

## CHAPTER 11: Accountability and the Parliament

### SYLLABUS: accountability of the Cth. Parliament through:

- Elections for the HoR and Senate
- HoR and Senate Privileges Committees
- The procedures & processes of Parliament
- Judicial review

- **Accountability** = transparency, scrutiny, effectiveness, & responsibility (remaining answerable).
- 7: states Sen must be directly chosen by the people; mandates a 6 year fixed term
- 24: states HoR must be directly chosen by the people
- 28: mandates a maximum 3 year term in the HoR
- 50: allows for houses to make their own “rules and orders” ie. ministerial code of conduct, standing orders
- 76: gives the HC OJ over Constitution.

### Elections

- A procedure allowing eligible citizens to hold elected officials to account for their previous term in office, and to delegate sovereignty to elected officials for their next term in office in a representative democracy.
- Primary tool of social contract through which mandates are formed
- Three criteria of effectiveness:
  1. Must be free from influence or intimidation by those seeking office
  2. Must allow fair expression of majority will and protect the rights of minorities
  3. Must be regular and reasonably frequent
- Australian elections meet these criteria in several ways, including:
  - the independent statutory authority, aka the Australian Electoral Commission, runs elections, not those seeking office
  - The Cth. Electoral At specifies that preferential voting be used for the HoR and proportional for the Sen, to protect both majorities and minorities
  - The CEA mandates compulsory voting
  - Section 28 mandates a maximum 3 year term in the HoR, and s.7 mandates a fixed 6 year term in the Sen, always commencing on the 1st of July.

### Accountability of Parliament through elections

Parliament is held accountable for:

- The statute it passes
- How well it deals with issues during debate
- For the formation and scrutiny of government
- And how the people are represented.

### Accountability of the HoR

- MHRs elected for maximum of 3 years using the PV system adopted in 1919. PV is based on single member electorates and a majoritarian system.
- **SME**: electors choose one representative for their entire electorate. Aus has 150 electorates and 150 MHRs.
- SMEs allow for considerable accountability as there is only one representative that the people must scrutinise. Over the frequent, three year terms, electors can become familiar with the actions of their

representatives. There is seldom any doubt when voters must decide who is to be held accountable when they feel they have been poorly represented. The media in each electorate provides a constant stream of information of its own representatives up for election.

- **Craig Thomson** was elected for the seat of Dobell, NSW, in 2007, after serving as the head of the Health Services Union (HSU). He was accused of misusing HSU funds to pay for the services of prostitutes, a scandal which was extensively reported on and led to Thomson losing his seat in the 2013 election.
- **Clive Palmer** won the Fairfax seat of QLD in 2013. By February 2016, scandals had emerged surrounding how his business was run and the donations of QLD Nickel to the PUP. After the media began covering this story, there was a significant decline in voter support of Palmer, and he announced that he would not recontest his seat in the 2016 election shortly before it.
- **Sophie Mirabella** held the Liberal safe seat of Indi until the 2013 federal election as questions surrounding her personal conduct arise, and it was believed that she misrepresented her electorate for the sake of her role as a Lib shadow minister. Nearing the 2016 election, she revealed that Indi had missed out on \$10mil when they didn't vote for her in 2013, and in retaliation, Indi voted for Cathy McGowan for another three year term.
- **Majoritarian system**: tends to amplify a small majority of votes into a large majority of seats. The strong, stable majorities created by this are awarded an artifact of majoritarian systems known as the "winner's bonus".
- Whilst there are undeniable benefits of such a system such as government stability, it also tends to misrepresent voters by skewing results in favour of the winning party. For example, if 51% of every electorate voted for ALP and 49% voted for Libs, then every electorate would receive an ALP representative and Libs would receive no representation in the HoR.

