under international law.*' In that case the High Court of Australia referred to a convention other than the *1951 Refugee Convention* to support its decision.

Australia's refugee and humanitarian program

Australia has generally implemented its obligations in a manner consistent with the *1951 Refugee Convention* in the *Migration Act* and in its administration of the provisions of that Act.



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THE HUMANITARIAN PROGRAM

The Humanitarian Program (the Program) has a long history of providing resettlement for refugees and others who are displaced as a result of conflict, persecution and human rights abuses. The Program's intake is drawn from a range of nationalities, ethnic and religious groups, reflecting global displacement arising from conflict and persecution. It prioritises



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those most in need of global resettlement in line with guidance and referrals from UNHCR and focuses on people who are outside their home country who are:

- assessed as refugees by the UNHCR and referred to Australia for resettlement;
- applicants proposed by a close family member in Australia; and
- vulnerable cohorts within refugee populations, including women and children, ethnic minorities;
- LGBTQI+ and other identified minority groups with family links in Australia.

There are two components within the Program:

- the offshore component, focussing on providing permanent resettlement in Australia to refugees and people in humanitarian need outside their home country (and outside Australia); and
- the onshore component which is reserved for people who arrive in Australia lawfully, seek Australia's protection and are found to engage Australia's non-refoulement (non-return) obligations.

Source: Australian Human Rights Commission, 'Our Work', (Web page, n.d) <humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/immigration-detention-and-human-rights>.

1. Describe the main features of Australia's humanitarian program. [C]

2. To what extent does Australia cooperate with and rely on the UNHCR? [C]

Legal principles applicable to Visa applications for refugees

All persons who enter Australia must hold a valid Visa or entry permit.

Under the *Migration Act*, a person seeking to enter Australia as a refugee must make an application in the required form for the relevant Visa. Broadly speaking, the applicant must satisfy the requirements set out in the *Migration Act*, such as, for example, satisfying the Minister of the Department of Home Affairs (the Minister) (or his delegate), that he or she has a '*well-founded fear of being persecuted*' and is not disqualified by the '*character test*'.

The decision to grant a refugee a Visa is discretionary, is subject to natural justice, and is made after due consideration of all the matters relevant to exercising the discretion.

A Visa application that is refused can be challenged in a number of ways:

- by ensuring the administrative requirements relating to processing the application are fully satisfied; and
- where there are grounds for considering that the Minister (or delegate) is in error or has not acted in accordance with the principles of natural justice, by making an application for a review of the decision to the *Administrative Review Tribunal* (ART).

There may be other ways to challenge a decision to refuse a Visa. For example, it is possible to allege, if there are appropriate grounds, that the relevant provision in the *Migration Act* is unconstitutional, or that the decision lies outside the scope (authority) of the Act.



Legal action to object to the refusal of a Visa

The refusal to grant a Visa is an administrative decision which can only be challenged in a court or tribunal by judicial review.

Judicial review can set decisions aside, compel duties to be performed and prevent wrongs, but it cannot substitute a correct or preferable decision that is a step beyond judicial power.

Australian Law Reform Commission, 'Chapter 15: Judicial review,' *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (ALRC Report 129) (Online, 12 January 2016) < alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/15-judicial-review/>.

Case Study

203807 (Refugee) [2024] AATA 4078

Facts: This is an application for review of a decision made by the Minister of Home Affairs (or delegate) on 11 March 2022 to refuse the applicant a protection Visa under s65 of the Act.

The applicant applied for a Visa on 6 April 2020. The delegate of the Minister for Home Affairs refused to grant the Visa on the basis that the delegate did not accept the applicant faced a real chance of serious harm for one or more of the reasons referred to in ss51(1)(a) of the *Migration Act*. The delegate also did not accept that there was a real risk the applicant would face significant harm for any reason upon her return to Brazil.

The Tribunal had regard to the criteria for a protection Visa set out in s36 of the Act. It considered the content of the original application of the applicant and received further oral evidence from the applicant. In part, the oral evidence stated:

... she indicates she wishes to stay in Australia as she does not feel safe in Brazil. She lost jobs, moved cities, was threatened and did not feel safe. She cannot count how many things happened to her because of her sexual orientation. She struggles with depression and anxiety because of what she went through. Since she was 16 years, she has seen doctors, psychologists, taken medicine and tried to keep a healthy mindset. She feels safe in Australia...

The applicant told the Tribunal she fears returning to Brazil as she is a lesbian. She lost jobs frequently because she was a lesbian. She would be fired without reason but usually after they found out she was in a relationship with a woman. She was bullied often... If she returns to Brazil, it will be hard for her to get a job or deal with her mental health. She does not want to go back as she wants to be herself.

The Tribunal pointed out that it was possible for a person to meet the criteria for the granting of the Visa if the Minister (or delegate) had substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s36(2)(aa) ('the complementary protection criterion').

Legal Issue: Did the Minister (or delegate) consider the grounds under s36(2)(aa) when making the decision to refuse the applicant a protection Visa?

Decision: The Tribunal found in favour of the applicant, on the basis of the evidence, including the evidence of the oral statement of the applicant at the hearing, that the Minister (or delegate) did not properly consider the grounds under s36(2)(aa) when making the decision.

The Tribunal remitted the matter for reconsideration with the direction that the applicant satisfies s36(2)(aa) of the Act.

Applications to the UNHCR

A person who has been refused a Visa by the Minister and who has exhausted his or her remedies in the domestic legal system, may make an application to the United Nations Human Rights Council (UNHRC) for a remedy. The Minister is not legally required to take notice of, or follow the decisions of, the UNHRC.

Research Task

Remedy Australia is a human rights organisation which believes Australia should comply with UN decisions on human rights complaints. Remedy Australia monitors Australian cases adjudicated by the UN treaty committees and maintains a public online database.

Go to the website of Remedy Australia, remedy.org.au/cases/subject. You will find a large number of case notes where the UNHRC and the Committee against Torture (CAT) have responded to applications made by the persons claiming that their human rights have been infringed. In relation to those cases about refugees, select 2 where the decision of the UNHRC or the CAT seems to have been influential and supportive of the eventual outcome of the applicant's case. Explain the decisions. [C]

Case Study

M.K.M. v Australia (CAT, 2017)



Unremedied

Mr M.K.M. claimed refugee status on arrival in Australia based on undisputed facts of his arbitrary detention and torture in Afghanistan by the Taliban (a non-state actor), who also brutally executed his father and another detainee in front of him. Australia rejected his claim, arguing the Taliban had not targeted him due to his ethnicity or religion, and also refused his claim for 'complementary protection' from torture (outside of the 5 grounds enumerated in the *Refugee Convention*).

The Committee Against Torture (CAT) held that deporting him to Afghanistan would amount to refoulement in violation of Article 3, and recommended Australia not deport him to Afghanistan 'or to any other country where he runs a real risk of being expelled or returned to Afghanistan.' Australia complied with the Committee's interim measures request, but entirely rejected the Committee's final views.

1. Analyse the response by the CAT to the application of M.K.M. Are you satisfied with Australia's response? Justify your answer using legal criteria. [A] [E]





Case Study

Gnaneswaran v Australia (UNHRC, 2021)



Unremedied

A Tamil survivor of torture arrived in Australia by boat in 2012 and applied for refugee protection. In the 6 years he spent in Australia appealing the initial rejection of his refugee claim, Mr Gnaneswaran married and had a child. His wife and Australian-born daughter were granted Visas. Australia gave Mr Gnaneswaran 3 days' notice of his forcible deportation, in which time he lodged a communication to the UN Human Rights Committee. The Committee responded the next day, asking Australia not to deport him while his case was before the Committee. But he was deported the same day to Sri Lanka, where he was arrested, interrogated and brought to court. The Committee found a breach of Article 17, read in conjunction with Article 23(1) of the ICCPR, concerning the protection of the family from arbitrary interference.

1. Analyse the response of the UNHRC to the application of Mr Gnaneswaran. Are you satisfied with Australia's response? Justify your answer using legal criteria. [A] [E]

Mandatory detention and offshore processing

Key terms

Migration zone: is the territory in which Australia's Visa policy applies. The Australian migration zone covers such Australian controlled territories as the government may determine.

Excised offshore place: territory excised from the migration zone which falls outside the operation of the *Migration Act* ss46A(1). Persons arriving unlawfully in an excised offshore place are prevented from making valid Visa applications. This does not involve removing such areas from Australia's sovereign territory. Therefore Australia's obligations under the *1951 Refugee Convention* continue to apply to the whole of Australia, including excised offshore places.

Declared country: a country which has been designated under the *Migration Act* as a declared country to which a person arriving unlawfully in an excised offshore place can be taken and detained.

The Tampa crisis

In 2001 a small Indonesian fishing boat with 433 asylum seekers (mostly from Afghanistan) began to sink in international waters. The asylum seekers were rescued by the MV Tampa. The Australian government refused to allow the ship to land on Christmas Island. When the ship crossed into Australian waters, the Government sent 45 SAS troops to board the ship and prevented it from landing. After a Bill to provide the Government with the power to remove any foreign ship in Australian waters failed, the Navy took the asylum seekers to Nauru.

This event became a catalyst for Australia's new border protection policy called the 'Pacific Solution'. The *Migration Act* was amended by the *Migration Amendment (Excision from Migration Zone) Act 2001 (Cth)* so that the Government could change Australia's **migration zone** by removing certain parts of its territory and calling them '**excised offshore places**'. The dilemma was to find ways of controlling our borders to stem increasing flows of people wanting to claim

asylum. Since 2001, the strategy the Australian government put in place for dealing with the arrival of unauthorised people by boat is the excision of islands around northern Australia from the migration zone.

A person who arrives in the **migration zone without a valid Visa, is an unlawful non-citizen**. If that person arrives at an 'excised offshore place', the person becomes an 'offshore entry person' and cannot make a valid Visa application. However, the Minister may determine it is in the public interest to grant a Visa.

The additional strategy was that a person who arrives at an excised offshore place can be taken to a country which has been designated a '**declared country**' under the *Migration Act*. Nauru and Manus Island (off the coast of Papua New Guinea) were both designated as 'declared countries'. Persons claiming asylum in these places are assessed by Australia. If they are accepted as refugees they are granted protection by Australia or another country. Australia grants Temporary Protection Visas (TPV's) valid for 3 years. At the end of that period, the refugee status is again assessed and if it is not safe to return to their own countries, their TPVs are renewed. These persons have not been processed under Australian immigration law. They have no avenue of redress to the Australian legal system. The *Migration Act 1958* (Cth) s494AA bars proceedings in an Australian court by an 'offshore entry person'.

The constitutionality of these 'declared countries' was unsuccessfully challenged.

Case Study



Plaintiff S156/2013 v Minister for Immigration and Border Protection & Anor (2014) HCA 22

Facts: The plaintiff, a citizen of the Islamic Republic of Iran, entered Australia's migration zone by sea at Christmas Island. His method of entry into Australia qualified him as an 'unauthorised maritime arrival' (UMA) under the *Migration Act 1958* (Cth) s55A. The plaintiff challenged:

- s198AB (which provides that the Minister may designate a country as a regional processing country),
- s198AB (the designation of Papua New Guinea (PNG) as a regional processing country), and
- s198AD(5) (that UMAs were taken to PNG).

Legal Issue: Were s198AB and s198AD constitutionally valid? Was the decision of the Minister to designate PNG as a regional processing country valid?

Decision: In a unanimous decision the High Court of Australia held that s198AB and s198AD are valid under the aliens power which is set out in s51(xix) of the *Constitution*. The Court also upheld the decision to designate PNG as a regional processing centre, although it acknowledged, 'there may be some doubt whether the provisions... can be said to respond to Australia's obligations under the *1951 Refugee Convention* (Article 44).' This confirmed, that despite concerns people may have about offshore processing, the High Court of Australia cannot overrule a law that is constitutionally valid (regardless of whether or not it is in breach of international treaties). Unless the *1951 Refugee Convention* and the *Universal Declaration of Rights* are incorporated into domestic law, the courts can do little. This is one reason why some people in Australia are calling for a 'Bill of Rights.'

1. What is the principal Act that applies to refugees? [C]
2. What classification was given to the plaintiff in this case? How did this classification impact him? [C]



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3. Is the use of regional processing facilities constitutionally valid? Explain the reasoning in the judgment. [C]
4. What did the High Court of Australia say about whether or not Australia's approach meets its international obligations? [C]
5. How might the outcome of this case have been different if Australia had incorporated the *1951 Refugee Convention* directly into the *Migration Act*? Justify your answer with legal criteria. [E]

Human rights and the use of detention centres

Australia is a signatory to the *1951 Refugee Convention* and to the *1967 Protocol*. It has acceded to both of these international agreements, and therefore has human rights obligations to asylum seekers and refugees. This responsibility applies to refugees and asylum seekers in all detention centres, including those on Manus Island and Nauru, even though they are outside Australia's sovereign territory. The application of the *Migration Act* to determine the outcomes of claims made by asylum seekers and refugees to become accepted into the Australian community lawfully is a different matter.



Practical Application

THE HUMAN RIGHTS OF PEOPLE IN IMMIGRATION DETENTION

Australia's international human rights obligations apply to all people, including those in immigration detention. The Australian government has ratified a number of international treaties, including:

- the *International Covenant on Civil and Political Rights* (ICCPR)
- the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT)
- the *Convention on the Rights of the Child* (CRC)
- the *Convention Relating to the Status of Refugees* (the *Refugee Convention*).

Australia has one of the strictest immigration detention regimes in the world. It is mandatory, is not time-limited and people are not able to challenge their detention in court. For many years, the Commission has called for an end to this system as it leads to breaches of Australia's human rights obligations. While the Commission acknowledges the use of immigration detention may be legitimate in certain circumstances, a person should only be held in an immigration facility for a strictly limited period of time if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be managed in a less restrictive way.

The role of the Commission

The Commission has monitored and reported on the conditions for people in immigration detention in Australia for over 20 years. The Commission's work on immigration detention includes:

- investigating complaints about alleged breaches of human rights in immigration detention facilities



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- conducting visits to immigration detention facilities and publishing reports on those visits
- conducting national inquiries
- developing minimum standards for the protection of human rights in immigration detention.

Source: Australian Human Rights Commission, 'The human rights of people in immigration detention', *Our Work*, (Online, 24 April 2023) <humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/immigration-detention-and-human-rights>.

1. Describe the role of the AHRC in relation to the conditions for people in immigration detention in Australia. [C]
2. Why has the AHRC called for an end to the Australian system of immigration detention? [C]
3. Describe the position which the AHRC took on 23 April 2023 with respect to the length of time a person is required to remain in immigration detention under the Australian system. Would you have taken the same position on this issue as the AHRC in April 2023? Justify your answer using legal criteria. [C] [E]

TIP

The High Court of Australia considered the question of 'indefinite detention' in the landmark case of *NZYQ v Minister for Immigration* (2023) HCA 6. In that case it reversed an earlier decision it made in *Al-Kateb v Godwin* (2004) HCA 37 in which it decided that 'indefinite detention' of a stateless person was lawful.

Research Task

1. Locate decisions of the High Court of Australia on AustLii.edu.au [S]
2. Locate the decision *NZYQ v Minister for Immigration* (2023) HCA 37. Locate 2 decisions made after this that focus on the issue of 'indefinite detention.' [S]
3. Explain the *ratio decidendi* (reason for deciding) of each case. Can you distinguish any of these decisions from the *NZYQ* case. [C] [A]
4. Have you changed your position on this issue as a result of reading these further cases? Use legal criteria to justify your answer. [E]



As you can imagine, given that the system of mandatory detention of asylum seekers and refugees has been in existence since 1992, there is a great deal of information and evidence that has been gathered by the AHRC. Other organisations and groups have been active in the Australian community supporting asylum seekers and refugees, with some applying sufficient pressure to make Australian governments bend to their wishes. For example, the refugee family who lived in Biloela and became part of the community stayed when the campaign to keep them in Australia was successful. In a more general way, organisations like Amnesty International have attempted to keep governments of all persuasions accountable.



Practical Application

UNSAFE OFFSHORE DETENTION FACILITIES MEAN ASYLUM SEEKERS MUST BE PROCESSED IN AUSTRALIA

Amnesty International Australia urges the federal government to heed the lessons of Australia's previous scandal-ridden, inhumane offshore processing regime and allow the 40 people who recently sought asylum in WA to be processed in Australia.

Asylum seekers held in offshore detention were subjected to a decade of medical neglect, inhumane treatment and human rights abuses. Hundreds of people held in offshore detention became so sick they had to be medically evacuated to Australia.



As far back as 2015, the United Nations special rapporteur on torture found that Australia's detention of people seeking asylum on Manus Island and Nauru constituted systematic violations of the *International Convention Against Torture*.

The centres were emptied following years of scandal, court challenges and public outcry against the policy.

Amnesty International Australia holds concern for the health and well-being of these individuals, and highlights the uncertainty surrounding the conditions of the offshore processing facilities in Nauru.

Dr Graham Thom, Amnesty International Australia Refugee Rights Advisor says:

"For ten years, the Australian community watched in horror as people who came to us seeking safety were indefinitely detained in appalling, cruel conditions. Sending a new cohort of people seeking asylum back to these offshore processing centres is outrageous given the recent revelations of corruption and mismanagement, not to mention the human suffering it caused."

There are still 55 people who remain in PNG without permanent resettlement. The federal government must not condemn a new cohort of people to a policy that's long been disgraced and discarded."

Source: Amnesty International, 'Unsafe offshore detention facilities mean asylum seekers be processed in Australia' (Online, 19 February 2024) <[amnesty.org.au/unsafe-offshore-detention-facilities-mean-asylum-seekers-must-be-processed-in-australia/](https://www.amnesty.org.au/unsafe-offshore-detention-facilities-mean-asylum-seekers-must-be-processed-in-australia/)>.

1. Describe the treatment of refugees and conditions in which they have lived and continue to live in offshore detention centres. [C]
2. Compare and contrast the positions of the Australian government and Amnesty International with respect to the recent arrivals seeking asylum. [A]
3. What is your point of view about this issue? Give your reasons. [A]

Recently Australia's refugee, asylum and immigration detention policies were the subject of concerns, criticisms, and recommended changes when Australia came up for its third five yearly Universal Period Review (UPR).



Practical Application

UN MEMBER STATES CHALLENGE AUSTRALIA'S REFUGEE AND ASYLUM POLICIES

Of the 122 UN member states participating in Australia's UPR hearing before the UN Human Rights Council on 20 January 2021, 45 states made comments or recommendations on refugee and detention policies.

Critical to the 50 formal recommendations were the issues of offshore processing of people seeking asylum, indefinite immigration detention, lack of legislation to prohibit detention of children, refoulement, and lack of compliance of Australia's asylum and border management policies with international law.

Australia's offshore processing policies generated the most discussion with 10 countries raising concerns about these policies and the majority calling for an end to offshore processing.

Many countries, including Germany and Norway, urged Australia to amend its detention policies to not only ensure immigration detention is time-limited but that is also subject to judicial review

Other issues of concern were conditions of immigration detention facilities, lack of access to family reunification for many refugees, the less robust refugee status determination process for people who arrived by sea, and the prevalence of hate speech against refugees and people seeking asylum. Italy also raised concerns about the humanitarian impacts of deportation of people whose permanent visas have been cancelled.

Source: UNHRC, Australia Universal Period Review, 'UN member states challenge Australia's refugee and asylum policies', (Webpage, 31 March 2023), <refugeecouncil.org.au/un-member-states-challenge-australias-refugee-and-asylum-policies/>.

1. Describe the legal principles which other Member States allege that Australia's system under the *Migration Act* has not complied with satisfactorily. Explain how this might show that Australia does not comply with its obligations under the *1951 Refugee Convention*. [C]
2. Explain why a large number of Member States called for an end to Australia's system of offshore processing. [C]

18.3 Hague Convention on the Civil Aspects of International Child Abduction

The *Hague Convention on the Civil Aspects of Child Abduction* (1980) (the *Hague Convention*) is a multilateral treaty, which seeks to protect children from the harmful effects of wrongful removal and retention across international boundaries by providing a procedure to bring about their prompt return and ensuring the protection of rights of access. It provides a lawful procedure for seeking the return of abducted children to their home country. It also assists parents to contact or get access to children overseas.

The Attorney General's Department, as the Australian Central Authority, administers the *Hague Convention* for Australia.



Practical Application

HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1: *The objects of the present Convention are –*

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and*
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.*

Article 2: *Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention.*

Article 3: *The removal or the retention of a child is to be considered wrongful where –*

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

Article 4: *The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.*

CHAPTER II – CENTRAL AUTHORITIES

Article 6: *A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.*

1. Describe the **purpose** of the *Hague Convention*. [C]
2. Outline the **principles** set out in the *Hague Convention*. [C]
3. What **processes** should Australia and other State signatories put in place to give effect to the *Hague Convention*? [C]

Practical Application



FAMILY LAW (CHILD ABDUCTION CONVENTION) REGULATIONS 1986 - REG 2

Definitions

"Central Authority" has the meaning it has in the Convention.

"child" means a person who has not attained the age of 16 years.

"Commonwealth Central Authority" means the Secretary of the Attorney - General's Department.

"Convention" means the Convention on the Civil Aspects of International Child Abduction referred to in section 111B of the Act, a copy of the English text of which is set out in Schedule 1.

"responsible Central Authority", in relation to action to be taken in a State or Territory, means the Commonwealth Central Authority or the State Central Authority of that State or Territory, as the case requires.

"return order" means an order under Part 3 for the return, under the Convention, of a child who has been removed to, or retained in, Australia.

(1B) Unless the contrary intention appears, an expression that is used in these Regulations and in the Convention has the same meaning in these regulations as in the Convention.

(2) The removal or retention of a child is wrongful in the circumstances mentioned in Article 3 of the Convention.

1. Do the principles and processes of the *Hague Convention* appear to be incorporated into the *Family Law (Child Abduction Convention) Regulations*? Explain. [C]
2. Analyse the reasons why it would be important for all Nation State signatories to the *Hague Convention* to incorporate its principles and processes into domestic legislation in the same way. [A]

Case Study



Commonwealth Central Authority & Cavanaugh [2015] FamCAFC 233

Facts: The mother and father married in Finland in 1996. The mother was a dual citizen of Australia and Finland and the husband was an Australian citizen. The couple lived in the United Kingdom and in Australia, for long periods until 2014. Two of their three children were born in Australia. In 2014 the family relocated to Finland and agreed to live there for at least one year.

In 2015 the family flew back to Australia to attend a family wedding. The family had return tickets to Helsinki for 31 March 2015. Two days before the family was set to return to Helsinki, the mother and father separated. While the children remained with their mother, the father retained their passports preventing them from returning to Finland. The mother returned to Finland and on 3 April 2015 commenced proceedings in the Helsinki District Court for divorce, interim sole custody, and the immediate return of the children to Finland.



Case Study ...

The trial judge found that at the time of the proceedings the children had no habitual residence. That is, the mother and father had abandoned their habitual residence in Australia when they moved to Finland but had not yet found habitual residence elsewhere. This was because the parents had differing intentions about where they were going to live beyond their agreement to live in Finland for one year. In the absence of a common intent, the family had not yet acquired habitual residence in Finland and the children could not be returned.

Legal Issue: The *Commonwealth Central Authority* appealed. The issue on appeal was whether the children had habitual residence in Finland, which would overturn the decision of the trial judge.

Decision: The grounds of appeal were, that the trial judge gave:

- insufficient weight to the fact that the *Hague Convention Regulations* tend to favour a finding that a child has habitual residence so that they can be protected from abduction;
- excessive weight to the absence of a common intention of the parents to remain in Finland beyond one year;
- insufficient weight to the common intention of the parents to remain in Finland for at least one year; and
- that the trial judge failed to take into account the children's ties to Finland.

The Court explained that determining a child's habitual residence requires an inquiry into a number of factors including:

- settled purpose;
- actual and intended length of stay;
- purpose of the stay;
- strength of ties to the contracting state (i.e. Finland or Australia);
- degree of assimilation into a contracting state including living and schooling arrangements; and
- degree of cultural, social and economic integration.

Taking into account these factors, the Court found that the trial judge gave excessive weight to the absence of a common intention for the children to remain in Finland beyond one year. The children had Finnish citizenship, were attending school in Finland and had significant family connections in Finland. In addition, both the mother and father had employment in Finland and were receiving child benefits and health care from the Finnish Government.

The trial judge also erred in considering that living in Finland for one year did not amount to a habitual residence, as one year could amount to a habitual residence.

The Court also found that the trial judge did undertake a consideration of the parties' circumstances in Finland.

On the basis of these findings, the Court decided that the children were habitual residents of Finland and were therefore being improperly retained in Australia. The Court ordered that the children be returned to Finland where further custody proceedings would take place according to the laws of Finland.



Case Study ...

1. Does the decision in this case support the view that in determining the 'habitual residence' of the children, the Court must have regard to the natural and ordinary meaning of this phrase? Explain. [A]
2. Is the decision of the Court determined by the facts of the case, or is it a matter of law? Explain. [C]
3. Suggest 3 changes to the facts of the case which might together change the decision of the *Family Court of Appeal*. Analyse why these changes would change the legal outcome of the case. [A]

Child abduction to a country not a signatory to the *Hague Convention*

Where an Australian parent has partnered (married or de facto) with a person from a country not signatory to the *Hague Convention* (the other country) and there is a possibility of travel to the other country with a child of the partnership, the Australian parent should take legal advice before doing so. The legal circumstances which arise in these cases are highly complex. Australia is a multicultural country, and many Australian citizens co-parent with persons who come from India, Indonesia, and Malaysia, for example. None of these countries are a signatory to the *Hague Convention*. Each of these countries has its own reasons for refusing to be a signatory. There are many cases where parents have been denied access to children abducted by the other parent for long periods of time. In some cases, where attempts made on legal grounds have failed, some parents have taken matters into their own hands at great risk to themselves and their children.

Malaysia has refused to adopt the treaty, on the grounds that it would contradict Shariah law, since that law bases child custody decisions to a substantial extent on religious, age and gender factors. Given that the *Hague Convention* has now been signed by more than 103 countries (2022 numbers), including some Islamic countries, the failure of a country to join the community of nations in signing and implementing the treaty is a red flag that the country is unlikely to return abducted children promptly, if at all.



Research Task

INSIGHT LOOKS AT HOW CHILDREN ARE AFFECTED IN CASES OF INTERNATIONAL PARENTAL ABDUCTION

Source: SBS, *Insight*, (Online, 2 December 2024) <[sbs.com.au/news/insight/article/six-famous-cases-of-parental-abduction-in-australia/udnu6budf](https://www.sbs.com.au/news/insight/article/six-famous-cases-of-parental-abduction-in-australia/udnu6budf)>.

Go to the episode of *Insight* on the SBS website and read about these cases of abduction to non-*Hague Convention* countries. Explain the difficulties experienced by parents seeking the return of children or even having contact with children in such countries. [C]



18.4 Geneva Conventions and Hague Conventions

Key term

International humanitarian law: International humanitarian law (IHL) is a set of rules that seeks to limit the effects of armed conflict. It protects persons who are not, or are no longer, directly or actively participating in hostilities, and imposes limits on the means and methods of warfare.

Source: International Committee of the Red Cross, 'What is international humanitarian law' (Online, 29 November 2024) <[icrc.org/en/document/what-international-humanitarian-law](https://www.icrc.org/en/document/what-international-humanitarian-law)>.

It is important to distinguish between international humanitarian law (IHL) and the *United Nations Charter*, which regulates whether a State may lawfully resort to armed force against another State. The *United Nations Charter* prohibits the use of force, except where necessary in self-defence, and where the *United Nations Security Council* authorises the use of force. IHL is about regulating behaviour of Nation States once a war starts.

IHL is also known as 'the law of war' or 'the law of armed conflict'. IHL is part of public international law, which is made up primarily of treaties, customary international law and general principles of law (see Article 38 of the *Statute of the International Court of Justice*).

Hague Conventions (1899) and (1907)

These treaties establish the laws and customs of war that opposing States must follow during hostilities. They are known as the 'laws of war' as opposed to the humanitarian laws set out in the *Geneva Conventions* that establish rules for the protection of victims of conflict and the right to receive relief.

For example, they prohibit the use of projectiles that disburse asphyxiating gas, and the use of bullets that expand or flatten easily in the human body.

Geneva Conventions (1949)

These are international humanitarian laws that consist of **4 treaties and 3 additional protocols** that establish international legal standards for humanitarian treatment of persons who are, or have become non-combatants in wartime. They essentially define the rights of prisoners of war, civilians, and military personnel in and around a war zone.

Australia's commitment to IHL

Practical Application

AUSTRALIA'S VOLUNTARY REPORT ON IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW AT THE DOMESTIC LEVEL

Australia was an early signatory to the *Geneva Convention 1949* and the *Hague Conventions 1899 & 1907* and their additional *Protocols* (the *Geneva Conventions*) and is deeply committed to implementing and upholding its IHL obligations.

Practical Application ...

The report provides an overview of Australia's implementation of IHL at the domestic level. It outlines key features of Australia's IHL implementation and provides relevant examples of Australian practice.

The report fulfils a voluntary pledge made by Australia to report on the domestic implementation of IHL, made at the 33rd International Conference of the Red Cross and Red Crescent, in connection with a Resolution entitled '*Bringing IHL home: A road map for better national implementation of international humanitarian law*'.

Source: Attorney General's Department, 'Australia's voluntary report on implementation of international humanitarian law at the domestic level', *International Relations*, (Online, 29 November 2024) <ag.gov.au/international-relations/international-law/australias-implementation-international-humanitarian-law>.

1. Why do you think Australia would make a voluntary pledge at an international conference of Red Cross and Red Crescent to report on its domestic implementation of IHL? [C]

Practical Application

POWs: DOES AUSTRALIA MEET ITS *GENEVA CONVENTION* OBLIGATIONS (EXCERPTS)

A key allegation is that Australia set up a system under which embedded US soldiers took custody of prisoners actually captured by Australian forces in order to avoid *Geneva Convention* obligations.

Australia is a high contracting party to the *Conventions*. It has accepted the full scope of obligations under the *Geneva Conventions* of 1949. All Australian military are trained in the laws of war (including the *Conventions*), and there are procedures in place to ensure that these rules are observed.

The situation in Afghanistan and Iraq posed practical problems for Australia. Australia had no proper facilities in Afghanistan or in Iraq at the relevant times for the proper care of prisoners of war. The United States did, and Australia found a solution to its practical problem by agreeing with the US that it would deal with any persons taken captive by Australian forces.

However, if Australia captured the detainees, it would have to satisfy itself that the US was willing and able to apply the *Convention* (Article 12). If, after transfer, it emerged that the *Convention* was not being applied in any important respect, Australia would be obliged to take effective measures to get the situation remedied or to request the return of the transferees.

Australia agreed on an arrangement with the US, under which a US soldier would be embedded with Australian troops, and would 'formally' take custody of any persons captured by Australian troops. The idea was that the captives would then always have been 'in the power' of the US and that physically transferring them to a US facility would not involve a transfer from Australia as Detaining Power and so its obligations under Article 12 of the *Third Geneva Convention* would not have been activated. Thus, Australia would not have needed to continue monitoring the situation of the transferees.



Practical Application ...

The problem with this arrangement is that it flies in the face of a proper interpretation of the *Convention*, which must be interpreted in light of the ordinary meaning of its terms and in the light of its humanitarian object and purpose. An interpretation that seeks to sidestep what appear to be self-evident obligations by a legal arrangement is not a defensible interpretation of the treaty. Australian troops, by capturing enemy fighters, clearly brought them within their power, and Australia's obligations under the *Convention* were thereby triggered. The question then becomes whether Australia properly carried out its continuing duty under article 12.

Source: Professor Andrew Byrnes, 'POWs: Does Australia meet its Geneva Convention obligations', *The Conversation*, (Online, 29 November 2024) <theconversation.com/pows-does-australia-meet-its-geneva-convention-obligations-2140>.

1. Describe the Australian solution to the fact that it did not have facilities for the proper care of prisoners in Afghanistan. [C]
2. Outline the point of view taken by Professor Byrne in the article about the alleged legal arrangement between Australia and the United States. Set out his reasons. [C]

Review

Comprehend

1. **Describe** the following key concepts:

a. The meaning of 'refugee' in the <i>1951 Refugee Convention</i>. b. The meaning of 'refugee' in the <i>Migration Act 1958</i> (Cth). c. The principle of 'non-refoulement'. d. The 'character test' in <i>Migration Act 1958</i> (Cth).	e. Migration zone. f. Excised offshore place. g. 'Declared country'. h. The purpose of the <i>Hague Convention</i>. i. The meaning of 'habitual residence'. j. International humanitarian law.
2. **Explain** how the *1967 Protocol* changed the *1951 Refugee Convention* and the legal implications of this change for the signatories of the *Convention*. [C]
3. **Summarise** the rights and responsibilities of signatories to the *1951 Refugee Convention* and identify those which Australia's legal arrangements for refugees under the *Migration Act 1958* (Cth) support or offend. [C]
4. **Explain** how the *character test* in the *Migration Act* incorporates the principles of the *1951 Refugee Convention*. [C]
5. **Explain** the relationship between the UNHCR and Australia. [C]
6. **Explain** the difference between *international humanitarian law* and *international human rights law*. [C]

[C]

Comprehend and analyse

1. **Explain** the legal arrangements under the *Migration Act 1958* (Cth) which facilitate Australia's policy of mandatory detention and offshore processing for asylum seekers and refugees.
Analyse the extent to which these legal arrangements may enable Australia to avoid compliance with the *1951 Refugee Convention*. [C] [A]
2. **Explain** the importance of the 'habitual residence' test to the operation of the *Hague Convention*.
Analyse the likely legal impact that the 'habitual residence' test has on the potential outcomes of disputes between parents about custody of children. [C] [A]

Comprehend and evaluate

Answer the questions below using Source 1 and Source 2 (located below).

1. Set out and **explain** the point of view of the Refugee Council of Australia with respect to Australian asylum seeker and refugee policy. [C]
2. Set out and **explain** the point of view of the Australian government with respect to its asylum seeker and refugee policy. [C]
3. **Justify** and **explain** each point of view. [E]

Source 1

1951 Refugee Convention

Article 23

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Source: UNHCR 'Convention Relating to the Status of Refugees', (Web page, n.d.) <[unhcr.org/media/convention-and-protocol-relating-status-refugees](https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees)>.

Source 2

NEW UN REPORT ON TORTURE URGES CHANGES TO AUSTRALIAN REFUGEE POLICY

The Refugee Council of Australia (RCOA) has urged the Australian Government to act on a new United Nations Committee Against Torture (CAT) report which highlights breaches of international law in Australia's treatment of refugees.

...the Committee recommended that Australia:

- End its policy of offshore processing of asylum claims, transfer all migrants, asylum seekers and refugees to mainland Australia and process any remaining asylum claims while guaranteeing all procedural safeguards.
- Adopt the necessary measures to guarantee that all asylum seekers or persons in need of international protection who are under its effective control are afforded the same standards of protection against violations of the *Convention* regardless of their mode and/or date of arrival.
- Investigate human rights violations in the regional processing centres, prosecute the alleged perpetrators, punish them appropriately if convicted and provide full reparation to the victims.

Source: UNHCR, 'New UN Report on Torture urges changes to Australian refugee policy,' (Online, 3 December 2024) <refugeecouncil.org.au/new-un-report-on-torture-urges-changes-to-australian-refugee-policy/>.

Topic 3

Human rights in Australian contexts

Topic 3 asks you to explore how human rights law is addressed in Australia and Queensland.

Chapter 19: Human rights in Australian law

Chapter 20: Resolving human rights complaints

Chapter 21: Protecting and Advocating for human rights in Australia

Chapter 22: Human rights principles in Australian case studies

Human rights in Australian contexts

Chapter 19: Human rights in Australian law

19.1 Right to free speech

19.2 Right to protest and the freedom of assembly and association

19.3 Freedom of religion

19.4 Right to vote

Learning objectives

At the conclusion of this chapter, students will be able to:

- explain and analyse the rights that Australians have in criminal and civil contexts, including the role of express and implied rights in ensuring equity under the law.
- analyse and apply human rights principles to a variety of Queensland and/or Australian case studies by determining the nature and scope of the legal issues and examining different viewpoints and their consequences.
- evaluate the legal situation using the analysis (above) by presenting legal alternatives to make a recommendation/s, justifying using legal criteria and discussing implications.
- analyse and evaluate legal issues to resolve or improve human rights in Australia and Queensland.

19.1 Right to free speech

Freedom of speech is one of the most **fundamental of all freedoms in a free and democratic society**. The right to freedom of speech is contained within a broader right, known as the right to freedom of expression. The *Human Rights Act 2019* (Qld) Section 21 sets out what freedom of expression entails.

Human Rights Act 2019 (Qld)

21 Freedom of expression

- (1) *Every person has the right to hold an opinion without interference.*
- (2) *Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether —*
- (a) *orally; or*
 - (b) *in writing; or*
 - (c) *in print; or*
 - (d) *by way of art; or*
 - (e) *in another medium chosen by the person.*

It is clearly not an unlimited freedom as there are many forms of expression which may give rise to civil liability or criminal liability. Examples of some areas of law that restrict freedom of expression include:

- defamation,
- oral harassment under the provisions of the *Domestic Violence and Family Protection Act 2012* (Qld),
- infringement of copyright,
- hate speech,
- racial vilification,
- threats to physically harm another person,
- inducements against public order,
- pornography,
- national security,
- perjury, and
- contempt of court.

At times there can be a very fine balance between a right to freely express yourself and whether that right of expression should be curtailed by the law. We will now explore some of these below.

Defamation

Key Term

Defamation is the publication of unsubstantiated ‘facts’ that seriously harms the reputation of an individual.

The tort of defamation started as a civil remedy which enabled an individual to take a court action to protect his or her reputation. Clearly a court action to stop someone making defamatory remarks is designed to limit freedom of expression. In Queensland, the tort of defamation was codified in the *Defamation Act 1889* (Qld), and remained the law until the *Defamation Act 2005* (Qld) repealed the 1889 Act.

Defamation was previously defined in s5(1) of the *Defamation Act 1889* (Qld) as follows:

5(1) Defamation

Any person who, by spoken words or audible sounds, or by words intended to be read either by sight or touch, or by signs, signals, gestures, or visible representations, publishes any defamatory imputation concerning any person is said to defame that person.

The *1889 Act* went on to define a defamatory imputation to be one whose publication injured a person's reputation, or caused that person to be shunned, avoided, ridiculed or despised.

The plaintiff has the responsibility to prove his or her allegations that the published material is defamatory. The '**ordinary reasonable person**' test is applied to decide if a publication is defamatory. The matter will be defamatory if a person of average intelligence could reasonably place upon it an interpretation which is defamatory (*Slayter v Daily Telegraph Newspaper Co Ltd* (1908) CLR 1).

The civil remedy of defamation law, if successfully relied on by a plaintiff, limits the freedom of expression that we believe to be our right.

All the States of Australia agreed to reform the law so that each state passed an Act to promote uniform laws of defamation throughout the country. As a result, Queensland enacted the *Defamation Act 2005* (Qld).

Practical Application

Defamation Act 2005 (Qld)

3 Objects of Act

The objects of this Act are—

- (a) to enact provisions to promote uniform laws of defamation in Australia; and*
- (b) to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance; and*
- (c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter; and*
- (d) to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.*

1. Do you agree it is important for the law of defamation not to '*place unreasonable limits on freedom of expression*'? Justify your position with legal criteria. [E]
2. Do you agree that a person whose reputation is harmed by the publication of defamatory matter should be entitled to seek a remedy in court? Give your reasons. [A]

The litigation process

In a **civil action** for defamation:

- the plaintiff must prove the elements of defamation, including the damage suffered, on the balance of probabilities, and
- the defendant relies on any defences which apply in the circumstances.



In this process there were opportunities to change the balance between the right to freedom of expression and the civil right to protect one's reputation. Parliament considered this issue when it reformed the law in the *Defamation Act 2005* (Qld).

It did this by introducing the requirement in the *Defamation Act 2005* (Qld) s10A that the plaintiff must show they have suffered 'serious harm' to bring an action for defamation. This shifts the balance in favour of freedom of expression. The new element effectively replaces the defence that an allegation of defamation needs to be more than 'trivial'.

Practical Application

Defamation Act 2005 (Qld)

10A Serious harm element of cause of action for defamation

- (1) *It is an element of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.*
- (2) *For the purposes of subsection (1), harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, the corporation serious financial loss.*
- (3) *The judicial officer (and not the jury) in defamation proceedings is to determine whether the serious harm element is established.*
- (4) *Without limiting subsection (3), the judicial officer may (whether on the application of a party or on the judicial officer's own motion)—*
 - (a) *determine whether the serious harm element is established at any time before the trial for the proceedings commences or during the trial; and*
 - (b) *make any orders the judicial officer considers appropriate concerning the determination of the issue (including dismissing the proceedings if satisfied the element is not established).*

1. Describe the effect that s10A has on proceedings for defamation. Explain how it might change the balance between the plaintiff and the defendant in the proceedings. [C] [A]



Case Study

***Newman v Whittington* [2022] NSWSC 249**

Facts: Ms Newman brought defamation proceedings against Mr Whittington, alleging that he made 27 defamatory publications about her online, primarily via Facebook. Some of Mr Whittington's publications were made after 1 July 2021 and therefore Ms Newman needed to overcome the serious harm threshold and prove that the publication caused or is likely to cause serious harm to her reputation. Ms Newman did not lead any evidence on the seriousness of the harm allegedly caused to her by the defamatory publications.

Legal Issue: Did the plaintiff Ms Newman successfully overcome the serious harm threshold and succeed in her action?

Decision: Ms Newman failed to overcome the serious-harm threshold in this case because the court was unable to assess the actual impact of the publications and whether they did cause serious harm to her reputation. There was no evidence before the court about the seriousness of the harm allegedly caused to Ms Newman.



Case Study ...

In the course of making this decision, the New South Wales Supreme Court followed the approach adopted in a case in the United Kingdom Supreme Court in which the Court said that:

- 'serious harm' is to be determined by reference to the actual facts about its impact, not merely the meaning of the words,
- the serious-harm threshold abolished the common law presumption that a defamatory publication causes damage to reputation, and
- the plaintiff (aggrieved person) must prove, on the balance of probabilities, that the harm caused by the defamatory publication was or will be serious.

Publication

Defamation Act 2005 (Qld) defines 'publication' to include:

- online media
- writings
- drawings, and
- speech.

Publishing a matter can include a gesture, tweet, retweet, or even an emoji. The communication that causes defamation can come in many forms. It can be in writing, a verbal communication, a cartoon, or a photograph. It can be published on the Internet, on social media, in text messages, letters, or emails.



In *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, the High Court of Australia decided that the same laws that applied to defamation in other types of publications apply to publications on the Internet.

Case Study



Burrows v Houda [2020] NSWDC 485

Facts: Mr Houda tweeted a link to a newspaper article. A number of third parties replied to the original tweet and included emojis within their comments. Evidence was led linking the emojis used and the surrounding context to articles posted in the original tweet.

Legal Issue: Were the words and emojis in the comments and replies capable of being defamatory? If so, would an ordinary reasonable reader come to that view?

Decision: The court found that the words and emojis in the comments and replies were capable of being defamatory. It also decided that an ordinary reasonable reader would come to that view and found in favour of Burrows.

1. Has the growth of the Internet increased the nature and scope of potential defamatory publications? Do you think this is an advantage or disadvantage for freedom of expression? [A]



Case Study

Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller [2021] HCA 27

Facts: Mr Voller commenced defamation proceedings against three media companies regarding comments posted by third parties about him on their respective Facebook pages. The media companies facilitated and encouraged the posting of comments by Facebook users on their respective Facebook pages. The companies led evidence that they did not know about the material posted, and did not intend to publish the the defamatory material.

Legal Issue: Were the media companies publishers of comments made by others on the public Facebook pages?

Decision: The High Court of Australia found that the media companies were publishers of comments made by others on their public Facebook pages. The acts of the media companies in facilitating, encouraging and thereby assisting the posting of comments by Facebook users determined that the media companies were publishers of those comments. Companies cannot rely on lack of knowledge of the material posted (or lack of intention to publish them) on their social media pages to deny that they are responsible for publishing the third-party comments.

1. Explain the circumstances in which the media companies can be found responsible for defamatory matter posted on their platforms by third parties. [C]

Defences

A person (defendant) who is being sued for defamation is entitled to defend any allegations made against him or her. In the particular circumstances, this amounts to ensuring that the defendants right to freedom of expression is protected.

Some defences to defamation in the *Defamation Act 2005* (Qld), include:

- **justification** (s25 – meaning the published statement is substantially true)
- **contextual truth** (s26 – the published statement made imputations that are substantially true so the aggrieved could not have been harmed)
- **absolute privilege** (s27– publications made during parliamentary debates, or in court or tribunal judgments are privileged and immune from defamation claims)
- **public document** (s28– the publication content is also contained in a public document, meaning a parliamentary debate, court or tribunal judgment, or other governmental publication)
- **fair report** (s29 – the publication made during the course of, or previously contained in any fair report of, a proceeding of public concern)
- **qualified privilege** (s30 – publication was obligatory for some legal, social or moral reason, but there are limitations)
- **honest opinion** (s31 – the publication was a statement of opinion rather than fact)
- **innocent dissemination** (s32 – the distributor of the publication did not have control over the content of the publication)

- **triviality** – the aggrieved is unlikely to sustain serious harm as required under section 10A of the *Defamation Act 2005* (Qld).

Practical Application

1. Consider the defences from the *Defamation Act 2005* (Qld) set out above. Which of these fall within the terms of s3(b) of the *Defamation Act 2005* (Qld). Explain your answer. [C]
2. Consider the defences set out above which are not included in your answer to Question 1. If a defendant relies on one of those defences and does not succeed in defending an action for defamation, is it a reasonable limit on freedom of expression for the court to compensate the plaintiff? [A]

We have seen that it is not possible to hide behind a social media screen. Nor is it possible to avoid the law of defamation if you repost or retweet an item sent to you on social media. Social media platforms do not have immunity from defamation litigation. Freedom of expression, where exercised irresponsibly, can result in severe consequences. All users of social media need to be very cautious about the content they post. Also, making derogatory comments or making false accusations against individuals can result in a Facebook user being liable for someone else's post

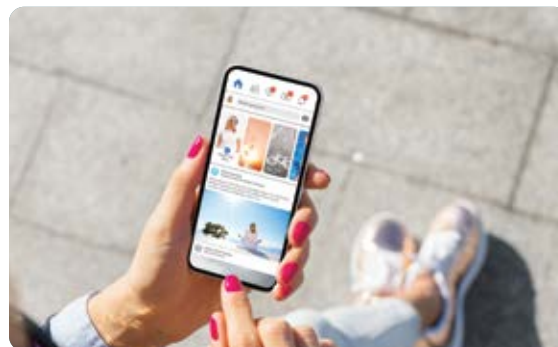
Cases do not necessarily require the plaintiffs and defendants to be well known.

Case Study

Rodgers & Anor v Gooding [2023] QDC 115

Facts: In June 2022, the plaintiffs sued their neighbour, Zoe Gooding, for labelling the de-facto couple as paedophiles on a Facebook community page. The allegation of paedophilia was false.

The defendant and sole publisher, published the post on a crime alert community page known as *Bushlands Beach Crime Alert*, and subsequently commented twice in that post thread. The parties were neighbours living in the same street. The post was online for 90 minutes before it was taken down. Even after deleting the post and making excuses they were hacked, these posts were recirculated by members of the Facebook group.



Posts and comments through social media are not only seen by community members but able to be screenshotted, replicated and republished. The plaintiffs had many social, psychological and occupational impacts from this post.

Legal Issue: Was the defendant liable for defamation?

Decision: The defendant was liable for defamation and in the judge's estimation the damage to the plaintiffs reputations was severe. The court found the defendant liable to pay each plaintiff \$100,000 in compensatory damages and \$40,000 in aggravated damages.

1. Assume the plaintiffs attempted to resolve the matter by sending a letter to the defendant setting out their concerns and seeking appropriate arrangements to end the matter without going to court. Write that letter on behalf of the plaintiffs. Write a letter in reply on behalf of the defendants, containing an offer of amends, reflecting the facts and outcome of the case. [A]



Tip

Under the *Defamation Act 2005* (Qld), where individuals are notified that they are being sued for defamation, they have 28 days to make an **offer of amends**. The purpose of the offer is to satisfy the dual purposes of a defamation action – to correct public perceptions and to compensate the aggrieved for harm caused.

An offer of amends must contain a correction to the publication and an offer to pay the aggrieved's costs. As long as a publisher makes a reasonable offer of amends, the aggrieved party is encouraged to accept it. If the aggrieved does not, the publisher then has a defence against the claim.

An offer to make amends cannot be considered as evidence for liability purposes in legal proceedings.

Prohibited hate symbols

One very recent restriction on the freedom of expression in Australia is contained in *Counter-Terrorism Legislation Amendment (Prohibitive Hate Symbols and Other Measures) Act 2023* (Cth). That Act inserted new provisions into the *Criminal Code* (Cth) as follows:

Criminal Code 1995 (Cth)

80.2H Public display of prohibited Nazi symbols or giving Nazi salute

(1) A person commits an offence if:

(a) the person:

(i) causes a thing to be displayed in a public place; or

(ii) makes a gesture in a public place; and

(b) the thing is a prohibited Nazi symbol, or the gesture is a Nazi salute.

80.2E Prohibited symbols

(1) Each of the following is a **prohibited symbol**:

(a) a prohibited Nazi symbol;

(b) a prohibited terrorist organisation symbol.

(2) Each of the following is a **prohibited Nazi symbol**:

(a) the Nazi hakenkreuz;

(b) the Nazi double-sig rune;

(c) something that so nearly resembles a thing to which paragraph (a) or (b) applies that it is likely to be confused with, or mistaken for, that thing.

80.2F Meaning of displayed in a public place

(1) A thing is **displayed in a public place** if it is capable of being seen by a member of the public who is in a public place (whether or not the thing is actually so seen by a member of the public).

(2) A thing is also **displayed in a public place** if it is included in:

- (a) a document (including, for example, a newspaper, magazine, program, leaflet or ticket); or
- (b) a film, video or television program;
that is available, or distributed, to the public or a section of the public.

(3) A thing is also **displayed in a public place** if it is included in a document, film, video or television program that is available, or distributed to, the public or a section of the public by means of a telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution including, for example, by means of the internet.

80.2FA Meaning of makes a gesture in a public place

A person makes a gesture in a public place if:

- (b) the person makes a gesture; and
- (b) the gesture is capable of being seen by a member of the public who is in a public place (whether or not the gesture is actually so seen by a member of the public).

80.2H Public display of prohibited Nazi symbols or giving Nazi salute

(9) For the purposes of paragraph (1)(d), this subsection applies if a reasonable person would consider that:

- (a) the conduct mentioned in paragraph (1)(a) is engaged in for a purpose that is:

- (i) a religious, academic, educational, artistic, literary or scientific purpose; and

- (ii) ot contrary to the public interest; or



- (b) the conduct mentioned in paragraph (1)(a) is engaged in for the purposes of making a news report, or a current affairs report, that:

- (i) is in the public interest; and

- (ii) is made by a person working in a professional journalistic capacity.

1. Describe the elements which constitute the criminal offence of 'Public display of prohibited Nazi symbols or giving Nazi salute'. [C]
2. Explain how the enforcement of this criminal offence might limit freedom of expression. Is it likely that it may have unintended consequences and limit other freedoms which we enjoy? Give your reasons. [A]
3. Explain how freedom of expression is protected by the *Criminal Code 1995* (Cth) s80.2H. In your answer give some examples in support of your point of view. [A]



Practical Application

AUSTRALIA OUTLAWS NAZI SALUTE AND HATE SYMBOLS

The Nazi salute and associated hate symbols have been criminalised in Australia.

A law banning the salute and the display or sale of symbols associated with designated 'terror' groups took effect on Monday.

The legislation criminalises the sale and display of Nazi motifs including the swastika and lightning bolt insignia of the SS (Schutzstaffel), the paramilitary wing of the Nazi party.

'It is now unlawful to perform the Nazi salute in public or to publicly display, or trade in, Nazi hate symbols,' Attorney General Mark Dreyfus said in a statement. 'The new laws also ensure that glorifying and praising acts of terrorism are criminal offences.'

The passage of the bill through parliament by a unanimous vote on December 6 sent a clear message that there is 'no place in Australia for acts and symbols that glorify the horrors of the Holocaust and terrorist acts', Dreyfus said.

In March, a group of neo-Nazis clashed with transgender rights protesters in Melbourne and members were seen raising their arms in a Nazi salute near the state parliament building.

In October, three men were charged after allegedly performing a Nazi salute outside the Sydney Jewish Museum. There were more anti-Jewish incidents in October and November last year than in the twelve months prior, according to the Executive Council of Australian Jewry.

Dreyfus noted in June, as the legislation was presented, that it would see federal law mesh with state legislation, all Australian states and territories having already either passed laws or announced plans to ban Nazi symbols.

The new law also bans the public display or trade in symbols associated with organisations that Australia designates as 'terrorist,' such as the Islamic State of Iraq and the Levant (ISIL or ISIS), Hamas, Hezbollah, or the Kurdistan Workers' Party (PKK).

That means that the display of the Hamas flag is now banned, which causes legal complications for pro-Palestine groups and demonstrations.

Australia's spy agency has been warning that far-right groups are on the rise in Australia and that they had become more organised and visible.

Source: Al Jazeera and News Agencies, 'Australia outlaws Nazi salute and hate symbols,' *Aljazeera News*, (Online, 8 January 2024) <[aljazeera.com/news/2024/1/8/australia-outlaws-nazi-salute-and-symbols](https://www.aljazeera.com/news/2024/1/8/australia-outlaws-nazi-salute-and-symbols)>.

1. When did the Australian Government pass the regulations? [C]
2. What support was there for the passing of the legislation through the Federal Parliament? [C]
3. Research the meaning of the following expressions:
 - (a) Neo-Nazis
 - (b) Transgender rights protestors
 - (c) The Holocaust
 - (d) Hamas flag

[C] [S]

Practical Application ...

4. What warning did the Australian Spy Agency give which prompted the Federal Government to pass this legislation? [C]
5. What lobby group was interested in the passing of this legislation? [C]



What do you think?

1. In October 2024, 3 men were found guilty in the Magistrates Court of New South Wales and were fined for performing a Nazi salute outside the Sydney Jewish Museum. They were captured on CCTV. The Magistrate dismissed the argument that one of the men was 'simply holding his hand up and walking' at the time, and the further argument of the other offender that his action was a reference to a 'Ricky Gervais comedy routine', which he had seen on Netflix. The Magistrate had the advantage of viewing the CCTV footage and was able to dismiss the argument.
2. It has been suggested that some protesters will adopt other symbols or gestures with equally potent force but which are not caught by the provisions of the Act, e.g. adorning clothes and flags with the number 88, the digits of which stand for Heil Hitler with H being the eighth letter of the alphabet.
3. There will be a tendency for far-right individuals to increase the use of these symbols or gestures in public in line with an overwhelming desire by them to seek media attention and even prosecution to demonstrate the strength of their cause.

Conduct your own research into these issues. Set out the matters which support the passing of the legislation. Do you agree with this point of view? Justify your point of view using legal criteria. [S] [A] [E]



Research Task

1. Locate the *Criminal Code (Serious Vilification and Hate Crimes) and other Legislation Amendment Act 2023* (Qld) and find the relevant section of the *Criminal Code 1899* (Qld) that concerns hate symbols. [S]
2. Describe the amendment to the *Criminal Code* which makes it an offence to publicly display, distribute or publish a prohibited symbol in a way that may cause a member of the public to feel menaced, harassed or offended without reasonable excuse. [C]
3. Is the Queensland or Commonwealth legislation more restrictive on freedom of expression? Explain your answer. [A]



Tip

It will be of assistance to you to go to Chapter 9 of this text which discusses a parliamentary inquiry that recommended the introduction of a criminal offence prohibiting display of hate symbols including those relating to Nazi and ISIS ideology.

19.2 Right to protest and the freedom of assembly and association

The *International Covenant on Civil and Political Rights* (ICCPR) states:

International Covenant on Civil and Political Rights

Article 21

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the Protection of public health or morals or the Protection of the rights and freedoms of others.