#### Accountability of the Sen

- Originally, Sen was intended to perform the federal role of protecting the states. However since federation it has been largely partisan. Voters consider Senators as representatives, just as they do MHRs. Some senators, such as Xenophon and Lambie (Jacqui Lambie claimed to never pass leg. that would endanger Tas), have large state support and focus on many state related issues, yet they are a minority. There is also decreased accountability due to elections being held once every 6 years.
- The Sen uses MMEs and a PR voting system.
- **MME**: required because the PR system seeks to apportion Senators according to the votes.
- Elections using MMEs are always weak in terms of accountability. As voters have such large electorates and 12 Senators to vote for, how are they to know who is responsible for which goes on in their electorate?
- The Sen uses STV-PR, with ballots that can be almost a metre long and list up to 100 candidates. There are two ways to vote for the Sen:
- **Above the line**: numbering parties from 1-6 in order of preference. Members elected are determined by the party, and they are listed on the party's ticket. The higher they are placed on the ticket, the higher chance they have of being elected. Pre-2016 reforms, parties decided the order of preferences on a ballot. 90% of people regularly choose above the line voting. \* as the parties, not the people, decide who is elected, they are not held accountable. \*

- **Below the line**: when a voter attempts to number all boxes, sometimes up to 100, they are likely to make mistakes or otherwise accidentally cast an informal vote. However with reforms, they only have to number up to 12, and are thus much more likely to retain control of their vote.
- **Lisa Singh**: showed in the 2016 election the power of the below the line vote. ALP demoted her to the supposedly unwinnable 6th position of the party's ticket. However she launched a below-the-line campaign and achieved enough votes for a seat as an ALP Senator by convincing the electorate of Tasmania to vote for her specifically rather than the above the line ALP party ticket. This shows how the below vote makes the party directly accountable to voters' wishes.
- **Robert Colbeck** was similarly demoted to the 5th position on the Liberal ticket, and also encouraged Tasmanian voters to vote for him below the line. He did not ultimately achieve the quota to become a Senator, but did achieve more below the line votes than the Liberal party leader from Tasmania who demoted him.
- **Malapportionment**: where the numbers of voters between electorates are not approximately equal and "one vote" can have more than just "one value". The Australian Senate guarantees this, as section 7 requires each state have 12 Senators. This means that Tasmanian Senators to be elected, they only need ~26,000 votes whereas an NSW Senator would need ~ 345,500 votes. The fact that Senators from smaller states such as Tasmania and SA have so few voters to respond to means that they are held much less to account whilst still having significant influence in the Senate.
- Brian Harradine: held the balance of power in the Senate from 1994 to 1996 despite never polling higher than ~0.12% of the overall Australian vote, due to how the malapportionment in Tasmania amplified his votes.

### **Parliamentary committees**

- **Standing committee**:
  - The House Standing Committee of Privileges and Members' Interests
  - The Senate Standing Committee for Privileges
  - The Senate Standing Committee of Senators' Interests
- a Parliamentary committee which endures for the life of the parliament. Disbanded when a parliament is dissolved by the Governor General or an election. These committees are tasked with composing codes of conduct.
- Privileges: need to inquire into reports and complaints of breach or contempt of privilege, which may be referred to them under the House.
- Interests: inquire into and report on arrangements made for the compilation, maintenance, and accessibility of register of MPs' interests. They consider specific complaints about registering of declaring interests, and consider possible changes for an codes of conduct adopted by the House.
- **Members' and Senators' interests**: these committees exist to maintain openness and transparency about the financial interests of MPs. MPs must declare all shareholdings, properties, investments, and other financial interests, which the committee will keep up to date so that they can investigate them any time there is a possibility of a conflict of interest between an MP's pecuniary and public duties. MPs must not influence law in a way which would bring them financial gain.
- **Parliamentary Privilege**: all MPs have special exemption form any civil liability or criminal prosecution for anything they say while Parliament is in session. It is an enhanced form of freedom of speech. It is necessary for the debate, responsibility, representative, and legislative functions of Parliament. MPs may be held to account and sanctioned for misuse or breach of Parliamentary Privilege.