Article 22

1. *Everyone should have the right to freedom of association with others, including the right to form and join trade unions for the Protection of his interests.*
2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.*

Freedom of assembly

Australia is a signatory to the ICCPR. The right to **peaceful assembly** protects the right of individuals and groups **to meet and to engage in peaceful protest**. The right to **freedom of association** protects the right to **form and join associations to pursue common goals**.

There is **no express right** in the *Australian Constitution* to either of these rights.

In the Australian community, **individuals and groups frequently exercise the right to assemble and associate for peaceful protest** or to form associations to pursue common goals. These activities occur freely although they can be affected by laws about when and where such gatherings take place or the nature of the goals they hope to achieve. For example, permits are generally required where protests such as street marches occur, because they can affect other people going about their lawful business. There have been occasions when permits have been refused because governments have opposed the views of the protesters.

The *Human Rights Act 2019* (Qld) s22 states:

- Every person has the right of peaceful assembly.
- Every person has the right to freedom of association with others including the right to form and join trade unions.

The *Peaceful Assembly Act 1992* (Qld) s5 sets out clearly that a person has the right to assemble peacefully with others in a public place. This right is subject only to restrictions that are necessary in a reasonable and democratic society in the interest of:

- (a) Public safety; or

- (b) Public order; or
- (c) The protection of rights and freedoms of other persons.

Under this Act there is provision made for persons to seek authorisation for a public assembly. There is a form to be filled in and once completed it is forwarded (by email) to the police and to the local authority. If you have given 5 business days' notice of such an assembly (usually a protest) the assembly is deemed to be approved automatically. The police, however, can obtain a court order from the Magistrates Court of Queensland preventing the assembly proceeding. Before they can apply for such a court order they firstly must mediate with the protest organiser using an independent mediator. Once the police have received the Notice of Intention to Assemble, they generally will give you a notice of permission, or they will proceed to obtain a court order from the Magistrates Court of Queensland to prevent the event occurring. Events organised at short notice, that is, with less than 5 business days' notice, are not an authorised public assembly. The permission notice, if given by the police, can contain conditions. But these conditions must relate to public safety, the maintenance of public order, or the protection of the rights of freedoms of other persons. The notice can also include conditions with respect to payment of clean-up costs arising out of the holding of the assembly.

Once approval has been given for a public assembly and it is authorised and, provided the public assembly is peaceful and held substantially in accordance with the conditions imposed in the permission given, any person who participates in the assembly does not incur any civil or criminal liability because of the obstruction of a public place (see s6). It is very advantageous therefore to make the application to authorise the public assembly.

Freedom of association

The freedom of association is the right of all persons to group together voluntarily for a common goal or to form and join an association such as a political party, a professional sporting club, a single interest group or a trade union. Citizens are generally free to associate with whatever persons they like. As one would expect, this freedom, is, of course subject to a wide range of statute law which may be seen as interfering with the freedom of association. While there is no express protection in the *Australian Constitution* of the freedom of association it is accepted by the High Court of Australia that this freedom may be part of the implied freedom of political communication as set out in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

- **Criminal Code Act 1995 (Cth) s102.8** makes it an offence for a person to associate with a member of a terrorist organisation. A person commits such an offence if on more than two occasions he or she intentionally associates with another person who is a member of, or a person who promotes or directs the activity of, such an organisation at the same time knowing that the organisation is a terrorist organisation.
- **Criminal Code Act 1995 (Cth) s119.5** makes it an offence for a person to permit a meeting or assembly of persons to be held in a place supporting or promoting the commission of an offence by preparing for incursions into foreign countries or for the purpose of engaging in hostile activities.
- **A series of offences referred to as 'conspiring offences'** which have long been the source of power to restrict freedom of association in order to disrupt and prevent the activities of criminal organisations and their members.



Case Study

Tajjour & Ors v The State of New South Wales [2014] HCA 35

Facts: Mr Tajjour and two others were charged with offences under s93X of the *Crimes Act 1900* (NSW). Section 93X says:

“(1) A person who--

(a) habitually consorts with convicted offenders, and

(b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders, is guilty of an offence.”

The offenders were charged under s93X. The defence raised that s93X was an invalid law because it breached the implied freedom of political communication in the *Australian Constitution* as set out in *Lange v Australian Broadcasting Corporation* [1997] HCA 25. They also argued that the law was invalid because it infringed the freedom of association which they said was to be found as being implied in the *Constitution* and which was consistent with Australia’s obligations under the *International Covenant on Civil and Political Rights*.

Legal Issue: Was s93X invalid because it breached the implied constitutional right of freedom of political communication or breached the freedom of association implied in the *Australian Constitution*?

Decision: It was held by the majority of the Court that s93X was not invalid. They held that it was not a breach of the implied constitutional right of freedom of political communication because it was reasonably appropriate and proportionate and served a legitimate end for the prevention of crime. Further, it held that the *International Covenant on Civil and Political Rights* was not incorporated in Commonwealth legislation and thus imposed no constraint upon the power of a State Parliament to enact contrary legislation.

Section 93X had been passed in response to a wave of gun violence involving bikies and organised crime groups. Two of the men in the case belonged to the Nomads Bikie Gang.



Research Task

In 2015 Victoria passed new legislation entitled *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic). In relation to that Act answer the following questions:

1. Locate the Act above. [S]
2. What is an unlawful association notice and what is its purpose? [C]
3. A person can only be guilty of consorting if they regularly associate with a convicted offender. What does the word ‘regularly’ mean? [C]
4. Under what circumstances can police officers issue an unlawful association notice? [C]
5. What defences are available to a person facing consorting charges under s124A of the Act? [C]
6. In your opinion has this Act gone too far in restricting persons from consorting (or associating) with others? Justify your decision with legal criteria. [E]

19.3 Freedom of religion

Generally speaking, Australians enjoy the freedom of religion in their daily lives. They have the freedom to worship whichever God they choose and practice that religion. Conversely, they have the freedom also not to believe in God and not to worship or engage in any religious practice.

There is only one reference in the *Commonwealth of Australia Constitution Act 1901* (Cth) to God and it is in the first paragraph of the Preamble, ‘Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania humbly relying on the blessing of Almighty God have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution hereby established.’

Religious freedom is one of the few freedoms that receives some Constitutional protection in Australia. The *Australian Constitution* s116 states:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Thus there is a prohibition on the Commonwealth Government in making laws to:

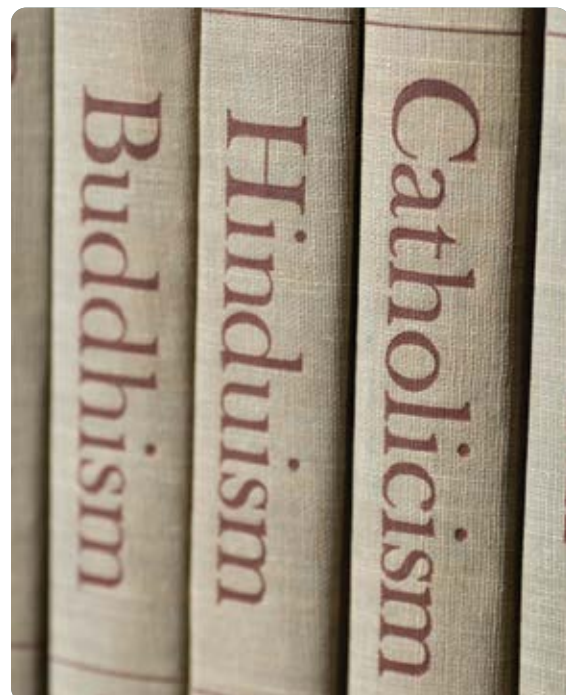
- establish any religion; or
- impose any form of religious observance on anybody; or
- prohibit the free exercise of any religion by any person; or
- require any form of religious test as a qualification for any office or public trust under the Commonwealth.

The effect of this section is to apply these restrictions to the making of any future laws by the Commonwealth. This does not restrict any of the Australian States in their law-making.

What is a religion?

It was generally agreed by the Courts that the criteria to establish whether a religion exists or not had to be widely expressed. It could not be sufficient for any group to simply assert that their beliefs, practices and observances were religious and therefore they were a religion. A more objective criteria was required. Minority religions outside the mainstream religions have to also be included. Furthermore, the concept of religion could not be limited to theistic religions (that is religions which hold beliefs in a god or in some other supernatural beings).

In *The Church of the New Face v Commissioner for Payroll Tax* (Vic) (1983) 154 CLR 116 (the Scientology case), the Hon Chief Justice Mason and the Hon Justice Brennan proposed the following:



The criteria of religion are twofold:

- (a) belief in a supernatural Being, Thing or Principle; and*
- (a) the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion ...*

Prohibition on the free exercise of religion

We refer now to the following cases in which it was argued that laws passed by the Commonwealth prevented a person from the free exercise of his/her religion.



Case Study

Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth (1943) 67 CLR 116

Facts: During the World War II *National Security (Subversive Associations)* Regulations were passed to secure the public safety and defence of the Commonwealth '*... prescribing all matters which are necessary or convenient to be prescribed for the more effectual prosecution of any war in which His Majesty is or may be engaged*'. Under these Regulations a number of bodies including the Adelaide Company of Jehovah's Witnesses Inc. were declared to be prejudicial to the defence of the Commonwealth in the efficient prosecution of the war. The beliefs of the Jehovah Witnesses led them to proclaim and teach publicly that the British Empire and other organised political bodies were organs of Satan, unrighteous, governed by and identifiable with the Beast in the thirteenth chapter of the *Book of Revelation*. Their teaching also included that they should have no part in the political affairs of the world and that they must not interfere in the least manner with wars between nations. They refused to take an oath of allegiance to the King or any other authority. After the declaration that this group was prejudicial to the defence of the Commonwealth, the Attorney of Australia directed an officer of the Commonwealth to take possession of premises owned by the Jehovah's Witnesses. The company of Jehovah's Witnesses sought an injunction in the High Court of Australia to restrain the Commonwealth on the grounds that the Commonwealth was trespassing on their premises. Part of the argument raised by the Jehovah's Witnesses was that regulations were beyond the power of the Commonwealth because they were in breach of s116 of the *Constitution*.

Legal Issue: Was the action taken by the Commonwealth pursuant to the Regulations made under the *National Security Act 1939* (Cth) in breach of s116?

Decision: No. The Regulations did not offend against s116 of the *Constitution*. The purpose of these Regulations was not to prohibit the free exercise of religion. The Hon Chief Justice Latham said:

Any Regulations ... which empower the Government to prevent persons or bodies from disseminating subversive principles or doctrines or those prejudicial to the defence of the Commonwealth or the efficient prosecution of the war do not infringe s116 ... Freedom of religion is not absolute. It is subject to the powers and restrictions of Government essential to the preservation of the community. Freedom of religion may not be invoked to cloak and dissemble subversive opinions and practices and operations dangerous to the Commonwealth.

1. This case was decided while Australia was engaged in World War II. The Chief Justice said that freedom of religion is not absolute. What did he say it was subject to? Do you agree that the free exercise of religion be subject to the preservation of our Australian society? Justify your decision with legal criteria. [C] [A] [E]



The free exercise of religion referred to in s116 was also dealt with in a more recent case.

Case Study

Kruger and Bray v Commonwealth (1997) 146 ALR 126 (Kruger's case)

Facts: A number of Aboriginal plaintiffs challenged the constitutionality of a Northern Territory law (Ordinance) giving power to the government officials to remove Aboriginal children from their homes. The Commonwealth Human Rights and Equal Opportunity Commission concluded a comprehensive investigation into the history of the now-defunct 'removals policy' and its past and continuing effects. The report severely condemned virtually every aspect of the removals policy. The policy at the time it was implemented, was to assimilate Aborigines into the Australian society, by removing them from their parents, their homes, and indirectly, their language and culture. The Commonwealth Government failed to implement many of the Report's recommendations. The challenge assumed considerable symbolic significance in the circumstances.



The legislation challenged was an Ordinance enacted under s122 of the *Constitution* which gives the Federal Government 'power to make laws for the government of territories.' The Ordinance was repealed in 1953. The plaintiff's case was to establish the illegality of the Ordinance put into effect at the time. That would mean that the Ordinance would have provided no authority for the actions taken under it. It would open the door for general law actions against persons who had acted under the purported authority of the Ordinance.

One of the plaintiff's claims was that the impugned law prohibited the free exercise of Aboriginal religious beliefs, by separating persons from their Aboriginal culture, in contravention of s116 of the *Constitution*.

Legal Issue: Was the Ordinance in contravention of s116 of the *Constitution* because it prevented the 'stolen generations' from the free exercise of their religious practices?

Decision: The majority of the judges of the High Court of Australia confirmed the earlier position of the court in that what needed to be considered in determining whether there was a breach of s116 was the purpose of the Act. It was a question of determining the purpose of the law which was being impugned. Therefore, a noxious anti-religious 'purpose' had to be apparent on the face of the statute. Of course, there were no words in the Ordinance, or legislation under which the Ordinance was admitted, that stated any anti-religious purpose, despite the policy undoubtedly having that effect. The Hon Justices Gummow, Dawson and McHugh, observed that the critical question in the infringement of s116 is whether the purpose of the law is to prohibit the free exercise of religion. They said:

The use of the preposition 'for' in the expression in s116 of the Constitution 'for prohibiting the free exercise of any religion' directs attention to the objective or purpose of the law in issue. The question becomes whether the Commonwealth has made a law in order to prohibit the free exercise of any religion, as the end to be achieved. 'Purpose' refers not to the underlining motive but to the end or object the legislation serves.

There was nothing in the challenged Ordinances which suggested that it had such a purpose. The claim failed.

1. How would you describe the view the majority took in determining whether s116 prevented the free exercise of religion or not. Is it a 'narrow' view or a 'wide' view? Explain your reasoning? [A]

This purposive test as stated in the case above was considered more recently in the Full Court of the Federal Court of Australia in *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2011] FCAFC 100 where the Yindjibarndi People had been negotiating with FMG Pilbara Pty Ltd with respect to their application for mining leases. The Yindjibarndi People said that the mining lease would damage ceremonial sites and that it interfered with the exercise of their religion. It was argued in court that the granting of such a lease would be prohibited by s116 of the *Constitution* on the grounds that there would be a loss of free exercise of their religion. The Court followed the rule from *Kruger v Commonwealth of Australia* stating that the rule is such that a law can only be invalid or inconsistent with s116, if its purpose, not its effect, is to prohibit the free exercise of religion. This was not the purpose of the legislation establishing the granting of mining leases.

Establishing a religion

There is a prohibition in the Commonwealth Government in making laws to establish any religion in s116 of the *Constitution*. That argument was raised in the following case.



Case Study

Attorney-General (Vic) v Commonwealth (1981) 146 CLR

Facts: An organisation called Defence of Government Schools (DOGS) challenged federal funding of non-government schools operated by religious organisations. Acts of the Commonwealth Parliament appropriating money for implementing legislation making grants to the States for payments to non-government schools to finance their educational programs was under challenge in this case. The intended recipients of such monies were schools owned and run by religious bodies, largely by the Roman Catholic Church.

Legal Issue: The question before the High Court of Australia was whether or not the legislation establishing the funding of non-government schools by appropriating monies for the making of such grants, was in breach of s116 of the *Constitution* because it was effectively establishing a religion.

Decision: The Court held by a 6 to 1 majority that if a law had the effect or purpose of constituting or recognising a particular religion including a branch of a religion or a church, as a national institution then and only then would it be in breach of s116. Such a law that was simply providing for financial aid to the education activities of church schools was not a law for establishing a religion even though it might indirectly assist in the practice of that particular religion.

1. Do you agree that Federal funding of non-government schools operated by religious organisations is tantamount to establishing a religion? Explain your viewpoint. [A]
2. Imagine a situation where the governing party of Australia was comprised predominantly of one particular religion. Imagine further that they wish to pass a Commonwealth Act of Parliament which breaches the establishment prohibition in s116 of the *Constitution*. Draft a section of such Commonwealth Act of Parliament which would in fact fall foul of such prohibition. Give your reasons as to why it would fall foul. [A] [E]

Religious test as qualification for public office

The establishment of religious test as a qualification for public office is prohibited under s116 of the *Australian Constitution*.

There was a reference to the imposition of a religious test for office in Parliament in *Crittenden v Anderson* (Unreported, High Court of Australia, the Hon Fullagher, 23 August 1950) noted in (1977) 51 ALJ 171. In that case the question arose as to whether a Roman Catholic member of parliament should be disqualified from holding office under s44 of the *Constitution* (We have already dealt with this section extensively in this text. This section states that a member of either house of the Commonwealth Parliament is incapable of being chosen as, or sitting as, a member of Parliament, if such person has an allegiance to a foreign power). It was asserted that the member of Parliament, because he was a Roman Catholic, was under an allegiance to a foreign power, namely the Vatican. The Hon Justice Fullagher dismissed such an assertion, holding that to impose such a disqualification pursuant to s44 would be to effectively impose a religious test for holding an office in Parliament which would be in violation of s116 of the *Constitution*.

There was a recent decision of the High Court of Australia dealing directly with the question of Commonwealth funding for the provision of chaplaincy services in schools.

Case Study



Williams v Commonwealth (2012) 86 ALJR 713

Facts: There was a funding agreement between the Commonwealth of Australia and the Scripture Union of Queensland (SUQ) for the provision of chaplaincy services at a State School in Queensland. It was argued that such a funding arrangement was invalid. Several arguments were raised in this case, one of which was that such a funding arrangement by the Commonwealth was in breach of s116 of the *Constitution* because the effect of it was that a religious test was required as a qualification for an office of public trust in the Commonwealth because it was for the provision of chaplaincy services.

Legal Issue: Did this funding agreement breach s116 of the *Constitution*?

Decision: The funding agreement was not in breach of s116 of the *Constitution* (The High Court of Australia held for other reasons that the funding arrangements were invalid). The funds in question were provided to the SUQ by the Commonwealth to employ chaplains in State Schools. These appointments were not in any way related to any qualification of public office in the Commonwealth.

The cases above have dealt with the prohibition on the Federal Government from interfering with religious observances or practices. The Commonwealth Parliament has also passed laws, based principally on the external affairs power, against race, sex, disability and age discrimination. However, there is no general Commonwealth law prohibiting discrimination on the grounds of religious belief or protecting rights with respect to religious practice. If the Commonwealth was to pass such a law it would have to rely upon a relevant international treaty or convention and the external affairs power. There are a number of States in Australia that have had in place legislation prohibiting discrimination on religious grounds (see *Anti-Discrimination Act 1991* (Qld) s124A). When a citizen in Queensland believes that they have been discriminated against on the grounds of religion, then they are entitled to make a complaint to the Queensland Human Rights Commission (QHRC) who investigate. If after investigation the parties are called together and no agreement can be reached as to an outcome then the case is referred to the *Queensland Civil and Administrative Tribunal* (QCAT). There is then a hearing about the allegation. The following is an example of such a case.



Case Study

Emanuel & Anor v State of Queensland [2011] QCAT 731

Facts: Two people, whose religious belief prevented them from having their photographs taken, complained of discrimination when the Department of Transport refused to issue them with drivers' licences without photographs. The complainants stated that their view of the Second Commandment '*which tells us not to make an image or a likeness*' prevented them from having their photographs taken. Their religious belief is based on the Christian Second Commandment and the books of the Old Testament of the *Bible*, *Exodus*, and *Deuteronomy*.

The Department gave evidence that driver licences with photographs were introduced in Queensland in 1986 and had become a primary form of identification, and claimed reliable identification cannot occur without a photograph.

Legal Issue: Was the Department of Transport being discriminatory when it refused to issue licences without photographs to the complainants.

Decision: The tribunal found that the requirement to have a photograph on a Queensland driver's licence was reasonable, and therefore not discriminatory, and the complaint was dismissed.

19.4 Right to vote

As we have seen earlier the *Australian Constitution* does not expressly guarantee the right to vote. Most constitutional lawyers accept that a right to vote exists and is implied by ss7 and 24 of the *Constitution*. In particular s24 of the *Constitution* refers to, '*the house of representatives shall be composed of members **directly chosen by the people** of the Commonwealth ...*' There is no doubt the *Constitution* read as a whole supports universal suffrage. However, there have always been citizens of Australia who have been disqualified from voting.

The *Commonwealth Electoral Act 1918* (Cth) (*Electoral Act*):

- establishes the electoral commission,
- sets up a system of electorates,
- establishes a system of keeping electoral rolls,
- sets out a postal voting system,
- sets out qualifications for enrolment for voting among other matters.

The *Electoral Act* has been amended several times since 1918.

The *Electoral Act* s93 sets out persons who are entitled to enrol on the electoral roll and to vote. It also sets out those citizens who are not entitled to have their name placed on the electoral roll or to vote in Federal elections. These are set out in s93(8) of the *Electoral Act*:

***Commonwealth Electoral Act 1918* (Cth)**

93 Persons entitled to enrolment and to vote

(8) A person who:

- (a) by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or***

- (b) *has been convicted of treason or treachery and has not been pardoned;*
is not entitled to have his or her name placed or retained on any Roll or to vote at any Senate election or House of Representatives election.
- (8AA) *A person who is serving a sentence of imprisonment of 3 years or longer is not entitled to vote at any Senate election or House of Representatives election.*

The definition of a person being in detention in the Act is one who is in detention on a full-time basis for an offence against the law of the Commonwealth or a State or Territory.

The first two such persons who are prohibited from voting can be seen as being easily justified. However, the third one of these, namely restrictions on persons who are serving a sentence of imprisonment has caused significant controversy in Australian history.

By way of background there have been many amendments to our voting laws that have affected the voting rights of prisoners.

Act	Implications on the 'right to vote' for prisoners
<i>Commonwealth Franchise Act 1902</i> (Cth)	Excluded Federal and State prisoners who were serving sentences of one year or longer from voting.
<i>Electoral Act 1918</i> (Cth)	Prisoners were prohibited from voting until 1983.
<i>Commonwealth Electoral Legislation Amendment Act 1983</i> (Cth) (1983 to 2004)	Prisoners serving sentences for an offence punishable by imprisonment for 5 years or longer were prohibited from voting.
<i>Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004</i> (Cth) (2004 to 2006)	Prisoners serving sentences for an offence punishable by imprisonment for 3 years or longer were prohibited from voting.
<i>Electoral and Referendum (Electoral Integrity and other Measures) Act 2006</i> (Cth)	Any prisoners serving a current sentence of imprisonment were prohibited from voting.

The validity of the latter amendment was the subject of a High Court of Australia decision.

Case Study

Roach v Electoral Commissioner [2007] HCA 43

Facts: The plaintiff was born in 1958 and was an Australian citizen of Indigenous descent. She was enrolled to vote, was of sound mind and capable of understanding the nature and significance of voting and had never been convicted of treason or treachery. In 2004 she was convicted in the County Court of Victoria on 5 counts under the *Crimes Act 1958* (Vic) and was serving a total effective sentence of 6 years imprisonment.

Legal Issue: Were the amendments valid?

Decision: It was invalid. The High Court of Australia held that there is a constitutionally prescribed system of representative government. A balance needs to be adopted between





Case Study ...

the system of representative government established by the *Constitution* and any legislative interference with that system of representative government. Any legislation is required to be reasonably appropriate and proportionate to the maintenance of representative government. The majority found that the 'net of disqualification was cast too wide'. The reasons they expressed for that included:

- (i) This amendment meant that any prisoner serving a period of detention was disqualified from voting. The amendment didn't have any regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender.
- (ii) The amendment does not treat imprisonment for a token period of days, mandatory sentences for serious offences, and sentences for offences of strict liability differently. It has no regard to any degree of culpability of the prisoners, e.g. a failure to pay fines in various States of Australia may result in imprisonment.
- (iii) It was pointed out that in 2006 6.3% of the prison population was serving a sentence for a public order offence or a road traffic or motor vehicle regulatory offence and 17.6% of the prison population was serving a sentence of less than one year. This amendment to the legislation was not reasonably appropriate or proportionate to the maintenance of representative government guaranteed by the Constitution.



What do you think?

The amendments saw the right to vote being taken away from anyone who had been convicted and was serving a sentence (whatever duration). Some believed this was justified as a person convicted and serving a term of imprisonment should, as part of their punishment, lose the right to participate in our democracy.

Do you agree that a person who is serving a term of imprisonment should also lose the right to have a say in our representative democracy? Justify your opinion using legal criteria. [E]

Review

Comprehend

1. **Describe** one restriction on the right to protest in Australia and **explain** why this restriction exists. Use an example to support your response. [C]
2. **Describe** one restriction on the freedom of expression and **explain** why this restriction exists. Use an example to support your response. [C]
3. **State** what type of right the freedom of religion reflects. **Explain**, using either case law or statute law, how this human right is protected and restricted. [C]
4. **State** what type of right the right to protest reflects. **Explain**, using either case law or statute law, how this human right is protected and restricted in Australia. [C]

Analyse and evaluate

1. Not everybody agrees that the displaying of Nazi symbols and the making of Nazi gestures should be criminalised. Some believe that freedom of expression is so important that such behaviour, though abhorrent to many, should not be criminalised. **Analyse** the arguments for and against this legislation and decide whether it should or shouldn't exist. **Justify** your decision with legal criteria. [A] [E]

Your analysis and evaluation can consider:

- To what extent does current legislation restrict Australian's freedom of expression?
 - What harm is done to persons in our society by allowing Nazi symbols to be displayed or Nazi gestures to be made without sanction?
 - Is this harm of allowing the behaviour of such little or great consequence that it outweighs, or balances, the harm done to our freedom of expression?
2. Using Sources 1 to 3 below, **examine** two different viewpoints to analyse prisoners' right to vote in Queensland. **Decide** the ideal condition under which a person serving a prison sentence can vote, **justifying** your decision with legal criteria. [A] [E]

Source 1

PRISONER ADVOCATES CALL FOR ABOLITION OF 'DISCRIMINATORY' VOTING RESTRICTIONS AS INMATES PREPARE TO CAST VOTE IN STATE ELECTION FOR THE FIRST TIME

For the first time in Queensland's history, thousands of inmates in correctional centres across the state will be given the right to vote in the upcoming October state election.

Mr Barns, the National Human Rights spokesperson for the Australian Lawyers Alliance, said all prisoners should be entitled to vote, irrespective of the length of their sentence. 'Why stop at three years? What's the magic of three years? It's completely arbitrary and we need to go further,' Mr Barns said.

Debbie Kilroy, chief executive of Sisters Inside said voting restrictions had a disproportionate impact on the state's Aboriginal and Torres Strait Islander population. 'When we start cutting off certain groups of people in our community, then we have an imbalanced process to elect certain officials into positions of power,' Ms Kilroy said.

Source: Phoebe Hosier, 'Prisoner advocates call for abolition of 'discriminatory' voting restrictions as inmates prepare to cast vote in state election for the first time,' *ABC News* (Online, 24 September 2020) <[abc.net.au/news/2020-09-14/queensland-prison-inmates-win-right-to-vote-state-election/12660172](https://www.abc.net.au/news/2020-09-14/queensland-prison-inmates-win-right-to-vote-state-election/12660172)>.

Source 2

'NO PRISONER SHOULD HAVE THE RIGHT TO VOTE': LNP BLASTS PROPOSED REFORM

Prisoners should not have the right to vote in Queensland state and council elections, LNP members have argued in response to moves to reinstate suffrage in the state's jails.

In a statement of reservation, opposition members of the parliamentary committee that considered the Electoral and Other Legislation Amendment Bill have lashed the idea.

'LNP members are of the view that no prisoner should have the right to vote,' Ray Stevens, Sam O'Connor and Dan Purdie wrote in the committee's report. 'This is because the LNP believes that those who break the law should not have the right to participate in deciding who makes the law. A person serving a sentence of imprisonment, no matter the length of the sentence, is not a law-abiding citizen and there should be no discretion for those who are serving shorter sentences.'

Source: Felicity Caldwell, 'No prisoner should have the right to vote': LNP blasts proposed reform,' *Brisbane Times*, (Online, 21 June 2019) <brisbanetimes.com.au/politics/queensland/no-prisoner-should-have-the-right-to-vote-lnp-blasts-proposed-reform-20190621-p5204d.html>.

Source 3

VOTING RIGHTS IN PRISON

The more philosophical debate is a back-and-forth between two countervailing considerations. The anti-disenfranchisement argument is that the franchise is a fundamental right, and that not even criminal activities warrant stripping people of the rights that they enjoy as members of the human race. In a world governed by today's values, this is arguably strong enough to create a presumption against the normative validity of prisoner disenfranchisement and force the onus of proof onto the opposition.