- **Privileges Committee:** SO 18 provides:
  - A committee of 8 Senators which shall be appointed at the commencement of a Parliament and shall inquire into matters referred to it by the Senate.
  - Composition: 4 govt members nominated by govt leader in Senate
    - 3 nominated by leader of Opposition in Senate
    - 1 nominated by micro/minor parties and independents
    - Chair nominated by Opposition and elected.
  - Acts as a court within Parliament that can enact extrajudicial disciplinary measures on MPs. The committees of the Senate often are not as partisan and show greater diversity, in reflection of the Senate itself, which can often lack even a majority party.
- **Advantages:** HC can only review statute produced by Parliament; there is no other body which can review MPs' behaviour.
- **Disadvantages:** Composed of MPs, therefore lack the impartiality of an independent body. Usually partisan as it is conventional for the composition of committees to mirror the composition of the chamber from which they are formed.
- **Craig Thomson:** elected for the NSW seat of Dobell, 2007. He had been the national secretary of the Health Services Union and had misused the HSU's credit card to pay for hotel accommodation and escort services. Fair Work Australia investigated these allegations over three years and their findings were tabled in the Senate in May 2012. Later that month, Thomson made a statement in Parliament professing his innocence and naming members of the HSU who he believed were in a conspiracy to "set him up". After criminal proceedings, Thomson was found guilty of the misuse of funds, and the Parliament moved a motion of 'regret', apologising to the members which he had named. It was not until 2016 when the Parliamentary Privileges Committee handed down its decision. It decided that the House would "reprimand" Thomson. It is worth noting that Thomson was on the committee during the years when ALP formed govt. He lost his seat in the 2013 election.
- **Hugh Mahon:** MHR for Kalgoorlie, WA. in 1920, PM Bill Hughes successfully moved for his expulsion from Parliament. This power no longer exists.
- **Work of the committee:** 136 matters referred from 1966-2007, with 147 reports tabled.
- Contempt of privilege has been found in 14 cases, out of 75 references in 65 reports.
- **Right of reply:** Citizens who wish to make a response to comments made about them in the House of Representatives or the Federation chamber may make a submission to the speaker for inclusion in the Hansard. Unless the speaker considers the subject to obviously be trivial, or if the submission is frivolous or offensive, they must refer them to the committee of privileges and members interests. They must then decide whether a response will be included in the Hansard .
- **Report 170: Persons referred to by the Senate:** Miss Lisa Hay and Dr Geoffrey Robinson both made separate submissions to the President of the Senate, Senator the Hon Scott Ryan, regarding a speech made by Senator Burstn in December 2017. The President passed the matter on to the Senator privileges committee and they found responses written by both individuals could be included in the Hansard report.
- **Senator Derryn Hinch** gave a speech in Parliament November 2016 shaming high school Redlands College in Brisbane, claiming that they attempted to prevent students and parents from knowing that Jonathan Sims, an ex second grade teacher at the school, was convicted for pedophilia to protect their image. Hinch specifically called out the school board chairman Jamie Ware, and presented his role in

the matter as covering the issue up and being threatening towards concerned parents. Jamie Ware submitted a response to the committee in March 2017 stating that Hinch's speech included "false accusations" and "misinformation", and requested for the "record to be corrected" and that Hinch give an "apology". By June 2017, the Privileges committee decided Ware's response would be included in Hansard and Hinch gave an apology in Parliament.

- **INEFFECTIVE MEASURES** - has not undone scandal surrounding school, was not reported on by media as heavily as the scandal was, very few people read the Hansard, and even less so when the corrections were included 7 months after the speech.