The pro-disenfranchisement response revolves around civic responsibility – the idea that the social contract is a two-way street requiring obedience to the rule of law as well as granting privileges. Why should those who despise the laws, have a say in their creation? Gleeson CJ took a somewhat similar line in *Roach*. This argument does carry weight, and it is a matter of opinion whether it satisfies the burden of proof placed on it.

The High Court in *Roach* used a hybrid justification: that the restrictions could be used to mark serious offending as antisocial and add symbolic to physical separation from the community. This resembles the 'extra punishment' argument, but it explains why the restrictions complete and complement physical incarceration, and argues that crimes against society must be met with complete segregation from society.

Source: Martin Churchill, 'Voting Rights in Prison: Issues Paper,' *The University of Queensland* (Online, 15 July 2020) <law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf>.

- Using the source below, **examine** a viewpoint related to the right to protest in Australia and its consequences. **Justify** a decision about the extent to which right to protest is protected under Australian law. [A] [E]

IT IS FUNDAMENTAL TO AUSTRALIA'S DEMOCRACY. BUT IS YOUR RIGHT TO PROTEST UNDER ATTACK?

Being a law-abiding protester in Australia has become more difficult with each passing year, experts say, and some fear the right to protest is being slowly eroded.

Over the past two decades, at least 49 laws affecting protest have been introduced in federal, state and territory parliaments. Most recently, Victoria announced a raft of proposed protest restrictions on 17 December, following a series of antisemitic attacks in Melbourne.

David Mejia-Canales, a senior lawyer at the Human Rights Law Centre, said the public should be 'very, very, very critical' about such legislation. 'Protest is the purest expression of democracy in many ways ... because protest is democracy in action. And any politician who does not like democracy in action, as long as it is peaceful, maybe we should really question their motivations.' He said this means it's becoming more and more risky for Australians to engage in the age-old democratic tradition of public protest.

Professor Luke McNamara, a member of the Faculty of Law and Justice at the University of New South Wales, says each of these 50 odd protest-restricting laws, such as the measures proposed in Victoria, may seem acceptable, but over time, they accumulate. 'It's becoming increasingly difficult to be a law-abiding, peaceful protester,' he said.

'What I mean by that is the rules keep shifting and governments continue to redraw the lines in such a way that places protest activity of the past recognised as maybe disruptive, but lawful and acceptable and to be tolerated. 'Increasingly, those sorts of behaviours are being put on the unlawful side of the line.'

Source: Sam Dover, 'It's fundamental to Australia's democracy. But is your right to protest under attack?', *SBS News*, (Online, 22 December 2024) <[sbs.com.au/news/article/is-australians-right-to-protest-under-attack/jdxyoaqt5](https://www.sbs.com.au/news/article/is-australians-right-to-protest-under-attack/jdxyoaqt5)>.

Human rights in Australian contexts

Chapter 20: Resolving human rights complaints

20.1 Introduction

20.2 Protesting infringement of human rights

20.3 Lobbying for human rights

20.4 Court action involving human rights

Learning objectives

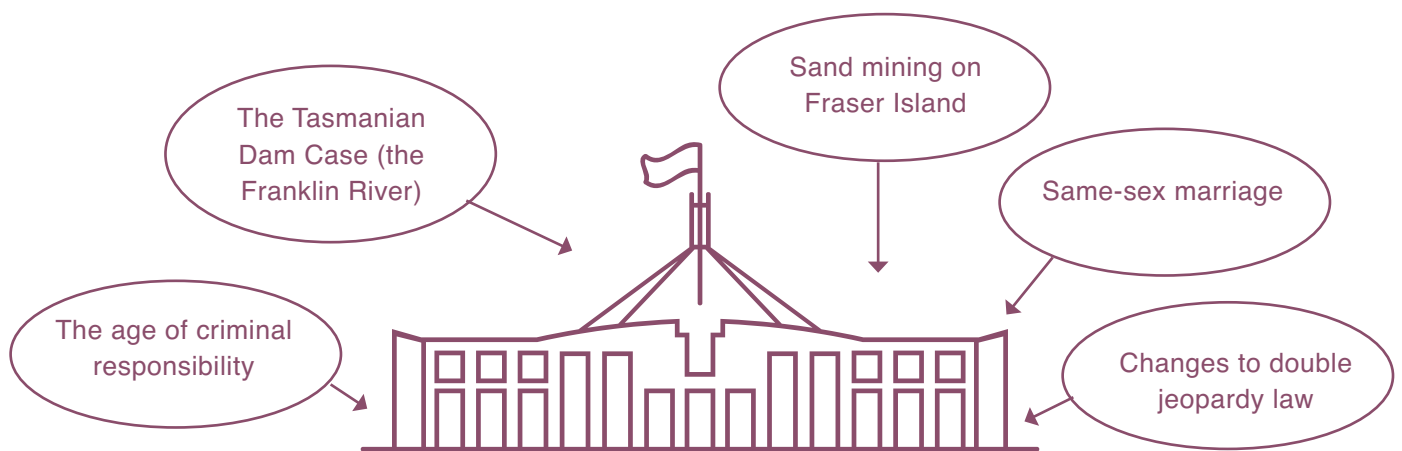
At the conclusion of this chapter, students will be able to:

- explain the legal processes available to citizens to resolve human rights complaints in Australia
- describe the processes involved in protesting, lobbying, lodging complaints, tribunals and court actions.

20.1 Introduction

Throughout your study into human rights, you would have realised that individuals and governments can breach their human rights obligations from time to time. When this occurs, citizens are able to utilise many different legal processes to resolve complaints. This can be because an individual citizen feels aggrieved, or it might be where a large group of citizens objects to government policies because they breach their human rights. Governments often promote policies that are different to those which citizens support.

Protesting, lobbying and taking court action are methods of influencing governments, and other citizens, that often occur contemporaneously. There have been many successful campaigns to change a government's policies which have attracted our interest in this text, for example:



Fraser Island

Fraser Island is the world's largest sand island. The sand contains rutile, zircon and ilmenite. It contains the greatest number of independent dune systems in the world. The four dunes of the East Coast are the site of several large Aboriginal middens (a midden is a burial ground). The island vegetation ranges from heaths to rainforests, all the more extraordinary because they grow out of sand. There are also 60 freshwater lakes.



In 1975, both under Queensland and Commonwealth law, the concept of sustainable ecological development was only a reality in the minds of conservationists and their supporters. The Queensland Government had already granted mining leases on Fraser Island to Queensland Titanium (1,000 hectares) and an American company, Dillingham, in partnership with Australian Murphys (12,000 hectares). By May 1975, Dillingham was planning to bulldoze some of the island's highest dunes around Lake Boomanjin.

The only way the conservationists could challenge these decisions was by appealing decisions of the Mining Warden, and by lobbying the federal government to refuse to grant export permits.

In 1975, Fraser Island was constantly in the news. There were internal disputes within the Whitlam Labor Government and the Minister for Mines and Energy, Rex Connor, threatened to resign. The Queensland Trades and Labor Council decided to ban mining, but the ban was not supported by the Australian Workers Union. A meeting was held in the Melbourne Dallas Brooks Hall of the Australian Conservation Foundation which attracted 150 people. There was a meeting organised by the local branch of the Country Party in Maryborough with the support of the town's Labor-controlled city council where 1200-1500 people went to support mining as being vital to the regional economy.

Finally, the Fraser Island Defence Organisation (FIDO) brought a case before the High Court of Australia.



Case Study

Sinclair v Mining Warden at Maryborough (1974-5) 132 CLR 473

Facts: On 20 December 1972, Queensland Titanium Mines Pty Ltd lodged with the Warden for the Mining District of Maryborough applications for mining leases over the sum of 1100 acres on Fraser Island. John Sinclair, on his own behalf and on behalf of the Fraser Island Defence Organisation (FIDO) opposed the applications, on the ground that for environmental reasons it was not in the public interest that they be granted. At the hearing of the application and the objections before the Warden it appeared that there were minerals under only 60 acres of the land covered by the application. John Sinclair and FIDO adduced extensive expert evidence of the damage to the environment that mining was likely to cause. The Warden recommended that the applications be granted. In the course of this decision he stated that the objectors (Sinclair and FIDO) represented the 'views of a section of the public' and that he was unable to conclude from the evidence that the interests of the public as a whole would be prejudicially affected by the grants. He further stated that unless it could be shown that it was against the public interest as a whole for the leases to be granted, the applicant was entitled to a recommendation that the leases be granted.

Legal Issue: Should the High Court of Australia review the Mining Warden's decision because there was an error of law? It was alleged by the appellant (Sinclair) that the Warden had made an error of law by deciding that it was impossible for him to conclude that any interests of the public would be prejudicially affected because of the limited interest of the objectors.

Decision: The whole of the High Court of Australia held that the Warden had failed to hear the application objections according to law. The Court said that the Warden had erred by holding that the limited interests of Sinclair and FIDO made it impossible for him to conclude that any interest of the public would be prejudicially affected by the granting of the leases. In addition, the Court held that the Warden had failed to appreciate, that quite apart from any objections that might be made to the application, it was essential that there should be evidence that would warrant his recommendation. The Court held that an applicant for a mining lease is not entitled to a recommendation for a licence simply by observing the formalities of an application.

A writ of mandamus (stopping the Warden from granting the licence) was granted to the appellant, Sinclair.

Research Task

The key figure in FIDO was Dr John Sinclair AO. He had lived in Maryborough most of his life and was employed by the Department of Education. He had strong personal links to Fraser Island. In 1971 he was FIDO's first President. He died, aged 79, in early 2019.

Write a brief assessment of John Sinclair's role in protecting the environment of Fraser Island, paying particular attention to the legal processes he used to achieve just and equitable outcomes. [C] [S]

20.2 Protesting infringement of human rights

We have seen that while Australia is a signatory to the ICCPR, there is no express right in the *Australian Constitution* to the right to peaceful assembly that protects the right of individuals and groups to meet and to engage in peaceful protest. However, this right is protected under the *Human Rights Act 2019* (Qld).

In addition, in Queensland, the *Peaceful Assembly Act 1992* provides for persons to seek authorisation for a public assembly.

Generally, Australian citizens, and certainly Queensland citizens, can protest about any issue of concern to them, subject to the general law. So what happens if citizens have a human rights complaint against the Australian or Queensland governments and want their voice to be heard in opposition to what they see as an unfair law or unfair policy giving someone else the right to interfere in their lives? The answer is that on many occasions they make public and private protest. There are many examples:



Lock the Gate

The **Lock the Gate Alliance** started when landowners in western Queensland objected to the processes whereby gas companies had the right to enter their land and extract gas. A number of landowners joined together with environmentalists and refused access, **directly protesting** against the system. Initially, these local farmers were simply protesting against something they felt was intrusive and unjust. They felt their property rights were breached.



Practical Application



HISTORY OF LOCK THE GATE

The Lock the Gate Alliance was formed in 2010 following meetings in New South Wales and Queensland of landholders, organisations and communities concerned about the ongoing and rapid expansion of coal and coal seam gas development.

In late 2010 representatives from over 40 community, professional and environmental groups from across Queensland, New South Wales, Victoria and South Australia convened in Broke to discuss the challenges of unchecked mining for coal and coal seam gas. The forum found that there were common issues experienced by communities where coal and coal seam gas extraction was being expanded. The forum considered the role of government in the expansion of these industries and the lack of consideration for the will of local residents and communities in the approval of coal and gas projects.

Meanwhile in south-east Queensland a meeting was held where local landholders, farmers and environmentalists gathered to discuss a response to the state government's approval of a number of major coal seam gas developments. It was at this meeting, at Warra on Queensland's Darling Downs, that the name 'Lock the Gate' was decided. So began the campaign calling on landholders to refuse to allow access to gas companies and refuse to negotiate sale of their properties to coal companies.

Fourteen years on and the Alliance continues to gain momentum, with rural and urban communities all over Australia stepping up to defend their land, water, and future from the invasive coal and coal seam gas industries.

Lock the Gate Alliance was incorporated in NSW on 8th December 2010 and became a registered company limited by guarantee under the Corporations Act 2001, on 6th March 2012. The inaugural AGM was held in Murwillumbah on 11 June 2011, and the second AGM was held in Newcastle on 15 September 2012.

Lock the Gate continues to grow as a diverse grass roots community movement working to protect land and water resources from mining impacts.

Source: Lock the Gate, 'History of Lock the Gate' *About Us*, (Webpage, n. d.) <lockthegate.org.au/history-of-lock-the-gate>.

1. Describe how 'Lock the Gate' has grown from a small number of protesting farmers to a national movement. [C]
2. Explain the rights the 'Lock the Gate' movement seeks to protect. [C]

Research Task

Go to <lockthegate.org.au>. Go to the 'campaigns' icon. Describe a current campaign in which the organisation is involved. Do you agree with their current policies? Give your reasons. [C]



Protesting against wind turbines

The Australian Energy Market Commission is responsible for the design, installation, and operation of solar farms, wind farms, and transmission lines to meet renewable energy targets. It implements the Australian government policy to reach net zero emissions by 2050. Despite broad support for the transition to renewable energy many local communities have protested against some aspects of the program. On the other hand, at times they have rallied in its support.

Practical Application



ANTI OFFSHORE WIND FARM RALLY IN WOLLONGONG DRAWS LARGE CROWD

A large and passionate crowd gathered at Wollongong's Flagstaff Hill on Sunday to demonstrate their opposition to the proposed development of a wind farm zone off the Illawarra coast, urging the government to 'keep the sea free'.

...the plan, which if approved would cover 1461 square kilometres of ocean between 10 and 30 kilometres offshore, from Wombarra to Kiama.

The federal government wants to establish the zone to provide renewable energy and contribute to Australia's target of net zero greenhouse gas emissions by 2050.

How wind farms might affect migrating whales was a key concern.

Kiama MP Gareth Ward said this part of the Pacific Ocean was a highway for 'whales and birds, endangered flora and fauna, things that are incredibly important to our country'.

Fears about wildlife and the environment carried into concerns about the impact on tourism and associated industries, and commercial fishing.

Some speakers also raised the visual impact of offshore wind farms and potential effects on shipping movements.

Organisers estimated 1500 to 2000 people were in attendance at the rally, which was followed by a sizeable paddle-out from Wollongong City Beach.

Among those in attendance was Coledale resident Johanna Pheils, who said she had an open mind about the proposal but felt there was 'very little reliable information'.

Source: Natalie Croxon, 'Anti-offshore wind farm rally in Wollongong draws large crowd', *Illawarra Mercury*, (Online, 1 January 2025) <illawarramercury.com.au/story/8404062/big-crowd-turns-out-for-wollongong-rally-against-coastal-wind-farm/>.

1. Outline the issues raised by the protesters opposed to a wind farm zone. Explain how these issues are 'human rights complaints'. [C]
2. Have the protesters had an opportunity to express their opposition to the proposed wind farm zone? Explain your answer. [C]



Practical Application



DO WE WANT A WIND FARM OUTSIDE OUR WINDOW? WHAT AUSTRALIANS THINK ABOUT THE NET ZERO TRANSITION

The rise of protest groups in regional Australia objecting to the installation of wind farms and transmission lines, in particular, presents a serious challenge to the Albanese government in communicating the importance of the net zero transition to the public.

In principle it seems that Australians strongly support this transition. In a poll for the Australia Institute's Climate of the Nation report last year, two in three respondents went as far as to say our country should be a world leader in climate action.

But at the same time the installation of these same wind farms has attracted strong local protests, especially in NSW and Victoria. There has also been significant community pushback to the Australian Energy Market Operator's plan to install 10,000 kilometres of overground transmission lines, which are key to carrying renewable energy to the electricity grid. Only 35% of respondents in the Guardian Essential poll supported them.

In an equally serious challenge for the net zero transition, 70% of respondents felt renewable energy should not be developed 'at the expense of local communities'.

In a bid to address these concerns, the Australian Energy Market Commission has drafted new community engagement rules to ensure communities are involved early in the process of designing the routes of transmission lines.

The changes seek to ensure all stakeholders get information about a project in a clear and timely fashion (including advice on how they can best play a role) and have opportunities to be regularly involved throughout the planning of projects.

Source: Lucy Richardson, Ella Healy, 'Do we want a wind farm outside our window? What Australians think about the net zero transition', *The Conversation*, (Online, 1 January 2025), <theconversation.com/do-we-want-a-wind-farm-outside-our-window-what-australians-think-about-the-net-zero-transition-214712>.

1. Describe the human rights of landowners and members of local communities which the Australian Energy Market Commission should be mindful of when designing the routes of transmission lines and the placement of wind turbines. Are local communities and landowners entitled to any compensation? Explain what losses they may suffer. [C] [A]

Practical Application

RALLIES HELD IN SUPPORT OF OFFSHORE WIND PROJECTS AS NEWCASTLE, WOLLONGONG RESIDENTS HOPEFUL OF JOB OPPORTUNITIES

Workers, doctors, teachers and environmental activists have joined forces across Australia at rallies in support of renewable energy. Hundreds of people gathered in Newcastle to advocate for the Hunter offshore wind zone. Since the zone was declared in July last year, there have been multiple rallies against it.

Leigh Shears, secretary of Hunter Workers, the union group in charge of the Newcastle event, said it was important to provide correct information on renewable energy 'without inflaming people's emotions'.

Mr Shears said the project was in the very early stages but current projections suggested 4,500 jobs would be created. 'There's approximately 3,000 jobs in the construction phase, which will take a couple of years, but it's also estimated [there will be] about 1,560 ongoing maintenance jobs over 30 years,' Mr Shears said. 'That's generational change, generational security, generational financial security for families and the region.'



Pro-renewable rallies were also held in Wollongong in New South Wales, the Queensland coastal city of Gladstone and Victoria's Gippsland region.

Figtree dad Xavier Mayes and his two children Rowan and Cora were among hundreds of families at a family fun day in Wollongong, in support of the proposed offshore wind zone for the Illawarra.

It attracted thousands of submissions during community consultation as well as large protests.

The Australian Conservation Foundation's Gavan McFadzean said the turnout was positive.

'I think it sends a message that there's really strong community support for the local benefits, the economic and climate benefits, of making the switch to renewable energy,' he said.

Source: Romy Stephens, Penny Burfitt, 'Rallies held in support of offshore wind projects as Newcastle, Wollongong residents hopeful of job opportunities', *ABC News*, (Online, 1 January 2025) <abc.net.au/news/rallies-held-in-support-of-offshore-wind-hopes-for-jobs/103418356>.

1. Describe the point of view expressed in this article about offshore wind farms. [C]
2. Describe the human rights relied upon that support the point of view in this article. Compare and contrast the point of view in this article to the point of view expressed in the article entitled 'Anti-offshore wind farm rally in Wollongong draws a large crowd'. [C] [A]

20.3 Lobbying for human rights

Key term

Lobbyist: a person who undertakes communication with government representatives in an effort to influence government decision making.

Practical Application

The **Lobbying Code of Conduct** (the code) defines lobbying activities as communications with Australian Government representatives in an effort to influence federal government decision-making.

This includes:

- making or amendment of legislation
- development or amendment of a government policy or program
- awarding of a government contract or grant
- allocation of funding.



If a person undertakes communications, in an effort to influence government decision-making on behalf of a third party, with people including a minister, an assistant minister, their staff or any person employed in the Australian Public Service, they must be registered before such communications take place.

This applies regardless of whether a person styles themselves as a lobbyist.

Certain activities are not considered lobbying activities under the code. These include:

- communicating with a Parliamentary Committee
- providing information in response to a request by a government representative
- communicating with a minister in their capacity as a local member (see the definition of 'lobbying activities' in subsection 5(1) of the code).

The code does not apply to lobbyists who make representations to government (or conduct lobbying activity) on behalf of their employer ('in-house' lobbyists), as these representations are considered sufficiently transparent.

Source: Attorney General's Department, 'Lobbying Code of Conduct', *Australian Government*, (Webpage, n. d.) <ag.gov.au/integrity/australian-government-register-lobbyists/information-lobbyists>.

1. Describe the lobbying code of conduct. To whom does it apply? What is the significance of the requirement of registration? [C]

Gambling, lobbying, and human rights

The gambling industry indirectly infringes many human rights in the *Universal Declaration*. For example:

Article 25

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family... In the event of... circumstances beyond his control.

No one could seriously suggest that governments, in particular the Australian government, do not have a responsibility to protect Australian citizens and families who are vulnerable to the gambling industry. Lobbyists play a large part in the process of entrenching the gambling industry in this country. Ultimately, someone pays the financial and human cost that is caused.

Practical Application

BIG GAMBLING IS PLAYING WITH OUR DEMOCRACY

The gambling industry's tentacles reach deep into Australia's corridors of power.

Responsible Wagering Australia, the industry body representing online gambling companies such as Sportsbet and bet365, paid for a lavish birthday lunch for federal Communications Minister Michelle Rowland, who is partly responsible for regulating the industry.

You might be appalled by this behaviour, but it's just the tip of the iceberg. The gambling industry's influence – on both sides of politics – goes far beyond lavish lunches and gin tastings.

...heavily regulated industries – where government laws have a big impact on business profits – are big spenders on lobbying and political donations.

Online gambling companies are relatively new players in the influence game, but their importance is growing quickly. Total Australian spending on online gambling (covering both legal and illegal websites) increased 72 per cent from \$5.57 billion in 2019 to \$9.56 billion last year.

When the Gillard government proposed pokies reforms in 2011, ClubsNSW showed up with guns blazing. Alongside other hotel and club industry associations, it ramped up political donations, favouring the Coalition, and ran highly effective scare campaigns in marginal seats. The clubs won: Gillard watered down the legislation, and even these modest reforms were repealed when the Abbott government won office in 2013.

People with a stake in public policy are entitled to put their views to governments. The problem is that in our current system, access is horribly one-sided.

The power imbalances are particularly stark in the case of gambling, which profits off some of the most vulnerable people in our community.

Source: Elizabeth Baldwin and Kate Griffiths, 'Big Gambling Is playing with our Democracy', *Grattan Institute*, (Online, 10 January 2025), <grattan.edu.au/news/big-gambling-is-playing-with-our-democracy/>.

1. Explain why the gambling industry and its lobbyists seek to influence government policy. [C]
2. To what extent do you think it should be important that governments consider restricting gambling to protect Australian families? [A]



Practical Application

GAMBLING AD BAN: LISTEN TO THE FACTS, NOT THE VESTED INTERESTS

Betting is a high-risk form of gambling, and in Australia it is growing...Australians lost \$9 billion betting in 2022-23. The average Australian's betting loss is more than double that of the average US or UK resident.

The problem is that for too many people, betting leads to significant harm, including financial and mental distress.

Online betting is particularly high risk. It's accessible, immersive, and increasingly high speed and complex. Many more people report difficulty controlling their gambling. And gambling harm extends to people's family and friends too

Gambling harm ripples through our communities. Gambling has been linked to family and domestic violence, crime, even suicide.

The Murphy inquiry, a major federal parliamentary inquiry into online gambling harm, chaired by the late Labor MP Peta Murphy, reached multi-partisan consensus on the changes needed to tip the odds back in punters' favour.

The inquiry's central recommendation was a comprehensive ban on gambling ads on TV, radio, and online. Gambling ads normalise gambling for children and trigger the urge to gamble for people at risk.

Predictably, betting companies oppose a gambling advertising ban. And the gambling industry doesn't stand alone in resisting it – the industry has many powerful allies, including Australia's beloved football codes.

The NRL, AFL, and other major codes have deals where they receive a proportion of every bet placed on their games. It may surprise many footy fans to know that the NRL and AFL have an interest not just in gambling ad and sponsorship revenue, but in the size of the betting market itself.

Sporting codes have had ample opportunity to substantiate their arguments publicly.

The Murphy inquiry invited them to submit evidence about the effect of an ad ban on the major sports. But they "did not provide any specifics of how their operations would be changed or cut back if their gambling revenue was restricted".



Sports industry giants such as the NRL and AFL shouldn't be dictating Australia's gambling harm prevention policy. The prime minister should follow the facts, take on the vested interests, and make gambling safer – in the interests of all Australians.

Source: Elizabeth Baldwin, 'Gambling and ban: listen to the facts, not the vested interests', *Australian Financial Review*, (Online, 1 January 2025), <[afr.com/companies/sport/gambling-ad-ban-listen-to-the-facts-not-the-vested-interests-20241002-p5kf7e](https://www.afr.com/companies/sport/gambling-ad-ban-listen-to-the-facts-not-the-vested-interests-20241002-p5kf7e)>.

Practical Application ...

1. Describe the Murphy inquiry and its central recommendation. Set out the evidence in the article which supports the central recommendation. [C]
2. Describe and explain the human rights supported by the central recommendation of the Murphy inquiry. [C]
3. Would a registered lobbyist acting on behalf of the NRL, the AFL, and any gambling company that offers betting facilities on NRL or AFL games be proposing to protect the human rights of vulnerable gamblers? Explain your answer. [A]

Practical Application

MAJOR FOOTBALL CODES AND GAMBLING FIRMS DIRECTLY LOBBIED ALBANESE'S OFFICE ON AD BAN

Newly released documents show how in the lead-up to footy finals the NRL, AFL and major wagering companies accelerated and intensified their efforts to directly lobby the prime minister's office to influence a proposed gambling ad ban.

The gambling industry's peak body sought to bypass the responsible minister and discuss ad ban issues directly with Anthony Albanese, according to documents tabled in parliament on Friday, which revealed details of letters, emails and meeting agendas and memos.

In a letter to Albanese, Responsible Wagering Australia argued gambling products needed to remain 'visible' to punters to avoid the prospect of illegal gaming flourishing. It even claimed ad bans could lead to cheating in sports and racing. The PM's office has also been meeting with gambling reform advocates.

The meetings and lobbying efforts were revealed in documents released after a Senate order prompted by the independent senator David Pocock, who accused the government of "pandering" to the wagering industry.

More than a year after the Murphy Review recommendations were handed down, Australians deserve answers about why the government still hasn't acted to curb the serious harm from gambling advertising.

The documents revealed the eagerness of the betting companies, and the NRL and AFL, to engage directly with Albanese's office in July, August and September.

The documents also note a September letter from the Alliance for Gambling Reform requesting to meet Albanese and a meeting between Albanese's principal private secretary and the Gambling Harm Lived Experience Experts.

Source: Josh Butler, 'Major football codes and gambling firms directly lobbied Albanese's office on ad ban', *The Guardian*, (Online, 10 January 2025), <theguardian.com/australia-news/2024/oct/18/major-football-codes-and-gambling-firms-directly-lobbied-albanese-office-on-ad-ban-documents-show>.

1. Describe the alleged breaches of the Lobbying Code of Conduct by the gambling industry and its lobbyists. [C]
2. Describe the evidence that gambling reform advocates also sought to lobby Anthony Albanese and his office. [C]



Research Task

Go to <agr.org.au>, the website of the **Alliance for Gambling Reform (AGR)**.

1. Describe the objectives of AGR. [C]
2. Select two campaigns in which it has been involved as a lobbyist. Describe the main features of the campaigns including their achievements. [C]
3. Set out the human rights which are stated or implied in the work of the AGR. [A]
4. Do you think an organisation like the AGR is necessary to protect the rights of people who are vulnerable to addicted or excessive gambling? Give your reasons. [A]



What do you think?

1. Do you think there should be a ban on online gambling advertising as recommended by the Murphy inquiry? Do you think this would assist to prevent the harm caused by gambling addiction? Do you think it is a human right to be protected from indiscriminate online gambling advertising? [A]
2. Do you think the lobbying code of conduct should be strictly enforced? Justify your answer using legal criteria where appropriate. [A] [E]

Ethical lobbying

So far we have looked at lobbying and lobbyists in a general sense, although you have had the opportunity to distinguish between those lobbyists that are involved in the business of gambling for profit, and antigambling lobbyists, who are more concerned with the rights of citizens that need protection from gambling. There are in fact many lobbyists who seek to protect the rights of citizens, and to promote human rights. These lobbyists have a positive impact on social policies and the policies of political parties. Some of these lobbyists include:



- Queensland Council for Civil Liberties (QCCL) <qcl.org.au>
- Amnesty International <amnesty.org.au>
- Youth Advocacy Centre (YAC) <yac.net.au>
- Women's Electoral Lobby (WEL) <wel.org.au>

The focus of all of the above lobbyists is on **human rights and the public interest**.