### **Procedures & processes**

- **Standing orders:** The rules by which each house of parliament operates. The constitution gives power to each house to make its own rules. Standing orders are enforced by the presiding officer of each house, the Speaker of the House of Representatives and the President of the Senate. They may be suspended by a motion of the chamber. In the House of Representatives the executive easily dominates and may easily suspend standing orders.
- **Tim Hammond:** removed from the house October 2016 under standing order 94A after a question for the PM Malcolm Turnbull resulted in bickering and his behaviour became disorderly.
- **Vote of no confidence:** enact CMR as they are aimed at a whole government. Can take several forms: a direct vote against the government, defeat of a core govt. Bill in the house, defeat of an appropriations bill, loss of government control of the business of the house. If a general motion is initiated by the Leader of the Opposition, and passes, debate will begin (as in a motion of censure) and a second vote will be taken afterwards. If it is successful again, the govt. will either have to resign and let the house form the new executive or request that the GG dissolve the house and issue the writ for an election. If a piece of legislation that would have enacted a policy which the govt. had focused on during their campaign in the last general election, and therefore were mandated to pass, is blocked in the House, then this is therefore an effective motion of no confidence. In order to spend money, and therefore govern, the intended use of the money to be spent must be verified by an act passed in Parliament. If the government loses control over this, and hence control over the business of the house then they have, by implication, lost the confidence of the house.
  - **Rudd:** the Rudd govt.'s core piece of legislation, the Carbon Pollution Reduction Scheme, was blocked by the Senate; however they were not required to resign as it passed easily through the House.
  - **Fadden:** in 1941, the Fadden Govt was forced from office after the House voted to reduce its federal budget by 1 euro.
- **Question Time:** an accountability procedure in which any member may ask a question of any minister concerning their portfolio or their conduct. Disadvantages include that ministers may easily give irrelevant answers or Dorothy Dixers, so long as they do not mislead the house, and it can often become a "political circus", sensationalised for media attention.
  - **Tanya Plibersek:** deputy leader of Opposition asks if Coalition agreement has been presented to Governor-General, Turnbull begins talking about 400k jobs created in Australia by Coalition.
  - **Adam Bandt:** Greens member asks Deputy PM Michael McCormack "Are you still a climate change denier?", question disallowed due to irrelevance to portfolio.

- **Speaker and President:** Speaker of the House and the President of the Senate are the presiding officers of each house who enforce the standing orders in them. When issues arise, the matter may be referred to the presiding officer. Such “points of order” will be subject to the officers’ interpretation of the Standing Orders. A weekly/fortnightly Procedural Digest is published containing the rulings of the Speaker, precedents set, and any strange situations. The Senate has an equivalent.
- The speaker is appointed by a majority vote in the HoR, which the govt will always win. This means speakers are often partisan. Their own character will also greatly influence the way the chamber is run when it is in session.
- Note that the Speaker is not a member of the executive or opposition and is not subject to IMR.
  - **Bronwyn Bishop:** removed ~400 MHRs from the House from 2013-15 under s.o 94A, only 3 of which being Liberals.
- **Senate Standing Committees on Education and Employment:** created by standing order 25
  - **Legislation committee:** deals with bills referred by senate. Consists of 3 govt senators, 2 opposition, and 1 minority. Chair elected by govt, deputy chair elected by opp.
  - **References committee:** deals with all other matters referred by senate and aligning with their portfolio. Composed of 3 opp senators, 2 govt, and 1 minority. Opp elects chair, govt elects deputy chair.
  - **Role:** To make inquiries into matters and bills referred by Senate and relating to their portfolio. Oversee performance of departments, including their annual reports. There is no specific time for these reports to be discussed in Parliament.
    - **The exploitation of general & specialist cleaners working in retail chains for contracting and subcontracting cleaning companies:** referred by Senate 19 June, 2 public hearings held in Tas and QLD, one more planned in VIC, submissions accepted until 12th July, and reporting end 15th October.

### **Judicial review**

- **constitutionality of legislation:** The HC has the power to declare any statute passed in Parliament as ultra vires if it does not exist under a Constitutional head of power (such as the concurrent and exclusive ones listed in section 51). Additionally, the court can only act *ex post facto*, and legislation can only be challenged by a party with standing. If this does not happen, the unchallenged legislation will remain law.
- However if an act is challenged in court and the HC rules in favour of the plaintiff, the statute will be struck down. Striking down legislation is the ultimate accountability mechanism.
- **Williams 2:** Williams again challenged the NSCP by challenging the constitutionality of the *Financial Management and Accountability Act 1997 (Cth.)* under the 51 (xxiiiA) social services power. The HCA agreed that the benefits of the service did not actually go to the beneficiary, and thus the amended act was struck down and the parliament found to be ultra vires.
- **Australian Communist Party v Cth [1951] Case:**
  - 19th of October 1950, Menzies passes the “ Communist Party dissolution act 1950 (Cth)”, which was a significant part of the Liberal-Country coalition’s electoral platform.
  - the ACT would disband the party and seize all its property, and allow the Governor-General to declare parties and individuals as communist affiliates. it featured 9 recitals supposedly justifying the facts and constitutionality of the act.