Ethical lobbying is a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest and which concern the human rights of citizens. In Queensland, ethical lobbying is governed by the *Integrity Act 2009* (Qld) (*Integrity Act 2009*).

Integrity Act 2009 (Qld)

Practical Application

For the purposes of the *Integrity Act 2009*, the term ‘lobbying’ means any attempt to influence the decision-making of a government or opposition representative in the exercise of their official functions on behalf of a third party, for a fee or other reward.

Section 42(1)(a) of the *Integrity Act 2009* (Qld) defines lobbying activities as:

communicating with a government representative in an effort to influence decision-making of the State Government or a local government, including, for example, the making of a decision relating to any of the following matters—

the making, amendment or repeal of legislation;

the development, amendment or abandonment of a government policy or program;

the awarding of a government contract or grant;

the allocation of funding;

the making of a decision about planning or the giving of a development approval under the Planning Act 2016, or ...”

Section 42(1)(b) extends the scope of the definition to communicating with an opposition representative in an effort to influence opposition decision-making, including—

the making, amendment or repeal of legislation;

the development, amendment or abandonment of an Opposition policy or program;

the position or view of the Opposition in relation to a decision of the State government or a local government, including, for example, a matter mentioned in paragraph (a)

1. Describe the meaning of ‘lobbying’ in accordance with the *Integrity Act 2009* (Cth). [C]

Queensland Council of Civil Liberties (QCCL)

The QCCL is a volunteer organisation working to protect the human rights and civil liberties of all Queenslanders. Since 1966 it has campaigned for law reform on everything from privacy to protest law, promoted human rights in the media and hosted a range of educational events.

Source: Queensland Council of Civil Liberties, 2023 <qcl.org.au/>.

As a lobbyist, the QCCL make submissions to governments, inquiries or relevant authorities, and publicly opposes laws and actions that undermine civil liberties. It also has other functions that you can read about on its website at <qcl.org.au>.

It recently released a statement to the media about a proposal to make what is known as Jack’s Law permanent.





Practical Application

JACK'S LAW SHOULD NOT BE MADE PERMANENT

'QCCL has opposed Jack's Law from the beginning. We oppose the making of this law, which violates a fundamental principle, permanent' says QCCL President Michael Cope

We oppose this law, for the following reasons:

1. It abrogates a fundamental protection of individual liberty, by removing the requirement of a police officer to have a reasonable suspicion prior to conducting a search of a person.
2. It does so in circumstances where there is no clear evidence that the measure will be effective in reducing crime to any significant degree, if at all.
3. Based on past experience, the power will be abused by police officers who will search people based on prejudices and generalisations about people in the community.
4. The pressure will come on to expand the power. This has already happened. Originally this measure was to be used in safe night precincts. Then it was extended to public transport. Then it was extended to shopping centres and recreation venues. How are these places distinguishable from a local park? Soon the pressure will come on to extend these laws to other areas

The police have made it clear that they will be exercising a discretion as to who is searched - they will be 'judicious' and elderly people will have nothing to fear. Research from Australia and overseas indicates that police assessments of whom to search or question are often based on generalizations and negative stereotypes that are in part attributable to ethnic bias.

'The Griffith Uni Review found that during the trial of wandering many people were searched due to police racial bias ie indigenous people were searched disproportionately.'

It has been found that, aside from the shame and humiliation associated with searches, disproportionate stop and search practices can also cause people to feel a diminished sense of belonging, fear, insecurity, anxiety, intimidation and helplessness.

'This proposed law, like many tough on crime measures is being proposed in response to a most tragic situation. However as is always the case public policy has to have regard to a broad range of considerations no doubt including but extending beyond the circumstances of any single case no matter how tragic.

Source: Queensland Council of Civil Liberties, 'Jack's law should not be made permanent', *Media Release*, (Online, 4 January 2025) <qccl.org.au/newsblog/jacks-law-should-not-be-made-permanent>.

1. Describe the right which the QCCL is seeking to protect. [C]
2. Set out the arguments made by the QCCL in support of its point of view. [C]

Youth Advocacy Centre (YAC)

The Youth Advocacy Centre (YAC), based in Brisbane, has a broader aim than the QCCL. It aims to speak out and support young people through free legal services, free social support and family support services, and its community legal education program. An important part of its work is the advocacy it does through publications and media releases, and importantly by making submissions to government and government institutions to ensure that they are responsive and act appropriately in support of the needs of children and young people. In this way it fulfils its role as a lobbyist.

Practical Application

YAC APPEAR AT YOUTH JUSTICE REFORM COMMITTEE HEARING

Last week Youth Advocacy Centre CEO, Katherine Hayes, appeared before the Youth Justice Reform Select Committee in Queensland, alongside representatives from Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd

The hearings have been an opportunity for sector experts to provide to the Committee their insights as to what youth justice reform should look like.

There were positive signs throughout the hearing, with a consistent message that reform should address the root causes and not focus on punitive measures. Many witnesses emphasised that community safety and the safety of at-risk children go hand-in-hand and must be pursued in tandem.

However, there is a risk that these positive steps could falter under the intense political pressure in Queensland to adopt a 'tough on crime' approach. There were also some suggestions that removal of detention as a last resort may be considered, which YAC strongly opposes.

Source: YAC, 'YAC appear at youth Justice reform committee hearing' *Media Release*, (16 December 2024), (Online, 4 January 2025) < yac.net.au/2023/11/29/yac-appear-at-youth-justice-reform-committee-hearing/ >.

1. Describe the point of view the YAC CEO Katherine Hayes put forward at the Youth Justice Reform Committee Hearing. Is this position consistent with its aims as an ethical lobbyist? Explain your answer. [C]

Both of the QCCL and YAC made submissions to the Parliamentary Committee inquiry into the Criminal Law (Raising the Age Responsibility) Amendment Bill 2021 (Qld).

20.4 Court action involving human rights

Taking legal action is another way citizens can resolve human rights complaints in Australia. We have already examined a range of cases involving human rights in previous chapters, but we will examine a few more cases to help you understand how the legal process protects our human rights. Before we examine each case we will also briefly identify the relevant Act or international instrument that applies.

As with all legal actions, the choice of court or tribunals depends on a number of factors. The basis of the claim (a Commonwealth or State statute), the nature of the relief sought (a declaration or damages/compensation) and the entitlement to relief (is that human right protected by domestic law?) are some of these practicalities.

Protection against discrimination

Australians, since 1975, have been able to rely on laws which have been passed to protect them from discrimination by complaining to the Australian Human Rights Commission (AHRC) or taking legal action in an appropriate court. Set up in 1986, the purpose of the AHRC is to

provide a forum where persons who have been the subject of discrimination can go to seek a remedy.

The AHRC has wide ranging powers to receive complaints where there are breaches of human rights within its jurisdiction. Its jurisdiction extends to any Commonwealth body or agency and discrimination in employment covered by the *Fair Work Act 2009* (Cth). Complaints must be made in writing to the AHRC which decides if it has the jurisdiction to deal with the matter. If it does, it investigates the matter then reviews the complaint to see if it should be terminated or is suitable for conciliation. If the complaint cannot be conciliated it will be terminated by the President of the commission. A complainant may then take the matter to the Federal Court of Australia or the Federal Circuit Court.

All the States and Territories have similar commissions with statutory powers under State acts to hear complaints.

In Chapter 15 we investigated a range of conventions that sought to eliminate discrimination on the basis of sex, race and disability and the corresponding Commonwealth Acts that partially ratify our international obligations into domestic law. We will look at an example of each of these, and then look at the Queensland jurisdiction.

Racial Discrimination Act 1975 (Cth)

The court case that follows highlights the fact that a complaint about alleged discrimination may restrict the right to freedom of expression.



Case Study

Eatock v Bolt and the Herald and Weekly Times [2011] FCA 1103

Facts: Mr Bolt wrote two articles published by *The Herald and Weekly Times* (HWT) which conveyed according to the judge, messages (what lawyers call imputations), including the following:

- there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal people but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and
- fair-skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

Ms Eatock complains that the articles contained offensive messages about fair-skinned Aboriginal people, by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so they could access benefits that are available to Aboriginal people. She makes her complaint under the *Racial Discrimination Act 1975* (Cth).

In the articles Mr Bolt identifies a number of named individuals who are said to have chosen to identify as Aboriginal, as examples of a wider 'trend' by persons who falsely claim to be fair-skinned Aboriginals. Mr Bolt named 18 individuals in the articles. Nine of these gave evidence in the trial. According to the judge, referring to the evidence of the 9, each is entitled to regard themselves and be regarded by others as an Aboriginal person within the conventional understanding of that description.

Legal Issue: Is Ms Eatock entitled to a remedy under the *Racial Discrimination Act 1975* (Cth)?

Decision: The judge considered the evidence before him and the applicable law in s18C of the *Racial Discrimination Act 1975* (Cth) and decided that Mr Bolt both understood and intended that the imputations he made about fair skinned Aboriginals, of the kind that were conveyed by



Case Study ...

the newspaper articles he wrote, applied to Ms Eatock. The judge found in favour of Ms Eatock.

The reasons for the judge's decision and his conclusions about the evidence had to do in part, with the manner in which the articles were written. He concluded that they contained errors of fact, distortions of the truth, and inflammatory and provocative language.

1. In your own words, state what Mr Bolt said about Ms Eatock that was discriminatory and offended her human rights. Explain your answer. [C]

Sex Discrimination Act 1984 (Cth)

An example of how citizens are able use the legal process to resolve complaints concerning the *Sex Discrimination Act 1984* (Cth) by court action is set out below.

Case Study



McBain v Victoria [2000] FCA 1009

Facts: Dr McBain was a Melbourne doctor specialising in reproductive technology. He wished to provide infertility treatment, specifically in-vitro fertilisation using donor sperm, to Ms Meldrum, a single women. The *Infertility Treatment Act 1995* (VIC) s8(1) provided that to be eligible to undergo infertility treatment a women must be either married or living in a de-facto relationship.

Legal issue: Is the Victorian Act inconsistent with the *Sex Discrimination Act 1984* (Cth)? Is infertility treatment considered a 'service' within the *Sex Discrimination Act 1984* (Cth) s22?

Decision: The Federal Court of Australia found that infertility treatment is considered to be a 'service' within the meaning of *Sex Discrimination Act 1984* (Cth) s22. Justice Sundberg decided that the requirement for women to be married or in a de-facto relationship to receive infertility treatment unlawfully discriminated against women on the basis of their marital status, in breach of the *Sex Discrimination Act 1984* (Cth). The *Infertility Treatment Act 1995* (VIC) is therefore inconsistent with Commonwealth law, and was invalid to the extent of its inconsistency (*Commonwealth of Australia Constitution Act 1901* (Cth) s109).

1. Who brought this case to the Federal Court of Australia? Why do you think they decided to take legal action? [C] [A]
2. What word required interpretation in this decision? [C]
3. How do you think this decision impacted women in Victoria? [A]



Disability Discrimination Act 1992 (Cth)

Under the *Disability Discrimination Act 1992* (Cth), a human rights complaint can be made to the AHRC, which decides if it has jurisdiction, and if the matter is suitable for conciliation. This is a case where the AHRC terminated the complaint and the complainant issued proceedings in the Federal Circuit Court.



Case Study

Ryan as Personal Representative of the Estate of the Late Peter John Ryan v Sunshine Coast Hospital and Health Service [2021] FCCA 1537

Facts: Mr Ryan suffered from diabetic retinopathy, a degenerative condition affecting his sight. He was left with only 2% vision, only able to make out shadows of people and objects. He is a person with a disability as defined in s4 of the *Disability Discrimination Act 1992* (Cth) and is legally blind.

Mr Ryan used braille and tactile signage, tactile ground surface indicators, and wayfinding signage to assist with his mobility on a day-to-day basis. Mr Ryan also used a wheelchair for mobility.

Mr Ryan alleged the design and construction elements of the hospital required him to comply with a number of 'requirements or conditions' in respect of his access to the hospital and its facilities. He said his inability to meet these 'requirements or conditions' meant that the respondent had discriminated against him on the basis of his disabilities.

Legal Issue: Had the hospital discriminated against Mr Ryan on the basis of his disabilities?

Decision: During the trial it was accepted by the respondent that the design and construction of the hospital discriminated against Mr Ryan in the way he claimed. As a result of concessions between the parties, the respondent agreed to undertake rectification works to address issues identified and accepted as defective, mainly to the exterior of the hospital. His Hon Justice Jarrett so ordered. Of the twelve items of rectification which remained in dispute, concerning the ability of a person with vision impairment to navigate the interior of the hospital, after hearing evidence, the Hon Justice Jarrett found in favour of Mr Ryan, and ordered the hospital to carry out the necessary works to make it accessible and navigable for a person with Mr Ryan's disabilities.

1. Explain why it is important for a person with Mr Ryan's disabilities to take the necessary court action against the hospital. [A]

Age Discrimination Act 2004 (Cth)

This is a case in which a man's age was used as a basis for terminating his employment in breach of the *Age Discrimination Act 2004* (Cth).



Case Study

Mr Gutierrez v MUR Shipping Australia Pty Limited [2023] FCA 399

Facts: Mr Gutierrez commenced employment with MUR on 1 August 2003.

In February 2018, MUR's Managing Director, told Mr Gutierrez, then 68, that MUR had a retirement age of 65 and asked him when he would retire. Mr Gutierrez replied that Australia does not have a mandatory retirement age, making him retire based on age was unlawful and that he would give three months' notice of his retirement.



In March 2018, Mr Gutierrez had a conversation with management in which he was asked to explain his role to his replacement. He felt compelled to give a retirement date of July 2019.

On 19 July 2018, Mr Smith, the manager informed Mr Gutierrez that his employment contract would end on 31 December 2018. From 1 January 2019, he would be on a new contract to train Ms Fernandez, his proposed replacement. Mr Gutierrez informed Mr Smith his actions were illegal and left the meeting in distress.

On 1 August 2018, Mr Gutierrez's solicitors sent MUR a letter informing them they had repudiated Mr Gutierrez's employment contract by advising Mr Gutierrez of the 31 December 2018 date and that Mr Gutierrez accepted the repudiation.

On 1 November 2019, Mr Gutierrez commenced proceedings against MUR in the Federal Circuit and Family Court for breaches of the *Age Discrimination Act 2004* (Cth) ('AD Act'), namely, that he had been discriminated against on the basis of his age, had been constructively dismissed and had suffered a psychiatric injury on the basis of that discrimination.

At first instance, Judge Driver found that MUR did unlawfully discriminate against Mr Gutierrez and ordered that MUR issue an apology to Mr Gutierrez and pay Mr Gutierrez general damages of \$20,000.

Legal Issue: Mr Gutierrez appealed Judge Driver's decision in respect of damages to the Federal Court of Australia.

Decision: He was successful. It was held that there was:

- (1) An incorrect assessment of harm. MUR was ordered to pay Mr Gutierrez general damages of \$90,000; and
- (2) Damages available for economic loss. MUR was ordered to pay Mr Gutierrez damages for economic loss as sought by him of \$142, 215. 56 plus interest.

1. Analyse why it was important for the Federal Court of Australia to increase the damages paid to the plaintiff to a level that it decided actually reflected his loss. Use legal criteria to explain your answer. [A]

Anti-Discrimination Act 1991 (Qld)

Commonwealth legislation is not Australian citizens' only source of protection against discrimination. The *Anti-Discrimination Act 1991 (Qld)*, promotes, 'equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct' (Long Title). Like the Federal Acts we discussed previously, the Act prohibits direct and indirect discrimination on the basis of certain attributes including sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality and family responsibilities, as outlined in s7.

The *Anti-Discrimination Act 1991 (Qld)* contains provisions that allow the Act to be enforced. If a complainant decides to make a complaint to the Anti-Discrimination Commission (now the Queensland Human Rights Commission) it must be made in writing, set out in reasonably sufficient detail and lodged with the Commissioner (s136) within a year (s138). The Commissioner then investigates the complaint (s155). The Commissioner may attempt conciliation if appropriate (s158), but if the complaint goes unresolved it can be referred to the Anti-Discrimination Tribunal (s166). The Tribunal follows a similar court process to most civil jurisdictions. Decisions can be appealed to the Supreme Court of Queensland in some circumstances (s217).



Research Task

In 2016 the State Library of Queensland recorded seven digital stories that explored the impact of the *Anti-Discrimination Act* on Queenslanders. View these stories by visiting <blogs.slq.qld.gov.au/jol/2016/11/17/25-years-of-the-anti-discrimination-act-1991-qld/>. Explain in your own words the discrimination experienced by one person involved. [S] [C]



Case Study

Davis v Metro North Hospital and Health Service & Ors [2019] QCAT 18

Facts: Dr Davis was a doctor who had considerable experience working in Queensland public hospitals as a physician and geriatrician. He was also a former Assistant Minister for Health under the Newman Liberal National Government. The Newman Liberal National Government had let go thousands of public servants during their term in office. Dr Davis applied for an advertised position as a Specialist Geriatric Medicine Senior Medical Officer at the Royal Brisbane and Women's Hospital. He was the only qualified applicant. Dr Davis was informed that the position had been withdrawn as the position was to be covered by internal re-arrangement of the work duties of other staff.

Legal Issue: Was Dr Davis unlawfully discriminated against by the respondent's actions of arranging internal staff to cover the position? Did the respondents fail to employ him for the substantial reason that he had held a certain political belief?

Decision: The tribunal found that the standard recruitment process was not followed, but this did not amount to discrimination because any person with a high-profile would have been processed in this way. However, the tribunal found that the decision of the CEO to cease the recruitment process and not appoint Dr Davis was because of the complainants' political beliefs. QCAT Member Endicott found that a hypothetical applicant would not have encountered interference in the recruitment process by the CEO. Thus, an inference of discrimination was open on the cumulative weight of evidence. This discrimination had



Case Study ...

impacted Dr Davis economically, professionally, socially and emotionally. The tribunal awarded Dr Davis \$1,450,771.69.

1. What type of discrimination was the basis of this case? [C]
2. Locating a copy of *Anti-Discrimination Act 1991* (Qld), correctly cite the relevant section that identifies this attribute. [C] [S]
3. What was the key argument of both the applicant and the respondent? [C]
4. What did the tribunal find? What compensation, if any, was awarded? [C]
5. What does this case demonstrate about the benefits of taking court action? Do you think the type of discrimination was easier to prove than another ground of discrimination such as racial or sexual discrimination? Explain your position. [A]

Case Study



AEJ & Anor v Rozema & Ors [2022] QCAT 355

Facts: A mother booked holiday accommodation in an apartment complex on the Gold Coast for her and her child and the child's grandmother. The child relied on an assistance dog to assist with his autism condition, and the mother was the handler of the dog. The dog usually walked between the child and his mother.

The managers of the apartment complex told the mother that owners of dogs in the complex were required to carry their dogs in a shopping trolley on the common areas, and to exit the building via the basement carpark. Because of difficulty using a ramp in the car park, the child and his grandmother would exit the building by reception while the mother used the basement carpark to exit the building with the dog in the trolley. As a result, the family were unable to walk together.

The arrangement caused distress to the child, and he was more difficult to manage because of the change to their usual routine of walking with the dog between the mother and child. The mother experienced stress and anxiety by the reaction of the child.

Legal Issue: Did the requirement imposed by the managers caused disadvantage to the mother and child, given the child's impairment?

Decision: The tribunal found that the managers imposed an unreasonable requirement that the dog be carried in a trolley on the common areas and that the dog exit the building via the basement carpark. This caused disadvantage to the child and his mother and consequently they were not able to comply with the requirement.

The manager was unable to provide any explanation as to why dogs were required to be transported in a trolley in the common area, other than it was a requirement of the body corporate committee.

The tribunal awarded compensation of \$8,000 for the child and \$5,000 for the mother. The compensation for the child was paid to the mother as trustee for the child.

1. Describe the type of discrimination which occurred in this case. [C]
2. Explain why the respondent's evidence about the requirement was unreasonable. [C]
3. How would you describe the amount of compensation that was paid? Explain your answer. [C]

Information Privacy Act 2009 (Qld)

Privacy is an important human right, but with so much of our personal information being held online or in databases, it is becoming an increasingly difficult human right to protect. The right to privacy is stated in Article 12 of the *Universal Declaration of Human Rights* (1948):

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

In Queensland citizens' privacy is protected by the *Information Privacy Act 2009* (Qld) (IP Act). The Act contains a set of rules that govern how Queensland Government agencies (such as the Department of Transport and Main Roads or the Queensland Police Service) can collect, store, use and disclose personal information. If a person believes their personal information has been used or accessed unlawfully, the Act allows an individual to make a complaint to the Information Commission (s166). A privacy complaint can also be referred to the *Queensland Civil and Administrative Tribunal* (QCAT), if mediation is unsuccessful or not reasonably likely to aid the resolution of the complaint (s174).



Case Study

RM v Queensland Police Service [2017] QCAT 71

Facts: RM was a former member of the Queensland Police Service (QPS) who had been medically retired. Prior to his retirement, RM had made a WorkCover claim in which he claimed, amongst other things, that he had been bullied. During the course of the WorkCover investigation, another member of the QPS, identified as 'CF' in the QCAT proceedings, sent an email to 10 QPS employees which contained information about RM's WorkCover claim including his name, his claim number, the nature of the claimed injury (being psychological and psychiatric) and the three causes/factors of the claim injury identified including the QPS employee alleged to have been involved. CF had been named as a bully in the WorkCover claim.

In finding that the email contained RM's 'personal information' (as defined in the IP Act), Member Deane noted that RM's identity and information about his claimed injury and causes was apparent in the email.

Legal Issue: Did the QPS breach RM's right to privacy by using his personal information in a manner other than it was intended to be used?

Decision: Member Deane found that the QPS had breached RM's right to privacy by distributing his personal information in an unauthorised manner. She found that the personal information was in the QPS's possession for the purpose of preparing the employers report and response to WorkCover. In distributing an email containing that information to staff, it sought to address rumours relating to the WorkCover claim in a manner that was not consistent with the QPS's policy in handling WorkCover claims.

RM alleged in arguing a breach of Information Privacy Principles (IPP) 9 and 10 that the QPS did not use his personal information how it was intended to be used. Member Deane agreed.

Member Deane ordered that the QPS provide RM with a written apology, reimburse RM's legal costs in the amount of \$4,400 and pay RM compensation for humiliation and embarrassment in the amount of \$5,000. The amount awarded is consistent with authority that awards of compensation for breach of privacy are not to be lavish.

1. How important you think it was to Member Deane's decision that RM's personal information was distributed to 10 QPS employees and not directly to WorkCover?
Give your reasons. [A]

Review

Comprehend

1. **Describe** the purpose of each of the following:
 - a. Fraser Island Defence Organisation (FIDO)
 - b. Lock the Gate
 - c. Anti-offshore wind farm rally in Wollongong
 - d. Queensland Council of Civil Liberties (QCCL)
 - e. Youth Advocacy Centre (YAC) [C]
2. **Explain** the 'Lobbying Code of Conduct'. How is 'ethical lobbying' different? [C]
3. **Explain** the environmental rights implied by the Fraser Island Defence Organisation campaign to save it from mining. [C]
4. **Explain** what human rights protesters against the Illawarra wind farm zone alleged were breached. [C]

Analyse and evaluate

1. **Analyse** the relative importance in the legal process of taking a court action as a means of resolving a human rights complaint. In doing so, select cases and other examples from the text to support your conclusions. [S] [A] [E]

Human rights in Australian contexts

Chapter 21: Protecting and advocating for human rights in Australia

21.1 Introduction

21.2 Statutory bodies

21.3 Legal organisations and special interest groups

21.4 Media

Learning objectives

At the conclusion of this chapter students will be able to:

- explain and analyse the roles of the following groups in protecting and/or advocating for human rights in Australia,
- analyse and evaluate legal issues to resolve or improve human rights in Australia and Queensland.

21.1 Introduction

The key concepts of fairness, justice, accountability, transparency, and the rule of law that we have explored in your studies are directly related to human rights. To ensure that Australia meets its obligations, there must be statutory bodies, organisations, or individuals in place to monitor compliance and advocate for citizens when their human rights have been violated.

Many institutions in Australia work to protect and advocate for human rights. You have already studied several of these in Units 3 and 4. In this chapter, we will further explore the objectives of statutory bodies, non-government organizations and the media.

We will begin by examining several statutory bodies. These include:



Statutory body or court	Act of Parliament	Jurisdiction	Website
Australian Human Rights Commission (AHRC)	<i>Australian Human Rights Commission Act 1986</i> (Cth)	Australia	humanrights.gov.au
Australian Law Reform Commission (ALRC)	<i>Australian Law Reform Commission Act 1996</i> (Cth)	Australia	alrc.gov.au
Queensland Human Rights Commission (QHRC)	<i>Anti-Discrimination Act 1991</i> (Qld)	Queensland	qhrc.qld.gov.au
Queensland Law Reform Commission (QLRC)	<i>Law Reform Commission Act 1968</i> (Qld)	Queensland	qlrc.qld.gov.au

Our courts, at both the Queensland and Federal levels, are also established by statute law. The courts also protect our human rights, although they can only do so if a case comes before them.

Tip

The statutes that create each of these institutions contain information about its objects, functions, powers and the processes it uses to achieve its objectives. You may wish to locate and bookmark these before we begin understanding their roles in protecting and/or advocating for human rights in Queensland and Australia.

But, statutory bodies and the courts are not the only groups that protect or advocates for human rights in Australia. There are other non-government and special interest groups with a common interest in the human rights space. The focus and scope of each group can typically be found in its objectives, aims or values.

Group	Jurisdiction	Website
Queensland Council for Civil Liberties	Queensland	qccl.org.au
Human Rights Law Centre	Australia	hrlc.org.au
Australian Lawyers for Human Rights	Australia	alhr.org.au
Amnesty International Australia	Australia	amnesty.org.au
International Federation of Red Cross and Red Crescent Society	International	ofrc.org

As you can see, these statutory bodies and groups may have a:

- a wide scope, involving international human rights issues or treaties to which Australia is a signatory,
- a scope that focuses on human rights in Australian contexts, or
- a scope that examines Queensland based issues.

We will analyse and evaluate how these groups contribute to resolving or improving the human rights of Australians, including both citizens and non-citizens.

21.2 Statutory bodies

The statutory body that dominates the Australian human rights landscape is the Australian Human Rights Commission (AHRC). The Hon Michael Kirby AC CMG, former Justice of the High Court of Australia and inaugural chairman of the Australian Law Reform Commission (ALRC), said of the AHRC:

Why do I love HREOC? Well, I was there at the birth. I watched the Commission grow and accept new challenges every year. Australians used to be blind to the inequalities of women, to injustice to Aboriginals and other indigenous peoples, to Asian Australians, to gays and other sexual minorities, to people with disabilities and many others. If our eyes have been opened, we should be grateful to HREOC. In a real sense, it has been a conscience of our country: speaking out when others were silent.

Source: Australian Human Rights Commission, 'Human Rights 21: from the Bench: Landmark Human Rights Cases', *Our Work*, (Online, 6 January 2025) <humanrights.gov.au/our-work/human-rights-21-bench-landmark-human-rights-cases>.

Australian Human Rights Commission (AHRC)

The Australian Human Rights Commission (AHRC) is an independent statutory organisation, established by the *Australian Human Rights Commission Act 1986* (Cth). The AHRC duties are outlined in s10A:

AUSTRALIAN HUMAN RIGHTS COMMISSION ACT 1986 (CTH)

10A Duties of commission

(1) It is the duty of the Commission to ensure that the functions of the Commission under this or any other Act are performed:

(a) with regard for:

- (i) the indivisibility and universality of human rights; and*
- (ii) the principle that every person is free and equal in dignity and rights; and*

(b) efficiently and with the greatest possible benefit to the people of Australia.

(2) Nothing in this section imposes a duty on the Commission that is enforceable by proceedings in a court.

The AHRC is made up of:

- a President (s8A), currently Hugh de Kretser, and
- seven commissioners.

Each Commissioner targets a specific area of discrimination, human rights or social justice. There is an Aboriginal and Torres Strait Islander Social Justice Commissioner (s46B), Age Discrimination Commissioner, National Children's Commissioner (s46MC), Disability Discrimination Commissioner, Human Rights Commissioner (s8B), Race Discrimination Commissioner and Sex Discrimination Commissioner.

Practical Application

WHAT WE DO

We protect and promote human rights in Australia and internationally.

- We investigate and conciliate discrimination and human rights complaints.
- We advocate to government and others for human rights to be considered in laws and policy making, and we also provide advice, review laws, and make submissions to parliamentary inquiries.
- We promote and raise awareness of human rights in Australia through education and training, events and discussion, media outreach, digital resources and social media communication.
- We undertake research into human rights and discrimination issues in Australia.
- We also provide legal advice on human rights obligations to courts and appear as a 'friend of the court' to provide specialist advice in discrimination cases.





Practical Application ...

- We produce guidelines for employers, and provide training and resources to assist organisations in embedding and supporting diversity and inclusion, and addressing the risks of modern slavery in their global operations and supply chains.
- We run international education and training programs for other human rights institutions in the Asia Pacific region.
- The Commission also has a role in monitoring and scrutinising Australia's performance in meeting its international human rights commitments. We regularly provide independent reports to the UN about this.

Source: Australian Human Rights Commission, *About*, (Web Page n.d.) <humanrights.gov.au/about>.

1. Identify which role(s) relate to:

- The protection of human rights. [C]
- Advocacy for human rights. [C]

Discrimination

Arguably the most important area in which the AHRC protects human rights, is by resolving complaints made to it about discrimination. A snapshot of the work which the AHRC does in this area, particularly in disability discrimination, is set out below.



Practical Application

Table 10: Complaints received by Act over the past five years

	2018-19	2019-20	2020-21	2021-22	2022-23
<i>Disability Discrimination Act</i>	891	1,006	1,163	1,960	1190
<i>Sex Discrimination Act</i>	520	479	504	597	561
<i>Racial Discrimination Act</i>	332	403	523	464	473
<i>Age Discrimination Act</i>	137	168	191	217	160
<i>Australian Human Rights Commission Act</i>	157	251	732	498	178
Total	2,037	2,307	3,113	3,736	2,562

Table 13: *Disability Discrimination Act* – Complaints received and finalised

<i>Disability Discrimination Act</i>	Total
Received	1,190
Finalised	1,325

Practical Application

Table 15: 1 – Complaints received by ground

<i>Disability Discrimination Act – Grounds*</i>	Number	Percentage
Disability of person(s) aggrieved	1961	77%
Associate	70	3%
Disability – person assisted by a trained animal	121	5%
Disability – accompanied by a carer or assistant	17	1%
Disability – aid	90	3.5%
Harassment	16	1%
Victimisation	79	3%
Causes, instructs, induces, aids or permits an unlawful act	12	<1%
Incites unlawful act	1	<1%
Advertisements		
Disability Standards	169	7%
Total	2,536	100%

* One complaint may raise multiple grounds and may include claims of both direct and indirect discrimination.





Practical Application ...

Table 16: Disability Discrimination Act – Complaints received by area

<i>Disability Discrimination Act – Areas*</i>	Number	Percentage
Employment	402	25%
Goods, services and facilities	596	37.5%
Access to premises	103	6%
Land	1	<1%
Accommodation	58	4%
Superannuation, insurance	17	1%
Education	166	10%
Clubs, incorporated associations	21	1%
Administration of Commonwealth laws and programs	43	3%
Sport	7	<1%
Requests for information	1	<1%
Qualifying bodies	5	<1%
Registered organisations		
Disability standards	169	11%
Total	1,589	100%

* One complaint may relate to more than one area.

1. Describe the number of complaints made to the AHRC over the period from 2018 to 2023. [C]
2. Identify the Act involved in the most complaints. How would you describe the overall number of complaints? [C]
3. Why do a large percentage (77%) of employed persons claim that they had been discriminated against because of their disability. [C]
4. Explain what area the data suggests should be the main focus for disability discrimination reform. [C]

Complaints process

When a complaint is made to the AHRC, it is considered, and if suitable for conciliation, conciliation is attempted. If conciliation is not successful, or it is not suitable for this method of alternative dispute resolution, the AHRC President terminates the complaint. The complainant then has the option of taking the complaint to the Federal Court of Australia or the Federal Circuit Court of Australia. In this way, the human rights of complainants are protected by a fair court process.

Research Task

1. Locate the cases *Scott v Telstra* (1995) FCA and *Maguire v SOCOG* (1999) FCA on the AHRC website <humanrights.gov.au/our-work/human-rights-21-bench-landmark-human-rights-cases>. [S]
2. Create a brief case note using the headings Facts, Legal Issue and Decision. [C]
3. Explain how the courts were used to protect an individual's human rights. [C]

Protecting and advocating

At times there can be a close relationship between the AHRC's protection and advocacy roles. For example, given that one of the largest areas of disability discrimination statistically is employment, it is logical that its advocacy should be directed towards reducing such discrimination.

Practical Application

WILLING TO WORK: NATIONAL INQUIRY INTO EMPLOYMENT DISCRIMINATION AGAINST OLDER AUSTRALIANS AND AUSTRALIANS WITH DISABILITY

In 2015, the Attorney-General asked the Age and Disability Discrimination Commissioner, on behalf of the Commission, to undertake the *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (the Inquiry).

The Terms of Reference for the Inquiry required the Commission to examine practices, attitudes and Commonwealth laws that deny or diminish equal participation in employment and make recommendations to address employment discrimination against older Australians and Australians with disability.

The Inquiry Report was released in May 2016. Its key findings included the following:

- Discrimination is underpinned by negative assumptions and attitudes that are held by many employers and throughout the community about the productivity and capability of people with disability and perceptions that they present a higher work health and safety risk.
- Employers may lack knowledge, awareness and skills to develop inclusive workplaces, implement recruitment and retention strategies to support people with disability and meet their legal and regulatory requirements. They may also be unaware of government programs and supports that can assist them.
- Individuals who are subject to negative assumptions, stereotypes and discrimination can experience stress, and a decline in physical and mental health.

The experience of discrimination can also diminish a person's self-confidence, self-esteem and motivation to remain in the workforce.

Source: Australian Human Rights Commission, 'Willing to Work: National enquiry into employment discrimination against older Australians and Australians with disability', *Our Work*, (Web Page n.d.) <humanrights.gov.au/our-work/disability-rights/disability-employment-australia>.

1. Describe the terms of reference for the Inquiry. [C]
2. Is the Commission (AHRC) fulfilling an advocacy role by completing the inquiry? Explain your answer. [C]

Australian Law Reform Commission (ALRC)

The Australian Law Reform Commission (ALRC) not only has a role in law reform, but it also plays a role in protecting and advocating for individual's human rights.

The ALRC was established by the *Australian Law Reform Commission Act 1996* (Cth). It is also governed by the *Public Governance, Performance and Accountability Act 2013* (Cth).

Like the AHRC, the ALRC sits within the Attorney-General's portfolio, but is also independent. This is important as it means the ALRC can conduct inquiries into areas of law and make recommendations without fear, favour or political interference. It is headed by a President, who can be a judge, legal practitioner or academic (s7). Currently, the President is the Hon Justice Mordecai Bromberg, a former judge of the Federal Court of Australia.



As the name suggests the ALRC conducts inquiries and provides recommendations on how an area of law can be reformed. Like Royal Commissions, the Executive, specifically the Attorney-General of the Commonwealth of Australia (the Attorney-General), refers matters to the ALRC (s20). It is not free to choose any area to examine. The Attorney-General also provides the ALRC with terms of reference to define the scope of its inquiry.

The ALRC's role in protecting and advocating for human rights

The ALRC indirectly protects and advocates for human rights when it reports to the Attorney General and its reports are made public and available to politicians, other influential groups (legal organisations and special interest groups), and the media.



Practical Application

The ALRC aims to ensure that the proposals and recommendations it makes do not trespass unduly on personal rights and liberties of citizens, or make those rights and liberties unduly dependent on administrative, rather than judicial, decisions and, as far as practicable, are consistent with Australia's international obligations.

The ALRC must also have regard to any effect that its recommendations may have on the costs of access to, and dispensing of, justice.

The ALRC does not offer legal advice or handle complaints. It cannot intervene in individual cases and does not act as a 'watch-dog' for the legal system or the legal profession.

Source: Australian Law Reform Commission, *About*, (Web Page, n.d.) <alrc.gov.au/about/>.

1. Describe the boundaries the ALRC sets with respect to human rights when it describes its role, including with respect to 'proposals and recommendations'. [C]
2. Analyse what the ALRC means when it says it aims to make proposals and recommendations which are 'consistent with Australia's international obligations'. [A]

Inquiry Focus

What was the ALRC's involvement in resolving issues between freedom of discrimination and freedom of religion?

A number of sources are set out below to enable you to analyse and evaluate the role of the ALRC in a particular legal issue.

Source 1: ALRC report summary

CHRONOLOGY OF ALRC REPORTS

2014	Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (IP 46)
2015	Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127)
2016	Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)
2019	Review into the Framework of Religious Exemptions in Anti-discrimination Legislation (On 3 November 2022, the Attorney-General withdrew the terms of reference for this Inquiry.)
2024	Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws (ALRC Report 142)

1. How many years has it taken governments to consider these issues? What does this suggest about the issue? [C]

Source 2: Extract of ALRC Report 129

TRADITIONAL RIGHTS AND FREEDOMS—ENCROACHMENTS BY COMMONWEALTH LAWS, (ALRC REPORT 129)

Chapter 5: Freedom of religion

- 5.1 Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.
- 5.2 This chapter discusses the source and rationale for freedom of religion in Australian law; how this freedom is protected from statutory encroachment; and when laws that interfere with freedom of religion may be justified.
- 5.3 Australians enjoy the freedom to worship and observe religion, and the freedom not to be coerced into engaging in religious practices. There are very few, if any, provisions in Commonwealth laws that interfere with religious freedom in these ways. The main areas of tension arise where religious freedom intersects with anti-discrimination

laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

5.4 Commonwealth anti-discrimination law makes it unlawful to discriminate against a person on the basis of a person's personal attributes, such as their sex or sexual orientation, in areas of public life including employment, education and the provision of goods, services and facilities. These laws, such as the *Sex Discrimination Act 1984* (Cth), are intended to give effect to Australia's international treaty obligations, and to eliminate various forms of discrimination that have negative social, health, and financial effects for individuals and society.

5.5 Some religious groups or individuals may wish to engage in conduct that may constitute unlawful discrimination against others, on the grounds of sex, sexual orientation, or the marital or relationship status of individuals.



5.6 Some stakeholders have argued for reforms to anti-discrimination laws to ensure that freedom of religion is protected more fully, including through the operation of exemptions from anti-discrimination laws for religious organisations, or 'conscientious objection' provisions. Other stakeholders, by contrast, suggested that the existing exemptions for religious organisations should be narrowed or removed, not widened.

5.7 A broader concern of stakeholders is that freedom of religion may be vulnerable to erosion by anti-discrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination. An alternative approach would involve the enactment of general limitations clauses, under which legislative definitions of discrimination would recognise religious practice or observance as lawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives.

Source: Australian Law Reform Commission, ALRC Report 129, (Web Page, n.d.) <alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/5-freedom-of-religion/summary-208/>.

1. Describe where the report says the main areas of tension arise between religious freedom anti-discrimination laws. [C]
2. Explain the purpose of Commonwealth anti-discrimination laws. What do they make unlawful? When would religious groups or individuals wish to engage in conduct that may constitute unlawful discrimination? [C]
3. If the exemptions for religious organisations of anti-discrimination laws are narrowed or removed, does this make it harder or easier for a person of strong religious beliefs to observe anti-discrimination laws? [A]
4. Analyse how lawful discrimination could be accepted where 'conduct is a proportionate means of achieving legitimate religious objectives'. [A]

Source 3: Media article published by *The Conversation*

WHY ARE RELIGIOUS DISCRIMINATION LAWS BACK IN THE NEWS? AND WHERE DID THEY COME FROM IN THE FIRST PLACE?

But the political debate is already well under way – and has been going on since 2017. So how did we get here?

When same-sex marriage was legalised in late 2017 following a successful postal survey on the issue, conservative religious groups were promised a ‘religious freedom’ review as a consolation prize. That review found Australia does not have a religious freedom problem. However, it did recommend new legislative protections against religious discrimination. In response, in December 2018, the Morrison government promised a Religious Discrimination Act.

What the Morrison government ended up proposing – in multiple versions over several years – was laws that would both prohibit discrimination against people on the basis of religion (which was not particularly controversial) and allow discrimination against LGBTQIA+ people and others by taking away existing anti-discrimination protections (which was very controversial). These draft laws never passed.



The debate we’ve been having over the past few years is actually a debate about two issues. The first issue is about religious discrimination. This means ensuring people are not discriminated against on the basis of their religious beliefs, or lack of religious beliefs. The second issue is religious exemptions, which involves allowing discrimination on the basis of sexuality, gender identity, marital status and so on where the discrimination has a religious motivation.

After the Labor Party won the 2022 federal election, Attorney-General Mark Dreyfus asked the Australian Law Reform Commission to advise on what amendments to federal law would be necessary to deliver the Labor Party’s election promise. Labor’s promised legislation would:

- ensure religious schools cannot discriminate against LGBTQIA+ students or staff under federal law.
- ensure religious schools can give preference to people of the same faith as the school when hiring staff under federal law.
- ensure the legislation will be drafted in a manner that does not remove existing legal protections against other forms of discrimination.

Source: Luke Beck, Professor of Constitutional Law, Monash University, ‘Why are religious discrimination laws back in the news? And where did they come from in the first place?’, *The Conversation* (Online, 13 January 2025) <theconversation.com/why-are-religious-discrimination-laws-back-in-the-news-and-where-did-they-come-from-in-the-first-place-2262>.

1. Explain the scope of the brief to advise given by Attorney General Mark Dreyfus to the ALRC. Is the brief consistent with Australia’s international obligations? Does the brief invite major changes to the existing law? [C]

Source 4: ALRC news item

MAXIMISING THE REALISATION OF HUMAN RIGHTS: RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

The ALRC's Report was today tabled in Parliament by the Attorney General and published online.

The implementation of the government's policy in accordance with the ALRC's recommendations would mean that under Federal law religious schools are in much the same position as all other schools, except that religious schools would not be prohibited by the *Fair Work Act* from being able to give preference in employment to a person of the same religion where that is reasonably necessary and proportionate to the school's objective of building a community of faith.

No school would be permitted to discriminate against students or staff based on those attributes protected by the *Sex Discrimination Act* (SDA). All schools would continue to have the benefit of those provisions of the SDA which provide that conduct with a disadvantaging effect is not indirectly discriminatory if the conduct is reasonable in the circumstances.

Currently, under Federal law religious educational institutions are permitted to discriminate against students and staff on certain grounds, including based on sexual orientation, pregnancy, or marital status. However, anti-discrimination laws in many states and both territories already prohibit discrimination against staff and students of religious schools.

The Terms of Reference for this inquiry tasked the ALRC with recommending the legislative reforms required to ensure that the government's policy when enacted as law, will be consistent with Australia's international legal obligations.

The ALRC conducted over 130 consultations and received over 400 submissions and 40,000 survey responses. The implementation of the government's policy in accordance with the ALRC's recommended reforms will:

- substantially narrow the circumstances in which discrimination by religious educational institutions against their students and staff is permissible at law.
- maximise the enjoyment of human rights and appropriately manage the intersection of rights.
- ensure any restriction of rights is justifiable under international law.
- make federal law more consistent with state and territory laws and the law in comparable overseas jurisdictions.

Quotes from ALRC President, Justice Bromberg: 'For the law to narrow the circumstances in which it is lawful for religious schools to discriminate against students and staff whilst preserving their capacity to maintain a community of faith, manages the intersection of human rights according to the international law obligations Australia is obliged to respect.'

Source: Australian Law Reform Commission, 'Maximising The Realisation Of Human Rights: Religious Educational Institutions And Anti-Discrimination Laws,' *News*, (Online, 13 January 2025) <alrc.gov.au/news/adl-final-report-tabled/>.

1. Explain the changes proposed to anti-discrimination law which justify the position taken by the ALRC President the Hon Justice Blomberg. [C]

Using Sources 1 to 4, answer the following:

1. Explain, using evidence from Sources 1 to 4, how the ALRC, in its responses to tasks it has been requested to perform, has achieved its aims. Analyse its performance by reference to the recommendations it made to change anti-discrimination law. [A]

21.3 Legal organisations and special interest groups

Key Term

Advocacy: the act or process of supporting a cause or proposal: the act or process of advocating.

Source: Merriam Webster Dictionary (Online) <[merriam-webster.com/dictionary/advocacy](https://www.merriam-webster.com/dictionary/advocacy)>.

Statutory bodies are not the only source of independent human rights monitoring in Australia. Many organisations and groups have made it their mission to promote and advocate for human rights issues. Some of these you may have encountered in earlier chapters.



- **Amnesty International (Australia)**—a non-government organisation that campaigns and advocates for the protection of human rights. In 1977 the organisation was awarded the Nobel Peace Prize. It has sections around the world, including Australia.
- **Australian Lawyers for Human Rights (ALHR)**—founded in 1993, ALHR is an association of legal professionals who practice, support and promote awareness of international human rights standards in Australia.
- **Human Rights Law Centre (HRLC)**—an independent, not-for-profit, non-government organisation that protects and promotes human rights in Australia and in Australian activities overseas.
- **International Federation of Red Cross (IFRC) and Red Crescent Society**—founded in 1919, IFRC carries out relief operations to assist victims of disasters and health emergencies but also helps communities in developing countries. The Australian Red Cross is a member of this organisation.
- **Queensland Council for Civil Liberties (QCCL)**—a voluntary organisation, founded in 1966, QCCL is focussed on maintaining and protecting the civil liberties and human rights of Queensland citizens.
- **Youth Advocacy Centre (YAC)**—founded in 1981, YAC aims to increase young people's access to legal and social justice by actively supporting and speaking out, with and for young people. It advocates for their human rights.



Research Task

Locate the homepage of 2 of the groups listed above and answer the following questions:

1. What do each of the above organisations stand for? [C] [S]
2. Using an example to support your response, what methods does the organisation use to promote and advocate for human rights? Do you think these are an effective way to gain the public's attention and force governments to change or adapt their positions? [C] [S] [E]
3. What is one specific legal issue that each organisation identifies as involving important human rights issues? What viewpoint does the organisation hold on this issue? Do you agree with their position? Why or why not? [C] [S] [A]

Advocacy

You will have discovered from your research, that the legal and special interest groups have their own focus when it comes to advocating for human rights. You will also have realised that there are a variety of ways in which advocacy is carried out. It ranges from the very personal interview with the relevant Government Minister to the impersonal delivery of a submission, writing a letter, or a media release. Sometimes a particular issue is the focus of a government or the media, and there is an opportunity to put forward a point of view which advocates for human rights.

Rights of the child—raising the age of criminal responsibility

Australia is a signatory to the *United Nations Convention on the Rights of the Child* (UNCRC). The current position of the United Nations is that the age of criminal responsibility should be 14. In Australia, there are no states where the age is legislated at 14. In most jurisdictions the age of criminal responsibility ranges between 10 to 12. In 2021, there was an attempt to raise the age to 14 in Queensland, which failed. It is instructive to see some of the advocacy at the time.



Inquiry Focus

What were the views of the QCCL, YAC and the media, when advocating for the proposed change to the minimum age of criminal responsibility from 10 to 14 years of age in Queensland.

Consider the information contained in Sources 1 to 3 which follow and answer the questions at the end.

Source 1: Extract of a letter from the QCCL

Source 1: Extract of a letter from the QCCL

Dear Madam

Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021

The key provision of the Bill raises the minimum age of criminal responsibility in this state from 10 to 14.

2. The minds of children

Since the end of the 1800's there has been a shift from the punishment of children to the treatment of children and a clear acknowledgement that their age should be taken into account. This is because children are morally different from adults as a result of the fact that they do not have the same judgment skills, self-control and ability to know right from wrong. Children take more risks, pay less attention to negative consequences, are impulsive and look at short term outcomes and not a long term perspective. They also suffer more from peer pressure.

Because children are impulsive and do not plan for the future, the concept of deterrence has a particularly limited application to them.

These views of the differences between adults and children have recently been profoundly reinforced by modern neuro-scientific research.

4. First Nations Children

While First Nations children make up 5 per cent of Australians aged between 10 and 17, they comprise 55 per cent of Australia's child prison population and are 24 times more likely to be incarcerated than non-Indigenous children.

5. Universities of Crime

'They learn a lot of bad habits in prison, and I think there were just smarter ways to do business.'

The Australian Institute of Health and Welfare reports that the evidence supports the proposition that young people in the 10-14 age group involved in the criminal justice system are, 'at risk of becoming chronic, long-term offenders, through exposure to harmful environments and the isolation from family and support networks.'

6. The correct approach

We support the Bill as a long overdue reform to the law. We urge, as we have done repeatedly, that our society must move from a punitive approach to young offenders to one having the following characteristics:

- It addresses the underlying causes of their offending, and the needs of those around them
- Accepts that the majority of child offending is a consequence of the failings of the institutions intended to support the child
- Invests heavily in early intervention to prevent offending before it starts
- Addresses the appalling over representation of first nations people in the legal system

We need to reduce long term unemployment, encourage more flexible working arrangements for parents, and ensure that poorer families either get access to quality child care or adequate income support if they elect to stay home during the first year or so of a child's life. We also need to slow down the spatial concentration of poverty and revitalise neighbourhoods where disadvantage and crime have become deeply entrenched.

Source: Queensland Council of Civil Liberties, 'Raising the age of responsibility', *Newsblog*, (Online, 2 January 2025) <qcccl.org.au/newsblog/raising-the-age-of-responsibility>.

1. Describe the three main arguments put forward by the QCCL. What evidence did they give in favour of these arguments? [C]
2. Did you find these arguments convincing and persuasive? Give your reasons. [C]

Source 2: Extract of executive summary of a submission by YAC.

Youth Advocacy Centre (YAC) supports raising the minimum age of criminal responsibility (MACR) in Queensland from 10 to 14.

Key points in support of raising the age include:

- Children's brains are not the same as adults' brains. Their brains are not fully mature until around 25 years of age.
- There is a range of environmental factors which affect the maturing process of the brain over which children have no control. Some of these factors put children at greater risk of offending behaviour.
- Children are also dealing with physical and emotional changes as they enter adolescence.
- The legal concept of 'doli incapax' should protect the 10–13-year-old age group, but it has failed to do so in Queensland.
- The UN Committee for the Convention on the Rights of the Child has set the age of 14 years as the MACR and has criticised Australian jurisdictions for the use of 10 years.
- The younger a child enters the justice system, the more likely it is that they will remain in it.
- Aboriginal and/or Torres Strait Islander children are significantly over-represented in the justice system and the younger the child, the greater the over-representation in the justice system. All Australian jurisdictions have agreed a Closing the Gap target to reduce this.
- Children in the care system, particularly those in out-of-home care, are over-represented in the youth justice system, often for offences which are related to their care situation.
- Youth detention centres (YDCs) are prisons for 10–17-year-olds. Like all prisons, they may exacerbate rather than address offending behaviour.
- Over 85% of children in Queensland YDCs are on remand, that is, their court matter is yet to be finalised. They may not receive a sentence of detention.



A more effective response for addressing offending behaviour in children, underpinned by a set of key principles, would be:

- Prevention and early intervention: the best response would be an approach which prevents development of problem behaviours, or enables them to be addressed very quickly, through a range of universal and targeted services and supports for children and their families.
- Diversion: This provides supports and services to children and their families to assist in diverting children to a more positive life path so that behaviour which causes concern is identified early enough for prevention and early intervention.
- A justice reinvestment approach: would support prevention, early intervention and diversionary services and supports for 10–13-year-olds and their families. This community-led approach has been used successfully in Bourke, NSW.

YAC calls for an evidence-based response, supported across the Parliament, which does not continue to politicise youth justice and our children.

Source: Youth Advocacy Centre, 'Minimum age of criminal responsibility', *Executive Summary*, (Online, 2 January 2025) <yac.net.au/raising-the-age-criminal-responsibility>.

1. Describe the YAC's approach to raising the age of responsibility to 14. Explain how it is different to the approach of the QCCL. [C]
2. Do you find the YAC's submissions convincing and persuasive? Give your reasons. [C]

Source 3: A news article published in *Brisbane Times*

BILL TO RAISE AGE OF CRIMINAL RESPONSIBILITY TO 14 IN QLD REJECTED BY COMMITTEE

A Queensland parliamentary committee has stymied an effort to raise the age of criminal responsibility to 14, instead recommending a continued national approach to increasing the age to 12.

The community support and services committee report, which follows an extensive public submission and hearing program that heard from more than 70 stakeholders, was tabled in Parliament on Tuesday.

Greens MP Michael Berkman warned that a compromise proposal could delay further reform in raising the age of criminal responsibility to 14.

It recommended that Parliament did not pass Greens Maiwar MP Michael Berkman's private members bill, commenting that 'there is more work to be done' before such a move was made.

This included national efforts among Australian attorneys-general to increase the age young people can be held responsible for criminal actions from 10 to 12, as called for by former Queensland police commissioner Bob Atkinson in his landmark 2018 youth justice system report.

In a dissenting report to the one provided by the three Labor and two LNP members of the committee, Mr Berkman welcomed some recommendations around training in residential aged care and court settings, but said these were 'severely undermined' by the unwillingness to raise the age to 14.

'Locking up children doesn't stop offending behaviour. It damages young people and makes everyone less safe,' he said in a statement following the report's release, warning that the compromise age of 12 worked towards in a long-running effort of state attorneys-general could delay further reform.

'Ultimately, the clearest pathway to improving community safety is keeping children away from the criminal legal system, creating alternatives to criminal justice responses and addressing the disadvantage these children face.'

Any alternatives to the present youth justice system, under which children as young as 10 can be held in police watch houses and detention centres, were recommended to be place-based and culturally appropriate due to the over-representation of Indigenous youth.

Source: Matt Dennien, 'Bill to raise the age of criminal responsibility to 14 in Qld rejected by Committee', *Brisbane Times* (Online, 15 March 2022), <[brisbanetimes.com.au/national/queensland/bill-to-raise-age-of-criminal-responsibility-to-14-in-qld-rejected-by-committee-20220315-p5a4we.html](https://www.brisbanetimes.com.au/national/queensland/bill-to-raise-age-of-criminal-responsibility-to-14-in-qld-rejected-by-committee-20220315-p5a4we.html)>.

1. Outline the decision of the Committee and set out the reasons it gave. [C]
2. Describe the aspects of the Committee's report to Parliament which were welcomed by Mr Berkman. [C]
3. What criticisms did Mr Berkman make of the committee's decision? [C]

Using Sources 1 to 3:

1. Analyse and evaluate the response of the Committee to the arguments provided by QCCL and YAC, and as outlined in *Brisbane Times* article. Do you regard the decision of the Committee as an adequate response in the circumstances? [A] [E]

21.4 Media

A healthy democracy cannot function without its media being free to bring to light uncomfortable truths, to scrutinise the powerful and inform our communities.

Source: Media, Entertainment and Arts Alliance, 2019, <meaa.good.do/press-freedom/four-corners-petition/>.

A free press is essential for democracy, as it informs citizens about matters related to our political and legal systems. Its role as the 'fourth estate' is crucial, as it operates independently from the Government, Judiciary, and Executive. The media's ability to hold the Government accountable is a cornerstone of democratic governance. Investigative journalism has significantly contributed to initiating two recent royal commissions: the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* and the *Royal Commission into Institutional Responses to Child Sexual Abuse*. Moreover, Queensland's largest anti-corruption inquiry, the *Fitzgerald Inquiry*, may not have come to fruition without the reports published by the ABC and *The Courier Mail*. This illustrates the media's vital role in maintaining government accountability.

The media also play a vital role protecting human rights. In fact, the right to freedom of opinion and expression is contained within the *International Covenant on Civil and Political Rights* (ICCPR). Thomas Hammarberg, Council of Europe Commissioner for Human rights, suggests that, 'The media play an enormously important role in the protection of human rights. They expose human rights violations and offer an arena for different voices to be heard in public discourse.'

We will now look at an example that you are familiar with, but we will look at it from a different perspective, one that demonstrates that the media can be used as a vehicle to promote a human rights issue.

Inquiry Focus

How did the media contribute to raising awareness about the potential human rights issues as a consequence of children being held in watchhouses?

The media and human rights issues

Youth crime is a significant social issue facing State and Territory governments around Australia. In early 2024, *Guardian Australia* (an independent online publication) and SBS (a public broadcaster) jointly investigated how children were being treated in adult watchhouses.



Source 1: Extract from *Guardian Australia*

'HARROWING' FOOTAGE SPARKS CALLS FOR QUEENSLAND GOVERNMENT TO REMOVE CHILDREN FROM POLICE WATCH HOUSES

Queensland's most prominent victims' rights groups say the state government must remove children from police watch houses after the release of confronting footage showing the 'brutal' treatment of children in the adult holding cells.

The videos, published after a year-long investigation by *Guardian Australia* and *SBS The Feed*, showed young people locked in 'freezing' isolation cells, becoming panicked and struggling to breathe.

Voice for Victims, an influential group that held a mass public rally in Brisbane in April, said *Guardian Australia*'s reporting had 'successfully highlighted the ongoing failures of youth crime and identified that a more holistic approach is needed to support these children and their carers and families'.

'Voice for Victims and experts have provided the incumbent government and cross benches with evidence-based solutions, including removing [children] from watch houses.'

The Queensland Council of Social Services and the Queensland Aboriginal and Torres Strait Islander Child Protection Peak released a joint statement in response to the footage calling for the 'immediate release of all children in adult watch houses'.

'The child's cries for help are heartbreaking,' the QCROSS Chief Executive, Aimee McVeigh, said of the footage of Sam.

Source: Ben Smee, 'Harrowing' footage sparks calls for Queensland government to remove children from police watchhouses,' *The Guardian*, (Online, 19 July 2024) <theguardian.com/australia-news/article/2024/jul/19/queensland-children-police-watch-houses-investigation-ntwnfb>.

1. Identify the two media organisations mentioned Source 1. [C]
2. Describe the focus of the investigation and what the media organisations discovered during their investigation. [C]
3. Explain how long the media organisations investigated the story. [C]
4. Identify the other non-government or government bodies cited in the news story. What role do you think they play in advocating or protecting the human rights of young people? [C]

Source 2: Extract of a transcript from *SBS News*

THE SHOCKING TREATMENT OF CHILDREN IN QUEENSLAND'S WATCH-HOUSES

For years there have been human rights concerns about what happens to children inside Queensland's police watch-houses. After a year-long investigation by *Guardian Australia* and *SBS The Feed*, we've obtained footage that shows the treatment of children inside these places and when they're put in isolation.

TRANSCRIPT

It's August 2023.

A 13 year old girl with a severe intellectual disability has just been put into an isolation cell in a Queensland police watchhouse.

The girl was brought into isolation after throwing toilet paper at a CCTV camera.

The box has no windows and is freezing cold.

Sam** has the mental capacity of a kindergarten child, the language skills of a 3-year-old - and has been deemed unfit to stand trial in court.

Video obtained after a year long investigation between *Guardian Australia* and *SBS The Feed* shows the girl becomes increasingly distressed after being brought to the isolation cell – known as the box - and tries to get out multiple times.

Source: Deborah Groarke, 'The shocking treatment of children in Queensland's watch houses,' *SBS News In Depth*, (Online, 18 July 2024) <sbs.com.au/news/podcast-episode/the-shocking-treatment-of-children-in-queenslands-watch-houses/u1tf03bqw>.

1. Describe the evidence gathered by *Guardian Australia* and *SBS The Feed* for their report on the treatment of children in adult watchhouses. [C]
2. Locate the *United Nations Convention on the Rights of the Child* (UNCRC) and the *United Nations Convention Against Cruel, Inhuman or Degrading Treatment* (UNCAT). Are there any other international treaties that could be relevant to this legal issue? If so, locate these. [S]
3. Applying your answer to Question 1, identify the relevant articles that Queensland may have breached in either or both Conventions (as identified in Question 2). [A]
4. Explain the role the media played in protecting and/or advocating for the human rights of young people in Queensland. [C]

The media and human rights groups

In response to the report, non-government human rights advocacy groups, such as Amnesty Australia, shared their viewpoint on the treatment of children in adult watchhouses.

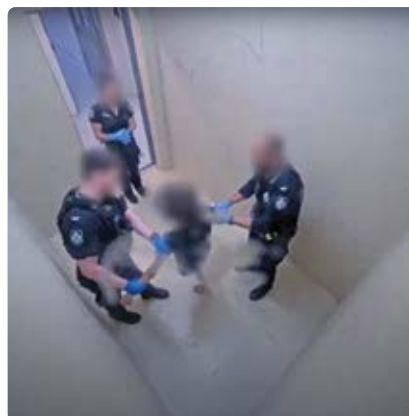
Source 3: Response from human rights group to the media reporting

Practical Application

QUEENSLAND GOVERNMENT PERPETRATING 'INDUSTRIAL SCALE CHILD ABUSE' IN WATCHHOUSES, AMNESTY INTERNATIONAL SAYS

In response to the joint investigation by *The Guardian* and *SBS The Feed* exposing violent assaults and deprivation of human rights of children detained in adult watchhouses in Queensland, Amnesty International Indigenous Rights campaigner Kacey Teerman says;

'By continuing to detain children in adult watchhouses where they are subject to torturous conditions and brutal assaults, the Queensland Labor government is knowingly perpetrating child abuse on an industrial scale.'





Practical Application ...

Amnesty International has repeatedly called for the Queensland government to abolish their policy of detaining children in watchhouses, noting that the Queensland Police Service's own operation manual says children should not be held in a watch house overnight. Queensland magistrates have made it clear in the past that children in watchhouses are exposed to adult detainees who are often drunk, abusive, experiencing psychosis or suicidal.

Source: Amnesty, 'Queensland Government Perpetrating 'Industrial Scale Child Abuse' in Watchhouses, Amnesty International Says,' *Amnesty* (Online, 18 July 2024) <[amnesty.org.au/queensland-government-perpetrating-industrial-scale-child-abuse-in-watchhouses/](https://www.amnesty.org.au/queensland-government-perpetrating-industrial-scale-child-abuse-in-watchhouses/)>.

HORRIFYING VISION OF CHILD IN CAIRNS POLICE WATCH HOUSE

Queensland's leading social service representatives are sickened and appalled by horrific vision of a handcuffed 14-year-old girl in a Queensland police watch house.

The Queensland Council of Social Service (QCROSS) and the Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP) have renewed calls for the immediate release of all children in adult watch houses after vision emerged of the child in the Cairns police cells.

The security and body worn vision seen by *The Guardian Australia* and *SBS' The Feed* shows 'Sam' inside the Cairns lock-up back in 2023, hysterical, crying and pleading for help, begging not be placed in an adult cell. QCROSS CEO Aimee McVeigh says the footage is more evidence of how damaging adult watch houses are for children and is a shocking reminder of the human rights crisis the Queensland Government has wilfully created.

Source: Queensland Council of Social Service, 'Horrible Vision of Child in Cairns Police Watchhouse,' *QCROSS Media Release*, (Online, 18 July 2024) <[qcross.org.au/horrifying-vision-of-child-in-cairns-police-watch-house/](https://www.qcross.org.au/horrifying-vision-of-child-in-cairns-police-watch-house/)>.

HUMAN RIGHTS COMMISSION EXPRESSES 'GRAVE CONCERN' AT TREATMENT OF CHILDREN IN ADULT WATCH HOUSES

The Australian Human Rights Commission has become the latest body to criticise the Queensland government's decision to house children in adult watch houses, expressing 'grave concern' at footage showing an intellectually disabled, 13-year-old First Nations child being forcibly restrained and kept in an isolation cell.

A joint *Guardian Australia/SBS' The Feed* investigation revealed footage of Sam (not her real name) being handcuffed, naked, and covered in her own urine, in a Queensland adult watch house.

National Children's Commissioner Anne Hollonds branded the treatment of Sam as an 'egregious breach' of human rights.

Source: Dechlan Brennan, 'Human Rights Commission expresses 'grave concern' at treatment of children in adult watch houses,' *National Indigenous Times* (Online, 20 July 2024) <[nit.com.au/20-07-2024/12630/human-rights-commission-expresses-grave-concern-at-treatment-of-children-in-adult-watch-houses/](https://www.nit.com.au/20-07-2024/12630/human-rights-commission-expresses-grave-concern-at-treatment-of-children-in-adult-watch-houses/)>.

1. Identify the different human rights groups highlighted in Source 3. [C]
2. Describe the relationship between the media and human rights groups. [C]
3. Examine a relevant viewpoint on the media's role in highlighting human rights issues, and their consequences. [A]

What do you think?

Queensland law allows for children to be detained in adult watchhouses, and this position remains unchanged despite reports like those completed by the media. Do you think this demonstrates the media has failed to promote or advocate for human rights issues, or have they achieved their objective? Justify your position with legal criteria. [E]

Review

Comprehend

1. **Identify** 5 key statutory bodies or groups that promote and advocate for the protection of human rights in Queensland or Australia. [C]
2. **Explain** the role of the Australian Human Rights Commission (AHRC). In your response discuss its functions as they relate to the protection and advocacy of human rights. [C]
3. **Select** a legal organisation or special interest group that protects and advocates for human rights in Australia. **Describe** two ways in which the group advocates for or protects human rights, using examples to demonstrate your understanding. [C]

Analyse and evaluate

1. **Analyse** the role of the AHRC in the protection of citizens from discrimination, with particular reference to disability discrimination. [A]
2. **Analyse** the role of the QCCL and the YAC as advocates in the raising of the age of criminal responsibility in Queensland to 14 issue. [A]
3. **Analyse** and **evaluate** the contribution of the ALRC to the ongoing debate about amendments to anti-discrimination laws to accommodate freedom of religion. [A] [E]

Human rights in Australian contexts

Chapter 22: Human rights principles in Australian case studies

22.1 Treaties with First Nations peoples

22.2 Climate change

22.3 National Bill of Rights

Learning objectives

At the conclusion of this chapter, students will be able to:

- analyse and apply human rights principles to:
 - treaties with First Nations peoples
 - climate change
 - bill of rights.
- evaluate issues in legal situations arising during analysis of treaty, climate change, and Bill of Rights

22.1 Treaties with First Nations peoples

Introduction

Key Term

Polity: a particular form or system of government; or the condition of being constituted as a state or other organised community or body.

Source: The National Dictionary, *Macquarie Dictionary* (2nd ed., 1991).

Since *Mabo*, it is recognised that First Nations people were the original inhabitants of Australia, and that they did not give up their rights to land or sovereignty. The principles of the *Mabo* case are applied in the *Native Title Act 1992* (Cth), under which many First Nations people have reached agreement with the Australian states as to their use and occupation of land. However, **none of these agreements, except the *Noongar Settlement in Western Australia*, have ceded sovereignty**. For a treaty between a Federal or State Government and First Nations people to be successful it would need to address the issue of sovereignty.

The British occupied Australia in 1788 on the basis that they were entitled to the land of Australia and that their system of government could be imposed on the pre-existing First Nations people. The doctrine of *terra nullius* was the accepted legal position in Australian law until it was rejected by the High Court of Australia in the *Mabo* case. It is not that the British lacked awareness that where there was a community with its own system of land ownership and governance in an occupied country, that it would be necessary to enter a treaty. For example, the British entered into an agreement with the Maori chiefs (Rangatira) from the North Island of New Zealand, known as the *Treaty of Waitangi* in 1840. While to modern New Zealand, the *Treaty of Waitangi* might not deal with all the issues that some in modern New Zealand society might like it to, it has stood the test of time as a seminal 'treaty' between the British and the original inhabitants of New Zealand.

ULURU STATEMENT FROM THE HEART

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.

Source: Uluru Statement, *Statement*, (Webpage, 8 December 2024) <ulurustatement.org/the-statement/view-the-statement/>.

One aspiration of the *Uluru Statement From the Heart*, is for a treaty. A summary of the position of a treaty at the time of writing is set out in the following table:



Practical Application

AUSTRALIAN TREATY WITH FIRST NATIONS PEOPLES

Commonwealth	In 2023, a referendum to recognise Indigenous Australians in the <i>Australian Constitution</i> and create a body called the Aboriginal and Torres Strait Islander Voice failed. There is no Treaty process currently occurring at a federal level.
New South Wales	In 2023, New South Wales Government appointed 3 independent Treaty Commissioners. The Commissioners are designing a consultation process that is expected to begin in early 2025. New South Wales does not have a Treaty with First Nations people or a voice to parliament. Source: New South Wales, <i>Treaty Consultation</i>, (Online, 9 December 2024) <nsw.gov.au/nsw-government/treaty-consultation>.
Victoria	In 2019 the Victorian First Peoples' Assembly election was held. In August 2022, the <i>Treaty Authority and Other Treaty Elements Act 2022</i> (Vic) was passed. Source: First Peoples State Relations, 'Treaty for Victoria', (Web Page, 11 December 2024) <firstpeoplesrelations.vic.gov.au/treaty-authority-establishment>.
Queensland	In 2023 the <i>Path to Treaty Act 2023</i> (Qld) was passed. It created the First Nations Treaty Institute and the Truth-telling and Healing Inquiry. This Act was repealed in 2024. As a result, the work on progressing the Path to Treaty, including the Inquiry have ceased. Source: Department of Women, Aboriginal and Torres Strait Islander Partnerships and multiculturalism, 'Path to Treaty,' <i>Queensland Government</i>, (Web Page, 2 December 2024) <tatsipca.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/reconciliation/tracks-treaty/path-treaty>.
South Australia	In 2023 the <i>First Nations Voice Act 2023</i> (SA) was passed. In March 2024, 46 First Nations people were elected to sit on 6 local Voices. There is currently no Treaty between First Nations people and South Australia. Source: Antar, <i>Treaty in South Australia</i> (Webpage, 10 December 2024) <antar.org.au/issues/treaty/states-territories/south-australia/>.
Western Australia	In 2016 the Western Australian Parliament enacted the <i>Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016</i> (WA). The <i>Noongar Settlement</i> is the largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history. Western Australia does not have a voice to parliament. Source: Antar, <i>Treaty in W.A. Fact Sheet</i>, (Online, 10 December 2024) <antar.org.au/resources/treaty-in-wa/>.

Practical Application ...

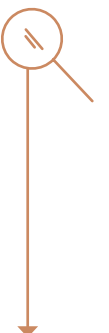


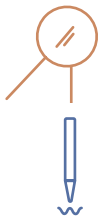
Tasmania	In October 2016, the Tasmanian Parliament unanimously passed the <i>Constitution Amendment (Constitutional Recognition of Aboriginal People) Act 2016</i> (TAS). The Act amends the <i>Constitution Act 1934</i> (TAS) to recognise Aboriginal people as Tasmania's First people. Tasmania currently has no Treaty with First Nations people. Source: Department of Premier and Cabinet, <i>Constitutional recognition of Tasmanian Aboriginal people</i>, (Online, 10 December 2024) <dpac.tas.gov.au/divisions/policy/constitutional_recognition_of_tasmanian_aboriginal_people>.
Northern Territory	In 2018 the government (signed) the historic <i>Barunga Agreement</i>, a Memorandum of Understanding between the NT Government and the four Aboriginal Land Councils under which it pledged \$4.2 million dollars over three years to fund a Northern Territory Treaty Commission (the Treaty Commission) to consult and report about a possible treaty-making framework in the Northern Territory. The Treaty Commission delivered its Final Report in 2022. There is currently has no Treaty with First Nations people. Source: Northern Territory Government, <i>Aboriginal Affairs</i>, (Online, 10 December 2024) <aboriginalaffairs.nt.gov.au/our-priorities/treaty/nt-government-response-to-treaty-commissions-final-report>.
ACT	In early 2023, the ACT Government announced that it would set up a First Nations Eminent Panel for Community Engagement and Healing. This panel will develop Treaty and truth-telling pathways through advising culturally appropriate governance, mechanisms, and co-design of Voice, Treaty, and Truth. As of 2024, nothing further has been heard of the Aboriginal and Torres Strait Islander Eminent Panel. Source: Antar, <i>Treaty in the Australian Capital Territory</i>, (Online, 10 December 2024) <antar.org.au/issues/treaty/states-territories/act/>.

1. Describe the current position in respect of treaty-making between the Australian States and Territories and First Nations people. [C]

Inquiry Focus

What could a treaty between an Australian state and First Nations people look like?





Source 1

Practical Application

HUMAN RIGHTS PRINCIPLES CONTAINED IN INTERNATIONAL HUMAN RIGHTS LAW

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

Article 1: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Articles 2-5: Establishes that the rights in the ICESCR should be recognised without discrimination, including the economic social and cultural rights set out in Articles 6 to 15.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007)

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 6: Every indigenous individual has the right to a nationality.

Article 9: Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 33:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.



Source: Australian Human Rights Commission, 'United Nations Declaration on the Rights of Indigenous Peoples' (Web Page, n.d.), <humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/united-nations-declaration-rights>.

1. Explain the importance of the above Articles extracted from UNDRIP to a First Nations representative in negotiations for a treaty with an Australian State or Territory. [C]
2. Would the fact that Australia is a signatory to both ICESCR and UNDRIP make a difference to the parties in a negotiation for treaty between First Nations people and an Australian State or Territory? Explain your answer. [A]

Practical Application

Source 2

NATIVE TITLE PROCESSES—THE RIGHT TO LAND

In *Mabo v Queensland (Mabo No 2)* (1992) 107 ALR 1, 175 CLR 1, (the *Mabo* case), Mabo and four other plaintiffs claimed the Mer islands in the Torres Strait on which they had lived for generations should be the subject of native title. The High Court of Australia was asked to decide if native title existed in Australia at the time of British settlement, and if it still existed, especially in relation to Mer.

The High Court of Australia decided that the doctrine of *terra nullius* did not apply, and that Aboriginal and Torres Strait Islander peoples did have native title of their traditional lands. The court accepted that Australia was not practically unoccupied or vacant but was occupied by First Nations people who had their own traditions and customs, and more importantly their own relationship with the land.

It also decided that the earlier Australian view of indigenous society as being of less worth than introduced British Society was essentially racist. Native title did exist in Mer and the Meriam people were entitled to the possession, occupation, use and enjoyment of the land. Any attempt by the States of Australia to extinguish native title was subject to overriding Commonwealth legislation, in particular the *Racial Discrimination Act 1975* (Cth)

Native Title Act 1993 (Cth)

Preamble (Extract)

The people whose descendants are now known as Aboriginal people and Torres Strait Islanders were the inhabitants of Australia before European settlement...

The High Court has:

(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands...

The people of Australia intend:

(b) to ensure that Aboriginal Peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation which history, their prior rights and interests, and their rich and diverse culture, fully entitled them to aspire...

1. Explain the importance of the *Mabo* decision of the High Court of Australia to First Nations people in respect of their rights to land and their recognition as the original inhabitants of Australia before European settlement. [C]
2. Are the rights of First Nations people set out in the *Mabo* case and the *Native Title Act* also found in the Universal Declaration, ICESCR and UNDRIP (see Source 1)? Explain your answer. [A]
3. Does the Australian law as set out in *Mabo* and in the *Native Title Act* establish the point of view that the Australians living in Australia and known as First Nations people, are part of a polity? Explain your point of view. [A]

Practical Application

Source 3

FIRST NATIONS AGREEMENT—MAKING IN AUSTRALIA

The recognition of Indigenous land rights in law has enabled First Nations people and Australian governments to enter legally binding agreements across matters such as:

- land use and access
- Indigenous cultural heritage protection
- co-management of land and sea
- economic development
- employment
- resolving land claims.

First Nations groups in Australia have made hundreds of these agreements with Australian governments at all levels.

Victoria and Western Australia have been signing what are called settlement agreements with First Nations groups since 2010.

These include terms that cover numerous matters like those listed above, and often **also include financial packages aimed at supporting First Nations governance institutions.**

So far, four First Nations groups have entered these agreements with the Victorian government.

In Western Australia, three settlement agreements have been made between the WA government and First Nations under Commonwealth native title legislation. The largest of these, known as the *Noongar Settlement*, is worth \$1.3 billion and has been characterised by some legal scholars as 'Australia's first Treaty'.



The *Noongar Settlement* in Western Australia was reached in 2015. PR Handout Image/AAP

How is Treaty different?

Treaty involves three elements:

- recognition of First Nations as distinct polities
- negotiation in good faith
- a settlement that deals with claims and that enables Indigenous self-government.

Treaties are different from other agreements, as they provide scope to recognise Indigenous sovereignty. To date, Australia has not signed treaties with Aboriginal and Torres Strait Islander peoples.

Source: Bartholomew Stanford, 'The Federal government has left Indigenous Treaties to the states. How are they progressing?' *The Conversation*, (Online, 10 October 2024) <theconversation.com/the-federal-government-has-left-indigenous-treaties-to-the-states-how-are-they-progressing-24055>.

Practical Application ...

1. Describe the main features of settlement agreements. [C]
2. Explain what distinguishes a treaty from other forms of settlement agreements. [C]

Practical Application

Source 4

NOONGAR (KOORAH, NITJA, BOORDAHWAN) (PAST, PRESENT, FUTURE) RECOGNITION ACT 2016 (NOONGAR SETTLEMENT ACT)

An Act for the recognition of the Noongar people as the traditional owners of lands in the south-west of the State.

Preamble

- A. Since time immemorial, the Noongar people have inhabited lands in the south-west of the State; these lands the Noongar people call Noongar boodja (Noongar earth).
- B. Under Noongar law and custom, the Noongar people are the traditional owners of, and have cultural responsibilities and rights in relation to, Noongar boodja.
- C. The Noongar people continue to have a living cultural, spiritual, familial and social relationship with Noongar boodja.
- D. The Noongar people have made, are making, and will continue to make, a significant and unique contribution to the heritage, cultural identity, community and economy of the State.
- E. The Noongar people describe in Schedule 1 their relationship to Noongar boodja and the benefits that all Western Australians derive from that relationship.
- F. So it is appropriate, as part of a package of measures in full and final settlement of all claims by the Noongar people in pending and future applications under the Native Title Act 1993 (Commonwealth) for the determination of native title and for compensation payable for acts affecting that native title, to recognise the Noongar people as the traditional owners of the lands described in this Act.

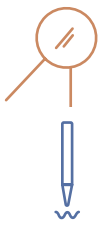
1. Describe in your own words, the Noongar people, as set out in the Preamble. Why is how they are described important? [C]
2. Explain the compromise which the Noongar people are making in the *Noongar Settlement Act*. [C]

Practical Application

Source 5

THE NOONGAR SETTLEMENT

By its very nature, the Noongar agreement is in fact a classic treaty: it is a coming together between two nations to agree upon certain things, and in doing so, finding a way forward together and recognising each other's sovereignty. By recognising each other's sovereignty, they decided how they would continue to coexist in a manner that they agreed to through negotiation.



Practical Application ...

Source: Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

PREMIER BARNETT PRESS RELEASE

'break-through agreement', 'a historic achievement in reconciliation', 'extra-ordinary act of self-determination by Aboriginal people... providing them with a real opportunity for independence'.

Source: Department of Premier and Cabinet (WA), 'Noongar's Vote to Accept Historic Offer' (Media Statement, 30 March 2015).

FEATURES OF THE NOONGAR SETTLEMENT

First, treaty recognises the Noongar as both traditional owners of the land and as a distinct polity, differentiated from other Western Australians. Participants involved in the negotiation explicitly connected their aims to recognition of Noongar nation: at the initial negotiation meeting in 2010, the Noongar lead negotiator Glenn Kelly, insisted on a 'nation to nation' dialogue... This status was explicitly recognised by the Conservative Western Australian government.

Second, the Settlement was agreed to via a political negotiation respectful of each party's equality of standing, evincing a commitment to secure a just relationship between Indigenous peoples and the state... Although Noongar nationhood is achieved subject to the overriding sovereignty of the Australian State, the treaty redefines a political relationship between Noongar and the West Australian State, and achieves a just, equitable and sustainable settlement.

Third, the settlement contains more than mere symbolic recognition. In consideration of surrendering their native title rights and interests and validating all potentially invalid acts committed on their territory, the Noongar people receive a package of benefits similar to those negotiated under Canada's model including ensuring the Noongar are guaranteed a sizeable land base, non-exclusive rights to resources over an extended area, a large sustained financial contribution from the State government, and enhanced cultural heritage protection. Together, these elements serve two goals key to any treaty: they acknowledge the injustices of the past, and serve the Noongar people's future by strengthening culture and enhancing economic opportunities. It is true that the self-governance rights are not as extensive under the Noongar settlement. There is no scope (at present) for a Noongar government and the Noongar people are not entitled pass legislation.

Source: Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's first treaty', *Sydney Law Review*, (2018) 40 <classic.austlii.edu.au/au/journals/SydLawRw/2018/1.html>.

1. Explain why, according to Roger Cook, the *Noongar Settlement* is a 'classic treaty'. [C]
2. Describe the features of the *Noongar Settlement* which the authors Hobbs and Williams identify as being essential to treaty. [C]

Use Sources 1 to 5 to answer the questions below:

1. What is the purpose of a treaty between the First Nations people and an Australian State or Territory? [C]
2. List the content which should be included in a treaty between the Commonwealth of Australia and First Nations people. [C]

3. Describe two processes by which a First Nations people's polity could be determined. Indicate the process you prefer and explain why. [C] [E]
4. Describe, in the circumstances of treaty, the meaning of 'good faith negotiations.' [C]
5. When negotiating treaty, what issues are raised for each party (the Australian State or Territory/First Nations group) relating to sovereignty? Is the issue of sovereignty a barrier to the making of treaty? [C]

Tip

You might like to read more widely about the issue of shared sovereignty. You might also like to consider how the powers to legislate and govern are shared between the different levels of government in Australia.

22.2 Climate change

It is now the case that climate change is probably the most serious challenge we face in Australia, and also the world. Global warming, rising sea levels, the extinction of many species of plants and animals, destructive bushfires and floods; all have emerged as major issues in Australia and globally. Climate change will determine whether or not Australians continue to live in a safe and sustainable environment in the future. An example of a human rights principle which may be affected by climate change is in the *Universal Declaration of Human Rights*, Article 25:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...

Source: United Nations, 'About', (Webpage, n.d.) <ohchr.org/sites/default/files/UD>.

Broadly speaking therefore, to protect the human rights principles in Australia which are affected by climate change involves Australia being part of the various international legal instruments which are intended to keep Australians and the world in a safe and sustainable environment. At the same time there is support from the United Nations to expand human rights principles so that the **right of every human being to a safe and sustainable environment**, is declared to be a human right. This would enable the Member States of the United Nations to include such a human rights principle in their international legal obligations through the process of international treaty, and for the principle be included in domestic legislation when found to be acceptable domestic policy.





Practical Application

IN A HISTORIC MOVE, UN DECLARES HEALTHY ENVIRONMENT A HUMAN RIGHT

The United Nations General Assembly declared today that everyone on the planet has a right to a healthy environment...

In a resolution passed (in July 2022) the General Assembly said climate change and environmental degradation were some of the most pressing threats to humanity's future. It called on states to step up efforts to ensure their people have access to a "clean, healthy and sustainable environment."

The resolution is not legally binding on the 193 UN Member States. But advocates are hopeful it will have a trickle-down effect, prompting countries to enshrine the right to a healthy environment in national constitutions and regional treaties, and encouraging states to implement those laws.

Source: United Nations Environmental Program, *News Media*, (Online, 25 July 2023) <[unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right](https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right)>.

1. Describe why it is important that the United Nations General Assembly has passed a resolution that it is a human right for a person to live in a 'clean, healthy and sustainable environment'. [C]

Inquiry Focus

Does Australia support the right to a clean, safe, and sustainable environment?

Source 1

AUSTRALIAN PARTICIPATION IN THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE

The Intergovernmental Panel on Climate Change (IPCC) was established by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) in 1988 to provide an authoritative assessment of the state of knowledge of climate change science and impacts and to develop realistic strategies for management of the climate change issue.

Australian Government representatives and Australian climate scientists played a major part in the establishment of the IPCC and its operation over the past twenty years including key roles in the preparation of virtually all of its reports. Australian delegations have participated in every formal intergovernmental session of the Panel and its Working Groups and have made a significant contribution to the scientific integrity of the IPCC assessment process.

What does the IPCC's latest report mean?

The Intergovernmental Panel on Climate Change (IPCC) has just released its latest report...

This latest report is from the IPCC's Working Group I's (WGI) contribution to the IPCC's Sixth Assessment Report (6AR). It covers human influence on the climate system, extreme weather, and the current and future state of our climate.

What are the main takeaways from this report?

- The most important climate science update for almost a decade shows there is a narrow path to avoiding climate catastrophe, but only through immediate, deep and sustained emissions reductions.
- Climate change is already wreaking havoc around the world, with worse to come. Our decisions this decade will be the difference between a liveable future for today's young people, and a future that is incompatible with well-functioning human societies.
- Every choice and every fraction of a degree of avoided warming matters. The right choices will be measured in lives, livelihoods, species and ecosystems saved. The benefits of stronger action will be realized well within our lifetimes, and even more so for our children and grandchildren.
- Current atmospheric concentrations of carbon dioxide (CO₂) are higher than at any time in the last two million years. It is "unequivocal" that this human interference has warmed the atmosphere, ocean and land.
- Human influence has warmed the climate at a rate that is unprecedented. Our climate is not merely changing, the rate of change is now accelerating.

Source: John W. Zillman et al, 'Australian participation in the intergovernmental panel on climate change', *Sage Publications*, Volume 19, Issue 1 (Online, 16 December 2024), <journals.sagepub.com/doi/abs/10.1260/095830508783563145?journalCode=eaee>.

Practical Application

Source 2

INTERNATIONAL LEGAL FRAMEWORK

The United Nations Framework Convention on Climate Change (1994) (UNFCCC)

The UNFCCC entered into force on 21 March 1994. Today, it has near-universal membership. The 198 countries that have ratified the Convention...

UN Climate Change Conferences

Every year, countries who have joined the UNFCCC meet to measure progress and negotiate multilateral responses to climate change. Today there are 198 Parties to the Convention.

Since 1994, the UNFCCC has provided the basis for international climate negotiations, including landmark agreements such as the *Kyoto Protocol* (1997) and the *Paris Agreement* (2015).

Australia is a signatory to the *Kyoto Protocol* which legally binds developed country Parties to emission reduction targets. Australia is also a signatory to the Paris Agreement from 2015, where the UNFCCC reached a landmark agreement to combat climate change and to accelerate and intensify the actions and investments needed for a sustainable low carbon future. The central aim of the *Paris Agreement* is to keep the global temperature rise this century well below 2°C above preindustrial levels.



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The latest Conference of the Parties (COP), COP29 was held in Baku, Azerbaijan, in November 2024.

COPs have created global milestones for the climate movement, setting standards and advancing action, including on reducing carbon emissions, accelerating a global energy transition, and helping countries adapt and build resilience to compounding climate change.

Cop 29 concluded on 24 November 2024 with an agreement calling on developed countries to deliver at least \$300 billion per year to developing countries by 2035 to reduce greenhouse gas emissions and protect lives and livelihoods from the worsening impacts of climate change.

Source: United Nations, *Climate Change Conferences* (Webpage, n.d.) <un-climate-conferences>.

1. Describe the international legal framework which applies to climate change. [C]
2. Do you think it would be appropriate for the United Nations General Assembly to propose an *Optional Protocol* which included a clause stating that all Parties to the UNFCCC agree that everyone is entitled to a 'clean, healthy, sustainable environment'. Give your reasons. [A]

Australian legal framework

Source 3

Climate Change Act 2022 (Cth)

3 Objects

The objects of this Act are:

(aa) to advance an effective and progressive response to the urgent threat of climate change drawing on the best available scientific knowledge; and

(a) to set out Australia's greenhouse gas emissions reduction targets which contribute to the global goals of:

(i) holding the increase in the global average temperature to well below 2°C above preindustrial levels; and

(ii) pursuing efforts to limit the temperature increase to 1.5°C above preindustrial levels; and

(b) to promote accountability and ambition by requiring the Minister to:

(i) prepare annual climate change statements; and

(ii) cause copies of those statements to be tabled in each House of the Parliament; and

(c) to ensure that independent advice from the Climate Change Authority informs:

(i) the preparation of annual climate change statements; and

(ii) the greenhouse gas emissions reduction targets to be included in a new or adjusted nationally determined contribution.

4 Simplified outline of this Act

- This Act sets out Australia's greenhouse gas emissions reduction targets.
- The Minister must prepare an annual climate change statement.
- The Climate Change Authority is to give the Minister advice that relates to the preparation of an annual climate change statement.
- The Climate Change Authority is to advise the Minister on greenhouse gas emissions reduction targets to be included in a new or adjusted nationally determined contribution.
- There are to be periodic reviews of the operation of this Act.

Practical Application

COMMISSION WELCOMES AUSTRALIAN FIRST, AS ACT PASSES RIGHT TO HEALTHY ENVIRONMENT

Canberrans now have the right to enjoy a clean, healthy and sustainable environment, after amendments to the ACT *Human Rights Act* passed yesterday.

The new right to a healthy environment is an Australian first.

'The right to a healthy environment recognises the connection between a healthy environment and enjoying our other, fundamental human rights.

'Incorporating the right to a healthy environment within the ACT's human rights framework means that public servants and government agencies will need to consider environmental impacts as a routine part of developing programs, policies and laws.

'The right to a healthy environment has special significance of course for children and young people, who will continue to grapple with climate change in the coming decades.

Canberrans will be able to complain to the Commission about breaches of the right to a healthy environment, under the new human rights complaints pathway, which came into effect in June 2024.

Source: ACT Human Rights Commission, 'Commission welcomes Australian first, as ACT passes right to healthy environment', *News and Events*, (Online, 29 August 2024) <hrc.act.gov.au/news-and-events/news/commission-welcomes-australian-first,-as-act-passes-right-to-a-healthy-environment>.

Practical Application

AUSTRALIAN GOVERNMENT INITIATIVES TO REDUCE EMISSIONS FROM ROAD TRANSPORT

The *New Vehicle Efficiency Standard Act 2024* (Cth) establishes a new vehicle efficiency standard (NVES) to regulate the carbon dioxide emissions of new passenger and light commercial vehicles. The NVES commences on 1 January 2025, with compliance requirements to commence on 1 July 2025.

The NVES will regulate the annual average carbon dioxide (CO₂) emission levels from all

Practical Application ...

new cars supplied to Australia by car manufacturers. The Standard brings Australia in line with the rest of the world.

Work is currently underway to implement the Standard in Australia from 1 January 2025 and a new regulator will be set up to manage its operation

Source: Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Australian government initiatives to reduce emissions from road transport,' (Online, 18 December 2024) <infrastructure.gov.au/infrastructure-transport-vehicles/vehicles/vehicle-safety-environment/australian-government-initiatives-reduce-emissions-road-trans>.

1. Describe the objectives of the *Climate Change Act 2022* (Cth). [C]
2. Compare the objectives of the *Climate Change Act* to Australia's legal obligations under the UNFCCC, the *Kyoto Protocol*, and the *Paris Agreement*. Explain your answer. [C] [A]
3. Analyse the significance of the incorporation of the human rights principle— 'to enjoy a clean, healthy, and sustainable environment'— to the legislative framework of the ACT. [A]
4. Explain how the NVES will contribute to 'a clean, healthy, and sustainable environment'. Do you think all Australians should support this human rights principle? [A]

Australia embraces the future-climate change in the Pacific

Source 4

Practical Application

THE PACIFIC PARTNERSHIP THAT CAN POWER OUR SECURITY AND PROSPERITY

1. Climate change is a shared threat throughout the Pacific region – and no community is immune to the impacts.
 - Pacific nations are on the frontlines of climate change. Communities are being pushed to their limit by worsening extreme heat, bushfires, floods, storms and rising seas.
 - Many First Nations communities are being disproportionately impacted, such as in the Torres Strait, where rising seas are swallowing land and ocean changes are impacting traditional food sources
 - People are being displaced from their homes in Tuvalu and Lismore alike.
 - More than 80% of Australians report having lived through an extreme weather disaster, with the Black Summer fires of 2019-20 and east coast floods of 2022 devastating many communities.
 - More than one in three Australians worry that extreme weather may force them to permanently relocate their homes – a prospect many Pacific Island communities are also facing.
2. Australian and Pacific Island diplomacy matters, and co-hosting the United Nations climate talks in 2026 is a critical opportunity to broker a new era of global climate action.

Practical Application ...

- Pacific nations as large ocean states make up more than 20 percent of the world's territorial ocean.
- Today, Pacific Island countries are leading a diplomatic campaign for a global phase out of coal, oil and gas, calling for a Fossil Fuel Non-Proliferation Treaty. By 2026, climate pollution will likely have peaked and fossil fuel use will be in decline with the focus on the pace of the phase out.
- Co-hosting the United Nations climate talking in 2026 is an opportunity for Australia and the Pacific Island countries to form a genuine partnership to shore up global commitments and broker a new era of climate action.

3. Tackling climate change is central to safeguarding regional security

- Pacific island leaders have made it clear that climate change is their primary security concern, issuing a regional security declaration in 2018 that climate change is "the single greatest threat to the livelihoods, security and well-being of the peoples of the Pacific".

Source: Climate Council, 'The Pacific partnership that can power our security and prosperity', *Resources, Reports*, (Online, 11 September 2024) <climatecouncil.org.au/resources/the-pacific-partnership-that-can-power-security-prosperity/>.

1. Describe the ways in which climate change is a threat to Pacific Island communities. [C]
2. Describe the ways in which climate change is a threat to Australian communities. [C]
3. Compare and contrast your answers to Questions 1 and 2. Explain your answer. [C]

Practical Application

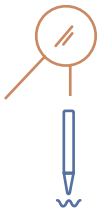
TUVALU-AUSTRALIA'S COMMITMENT TO STRENGTHENING CLIMATE AND DISASTER RESILIENCE IN THE PACIFIC

Australia is committed to working in partnership with the Government of Tuvalu to meet the needs and aspirations of its people to build resilience to climate change and disaster events.

Tuvalu's island group sits less than five metres above sea level, making it the world's second lowest-lying country and highly vulnerable to the impacts of climate change.

As climate change impacts intensify, Tuvalu will need international support to implement its Long-Term Adaption Plan to help protect the lives, livelihoods and culture of Tuvaluans. Australia is partnering with Tuvalu, under the UN Secretary General's Adaptation Pipeline Accelerator (APA) initiative, to advance the Long-Term Adaptation Plan. The APA initiative aims to pioneer a new collaborative model for accelerating investment for adaptation in developing countries at pace and at scale.

Australia is working with the Government of Tuvalu through the Australian Infrastructure Financing Facility for the Pacific (AIFFP) to ensure that critical infrastructure is climate resilient. Australia also works closely with Tuvalu's National Disaster Management Office and has supported a Disaster Risk Management and Response Coordinator position through the Australia Assists Program.



Practical Application ...

Source: Department of Foreign Affairs and Trade, 'Tuvalu-Australia's commitment to strengthening climate and disaster resilience in the Pacific', *About Us-Publications*, (Online, 19 December 2024) <dfat.gov.au/about-us/publications/tuvalu-australias-commitment-to-strengthening-climate-and-disaster-resilience-in-the-pacific>.

1. Describe the likely impact of climate change on Tuvalu. [C]
2. Describe the nature and scope of Australia's assistance to Tuvalu and explain how it is consistent with Australia's legal obligations under the UNFCCC and *Cop 29* climate change agreement. [C] [A]

Climate change litigation

The effects of climate change on the human rights of individuals and communities is increasingly the subject of court cases throughout the world, including in Australia. In the case of *Daniel Billy et al v Australia*, Communication No. 3624/2019 eight Torres Strait Islanders filed an official communication with the United Nations Human Rights Committee, pursuant to the right to do so under the *First Optional Protocol* of the ICCPR. They claimed that their lives livelihoods and unique culture were threatened by climate change. The UNHCR found in favour. We are interested here in this case because it is about climate change action. In Chapter 16 where you read about this case previously, it was about the procedures they followed as claimants.

Litigation advances the human rights principle of a 'clean, healthy, and sustainable environment' through court action.

Practical Application

Source 5

CLIMATE CHANGE CAUSED BY HUMANKIND'S PRODUCTION OF GREENHOUSE GASES IS THE DEFINING ISSUE OF OUR TIME

The Environmental Defenders Office represents clients in legal actions to stop projects that will worsen climate change, holds to account those responsible for climate change, and pushes for robust environmental laws to protect future generations.

Efforts to minimise climate change are a central pillar of our work, from legal action involving coal mines and unconventional gas extraction, to land clearing and water resource management.

EDO litigates on behalf of communities impacted by climate change, taking legal action in courts across Australia to protect our environment and way of life.

We develop landmark cases with local clients to ensure companies are accountable for the climate impacts of their projects and held responsible for the carbon emissions generated by their products.

The cases we bring are decided on the strength of the evidence and application of the law, free from the influence of the fossil fuel lobby and political opportunism

The landmark victory on behalf of Groundswell Gloucester in the Rocky Hill coal mine case exhibits the power of communities to progress action on climate via the courts.

Practical Application ...

This was the first hearing of its kind since the historic Paris Agreement, in which a superior jurisdiction court refused approval of the open cut mine after hearing expert testimony about climate change, the global carbon budget and the impacts of burning fossil fuels.

Since Rocky Hill, a second major coal mine has been refused, partly on climate grounds, after EDO lawyers took up the case.

The Bylong Valley coal mine was set to produce 6.5 million tonnes of thermal coal per year. In refusing the mine, the New South Wales Independent Planning Commission found the mine was not in the public interest because, "the long-term environmental, heritage and agricultural costs will be borne by... future generations."

Source: Environmental Defenders Office, 'Climate change caused by humankind's production of greenhouse gases is the defining issue of our time,' (Online, 20 December 2024) <edo.org.au/climate/#:~:text=EDO%20litigates%20on%20behalf%20of,environment%20and%20way%20of%20life>.

1. Go to the website of the Environmental Defenders Office at edo.org.au. Investigate the legal action that they take on behalf of clients. Select some examples and write a short description of their work. [C]

Case Study

Sharma and others v Minister for the Environment; [2021] FCA 560; [2021] FCA 774; [2022] FCAFC 35; [2022] FCAFC 65

Facts: On September 8, 2020, eight young people filed a class action in the Federal Court of Australia to block a coal project. They sought an injunction to stop the Australian Government from approving an extension of the Whitehaven Vickery coal mine.

The plaintiffs claimed to represent all people under 18, and argued that Federal Minister Sussan Ley has a common law duty of care for young people. They further asserted that digging up and burning coal would exacerbate climate change and harm young people in the future. They sought an injunction to prevent the Minister from approving the project under the *Environment Protection and Biodiversity Conservation Act* (EPBC).

On May 27, 2021, the Federal Court of Australia established a new duty of care to avoid causing personal harm to children but declined to issue an injunction to force the Minister to block the coal mine extension. The Court concluded that 'the applicants have established that the Minister has a duty to take reasonable care to avoid causing personal injury to the children when deciding, under s130 and s133 of the *EPBC Act*, to approve or not approve the Extension Project.' In establishing the duty of care, the Court found that the foreseeable harm from the project, if the risks were to come true, would be 'catastrophic', and therefore children should be considered persons who would be so directly affected that the Minister ought to consider their interests when making the approval decision

On July 8, 2021, the Court issued a declaration that ***'The [Minister] has a duty to take reasonable care . . . to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere.'*** The Court ordered the Minister to pay costs.

On September 13, 2021, the Minister of Environment filled an appeal questioning the judge's finding that the Minister owes a duty of care to avoid causing personal injury to children





Case Study ...

related to anthropogenic climate change. The appeal is based on the separation of powers and the argument that the Minister's decision is a matter of policy and subject to discretion. The regulation of GHG emissions is better suited for the Executive, and no novel duty of care should be recognized. The appeal also questioned whether the approved project would cause a net increase in global GHG emissions and the reversed onus of proof in approaching this issue.

Legal Issue: Does the Minister for the Environment have a duty of care to avoid causing harm to Australian children when deciding whether or not to approve a coal mine expansion?

Decision: On March 15, 2022, the Full Federal Court of Australia unanimously overturned the primary judge's decision to impose a duty of care on the Minister. The Court reasoned that the question of whether the government owed a duty of care to children when decisions were made by the Minister under the *EPBC Act*, was a matter of policy, not of law.

Despite allowing the Minister's appeal, the Court rejected the Minister's argument that the primary judge made findings based on evidence of climate change that were unfounded.

This means that the primary judge's findings of fact about the risk of harm of climate change to children remain. The Full Federal Court noted that 'the nature of the risks and the dangers from global warming, including the possible catastrophe that may engulf the world and humanity' were never in dispute.

The plaintiffs announced that they would not appeal the decision.

1. Describe what the Full Court of the Federal Court of Australia did when it decided not to make a decision about whether or not the Australian government owed a duty of care to the plaintiff children. [C]
2. Describe the significance of the Court's finding about the 'nature of the risks and the dangers from global warming'. [A]



Case Study

Youth Verdict v. Waratah Coal, [2020] QLC 33; [2021] QLC 4; [2021] QLC 36; [2022] QLC 3; [2022] QLC 21

Facts: On May 13, 2020, the environmental group Youth Verdict lodged an objection to the proposed Galilee Coal Project in the Queensland Land Court (QLC) on human rights grounds. The plaintiffs allege that by contributing to climate change, the mine will infringe on their right to life, the protection of children, and the right to culture as protected by the *Human Rights Act 2019* (Qld) (the Act). Thus, approval of the mine would be unlawful. The Galilee Coal Project had received federal approval but needed a recommendation that it be approved by the QLC before the environmental authority and mining lease could be granted by the Queensland Department of Environment and Science and Minister for Resources, respectively. The recommendations are not finally determinative but must be considered by the Minister for Natural Resources Mines and Energy (Minister) and by the Chief Executive of the Department of Environment and Science (Chief Executive) when making a final decision on the mining lease.

Legal Issue: Should the plaintiffs' objections to the Galilee Coal Project be dismissed?

Decision: On August 28, 2020, the QLC denied the defendant's motion to dismiss the case. On November 25, 2022, the QLC recommended to the Minister and the Chief Executive that the Mining Lease and Environmental Authority respectively be rejected. In reaching this decision the Court considered factors including climate change, the economic and

Case Study ...

social benefits and costs and the limitation of human rights associated with the Project. The Court found that the development of the Project would unjustifiably limit the right to life, the protection of children, the right to culture of First Nations people, the right to property, the right of certain groups to enjoy human rights without discrimination, and the right to privacy and home.

Waratah Coal Company appealed the decision but withdrew it. There's been no further action since 2022.

1. Describe the legal issues raised by the cases set out in Source 5. [C]
2. Is there a common purpose to the climate change litigation? Explain your answer. [C]

Use the information contained in Sources 1 to 5 to answer the questions below.

1. Outline the arguments contained in Sources 1 to 5 which support the view that Australia supports the human right to a 'clean, healthy and sustainable environment'. [C]
2. Explain Australia's involvement in the issues which its Pacific Neighbours are raising about climate change. Analyse Australia's legal situation as a Pacific country. Do you agree with current policies? Give your reasons. [C] [A] [E]



22.3 National Bill of Rights

In Australia, there has been for some time a debate about whether or not there should be an Australian **Bill of Rights** (also referred to as a Charter of Rights or a Human Rights Act). So far as the Australian Government is concerned, this question remains open. This is despite the fact that there has been enormous progress in the field of human rights which can be traced to the *United Nations Declaration of Human Rights* (1948), to which Australia is a signatory. Australia is a signatory to many other human rights conventions/treaties, many of which have been incorporated into domestic legislation. Subject to the *Australian Constitution*, these are relied upon by our citizens in their daily lives.

We have seen that Australian anti-discrimination legislation has guaranteed Australian citizens certain human rights. In addition the Commonwealth Government has used the external affairs power (*Australian Constitution* s 51xxix) to pass human rights legislation, including the *Human Rights (Sexual Conduct) Act 1994* (Cth).

Significantly, there is now State and Territory legislation:

STATE AND TERRITORY LEGISLATION

2004	<i>Human Rights Act 2004</i> (ACT)
2006	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)
2019	<i>Human Rights Act 2019</i> (Qld)

We have seen that all legislation in Queensland, and in the Commonwealth, is scrutinised for compatibility with Australian human rights obligations. This scrutiny is carried out during the Parliamentary process. In Queensland, a Statement of Compatibility with the *Human Rights Act 2019* (Qld) is provided to the House when the legislation is considered. At Commonwealth level, this is done pursuant to the *Human Rights (Scrutiny Act) 2011* (Cth)

The debate about whether or not to introduce a Bill of Rights at the Commonwealth level may have stalled every now and again in the political process, but clearly the influence of human rights in the Australian legal system continues unabated.

BRIEF SUMMARY OF THE DEBATE

FOR

- We will know our rights.
- Our rights will be clear.
- It will educate citizens about their rights.
- Governments must act in accordance with citizens rights.
- Our rights will be enforceable when breached.
- We will know the remedies for a breach of our rights.

AGAINST

- Stating our rights in legislation restricts them, stopping flexibility and growth.
- Stating our rights in legislation limits them to those stated.
- The *Australian Constitution*, the common law, and the principle of 'responsible government' sufficiently empowers citizens to protect their fundamental rights and freedoms.
- The 'separation of powers' doctrine offers greater protection than a **Bill of Rights**.
- Where there is conflict between rights the judiciary will decide which right prevails.



Research Task

1. **Select** two of the arguments in **FOR** a Bill of Rights. Look for a discussion of each online. [S]
2. **Select** two arguments which oppose your above selection from **AGAINST** a Bill of Rights. [S]
3. **Explain** the point of view taken by each side. [C]
4. **Analyse** the arguments for each point of view. Which do you find more persuasive? [A]



Tip

For more information and a summary video of both arguments from the Australian Human Rights Commissioner, go to ruleoflaw.org.au/education/human-rights/.

Alternatively, access ruleoflaw.org.au/education/human-rights/arguments-charter-of-rights/.

The current position

At the time of writing, there is a **Bill of Rights** currently awaiting passage through the Federal Parliament. In 2023, the Attorney-General of Australia referred to the Parliamentary Joint Committee on Human Rights an Inquiry into Australia's Human Rights Framework. This Inquiry delivered its report to the Commonwealth Attorney General in May 2024. It recommended that the Australian Parliament should enact a federal *Human Rights Act*.

The rationale for a national **Bill of Rights** is well argued by the Australian Human Rights Commission.

Practical Application



A NATIONAL HUMAN RIGHTS ACT FOR AUSTRALIA

RIGHTS AND FREEDOMS

Overview

Australia has strong sense of human rights and freedoms, but people's basic human rights are not very well protected in Australian law.

Australia is the only liberal democracy in the world that does not have a national act or charter of rights that explains what people's basic rights are and how they can be protected.

Some states and territories in Australia have their own Human Rights Act, but Australia needs a national Human Rights Act to ensure that the rights of all people are protected, all of the time.

The Australian Human Rights Commission has developed a model for what a national Human Rights Act might look like, how it could function, and what it would do.



Practical Application ...

Key messages

The Commission's model would create legal protections for the human rights of all Australians, and ways to seek justice if people's rights are breached in some way.

It would also provide options for people to challenge decisions that breach their human rights, and opportunities to go to court if their issues can't be resolved through conciliation.



This model would also increase the responsibility that governments have, to consider how their laws, policies, and actions might affect people's human rights.

A proposed model for a Human Rights Act for Australia

A national Human Rights Act would be an evolution, not a revolution. It would build on the success and lessons learned from our state and territory models, and on the experience of the Australian Human Rights Commission in handling complaints since 1981. The Australian Human Rights Commission has released a report (<https://humanrights.gov.au/free-and-equal>) setting out how a national Human Rights Act should operate.

Key elements of the Commission's proposal for a Human Rights Act

- Government, administrators and public service providers would be required to consider human rights and to act in accordance with human rights when making policy or decisions that affect individual lives. They would have to consult with the people who would be directly or disproportionately affected by policies or laws, especially First Nations people, children, and people with disability.
- Parliament would be required to place greater priority on the human rights impacts of all new proposed laws.
- Courts would be required to interpret legislation, where possible, in a way that is consistent with human rights. However, courts would not have the power to strike down laws for not being compatible with human rights.
- Limitations could be placed on some human rights in certain circumstances. For example, it might be necessary to balance the right to freedom of expression with the right to privacy, or the right to access information with national security interests.
- When deciding whether to pass a new law that limits human rights, Parliament would have to consider whether the proposed limitation is proportionate. For example, any limitation on individual rights would need to be reasonable and necessary to achieve an important public interest and be put in place for the shortest time possible.
- Individuals who consider that their human rights have been breached would have the option of making a complaint to the Australian Human Rights Commission. A complaint could proceed to conciliation, a facilitated process for the parties to seek a resolution on their own terms.

Practical Application ...

- If a complaint about human rights cannot be resolved through conciliation, then the individual would have the option of taking the complaint to the relevant federal court. The court could provide remedies such as preventing government from taking an action that would breach human rights, or ordering government to pay compensation.

Source: Australian Human Rights Commission, 'A National Human Rights Act for Australia', (Web Page, 7 March 2023), <humanrights.gov.au/human-rights-act-for-australia>.

1. Describe the point of view of the AHRC. What are the advantages of this approach? Do these advantages outweigh the arguments in favour of entrenching the human rights of Australians in the *Australian Constitution*? Explain your answer. [C] [A]

Practical Application

SHOULD AUSTRALIA ADOPT A NATIONAL HUMAN RIGHTS ACT?

In early 2023, Attorney-General Mark Dreyfus announced an inquiry into Australia's human rights framework, with the report published in May of this year. It also recommends the introduction of an Australian Human Rights Act. The AHRC has also recently recommended a Human Rights Act for Australia as well as a national framework. A key critique of the current system is its reactive nature, addressing violations only after they occur. So, despite the two key bodies within Australia that are designed to uphold human rights standards advocating for a Human Rights Act, why has one not been introduced?

If implemented, a Human Rights Act would require all legislation and government action to align with the human rights framework before roll-out. Most notably, the act would provide an avenue for people to take action against injustice when their rights are abused.

The Australian Human Rights Institute notes a statutory bill of rights could be changed by the Commonwealth Parliament and remain relevant by evolving and adapting to societal changes. The trade-off is that the bill could be easily changed by the government of the day, but perhaps this is the price to pay to avoid the stalling experienced by more rigid systems. Most notably, the adoption of a bill of rights would send a strong signal to the international community that Australia is committed to human rights protections.

It is ultimately up to the government to decide whether to accept the recommendations and, if so, for Parliament to vote on the matter. The House of Representatives has previously defeated an Australian Bill of Rights. It remains unclear what stance the Albanese government will take on this issue today.

Source: Jade Kingston, 'Should Australia adopt a national human rights act?', *Institute of International Affairs*, (Online, 17 January 2025) <internationalaffairs.org.au/australianoutlook/should-australia-adopt-a-national-human-rights-act/#:~:text=the%20implications%20>

1. Describe the point of view of the author. Does she support or oppose the proposal for a national **Bill of Rights**? Explain your answer.[C]

Review

Comprehend

1. **Describe** the following:
 - a. Polity
 - b. Makarratta
 - c. Shared sovereignty [C]
2. **Explain** how the *Mabo* case changed the law of land ownership in Australia. [C]
3. **Describe** the current position of treaty negotiations between Australian governments and First Nations people. [C]
4. **Describe** the three main requirements for the existence of treaty. [C]
5. **Describe** the human rights principles underlying the process of agreeing to treaty negotiations. [C]
6. **Describe** the agreements which have been entered into by First Nations peoples, Australian governments and other organisations, pursuant to the *Native Title Act* (1992) (Cth). [C]
7. **Describe** the latest evidence from the IPCC about climate change. [C]
8. **Explain** the significance to the legal framework of the ACT of the inclusion of the human right that citizens are entitled to a 'clean, healthy and sustainable environment' in its *Human Rights Charter*. [C]
9. **Explain** how the enactment of the *Climate Change Act 2022* (Cth) provides legislative support for government policies to promote a 'clean, healthy and sustainable environment'. [C]

Analyse and evaluate

1. **Analyse** the features of the *Noongar Settlement* which justify the agreement being characterised as a treaty between First Nations people and the Western Australian government. [A]
2. **Evaluate** the importance of climate change in Australia's relationship with its Pacific Neighbours. How is climate change reflected in the legal arrangements that are currently being made? Do you think there should be a regional Human Rights Council which includes Australia and its Pacific neighbours? Give your reasons. [E]

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