- it was immediately challenged by the Communist Party who disputed two main points:
  1. did the validity of the act depend solely on its preamble?
  2. if this was not the appropriate test for validity, was it invalid under some other test?
- If the preamble could validate the ACT then it would greatly increase the powers of the legislature over the Judiciary as it would be able to determine the limits of its own power.
- 5/6 judges decided no, it did not depend on the preamble, and yes, it was invalid as it did not fall under any constitutional head of power, such as the defence power of s.51 (vi).
- The case was significant as it clearly defined and upheld SOP even when Menzies had a clear democratic mandate to undermine it with the act.
- **Maxims**: created in the days when many lawmakers and interpreters were illiterate and consistent standards of interpretation needed to be upheld.
- **Ejusdem generis**: “of the same kind”. The meaning of a generic word can be understood by the specific words which preceded it.
- **Noscitur a sociis**: “by the company it keeps”. Acts are interpreted by their context.
- **Expressio unius est exclusio alterius**: “the express mention of one thing is to exclude all others”. Specific words create an unchanging “class”.
- **Rules**: used to apply general statutes to specific facts
- **Literal rule**: following the act’s wording, word for word.
- **Golden rule**: an alternative meaning to the act’s wording is applied, when a literal meaning would have produced absurdity.
- **Mischief rule**: applied when the act being interpreted is ambiguous toward the situation. The act is applied so as to suppress the activity which it intends to.
- **Relationship b/w courts and parliament**: there is constant feedback between the two institutions. Judicial review creates an incentive for Parliament to act only within its powers.

## CHAPTER 12: Accountability and the Government

### SYLLABUS: accountability of the executive and public servants

- Through CMR + IMR
- Through Senate Estimates and at least one other committee
- Through the Auditor General and the Administrative Appeals Tribunal
- Through Judicial Review

### ENEMIES OF EXECUTIVE ACCOUNTABILITY:

- **PARTY DOMINANCE**: strict adherence with party discipline often results in real debate and discussion taking place behind closed doors in the Party Room, and a loss of transparency
- **EXECUTIVE DOMINANCE**: increases the percentage of Parliamentarians who shape their actions in accordance with the will of the majority party, and thus not holding them accountable
- **PARLIAMENTARY PROCEDURES** that have not kept pace with the depth and new complexity of the modern day Parliament
- **MODERN TENDENCY OF OPPOSITIONS** to be obsessed with scandal and trivia to embarrass govt.
- **CMR**

- Refers to the accountability of an entire government. CMR relies on unity, solidarity, and secrecy, meaning decisions must be presented with a united front, and differing viewpoints must be discussed in Cabinet meetings. Few resignations have occurred due to policy complications.
- **Gary Punch**: Minister for Aviation Support who resigned from the Hawke ALP Cabinet in the early 1990s after he could not stand by their decision to implement a particular runway in an airport in his electorate. However, at the time it had recently become more acceptable to even go against your own party to represent your electorate, so he was included in the Cabinet again in 2 years time.
- **Stuart West**: resigned Hawke ALP Cabinet 1983 due to his discomfort with the continuation of uranium mining being allowed, despite ALP policy specifically stating it was against this; as the sole member of the left wing faction in the ALP, he stood alone in this opposition.
- Cabinet secrecy and solidarity must balance the number of rare voluntary resignations with the number of leaks it experiences.
- **Motions of no confidence**: dismiss an entire ministry. Their effectiveness first comes from the fact that they take precedence over all other house business. Standing orders then allows 30 minutes maximum for the Opposition to speak, 30 minutes for the Prime Minister, and 20 minutes for any other member. These motions can serve to frustrate the government and give the Opposition an opportunity to highlight problems.
- It is very rare that is effectively removes a govt, as that would require a breakdown in party loyalty and voting against one's own party.
- **1975 crisis**: motion passed after the parliament had been dissolved by GG of the time Sir John Kerr.
- **Effective motions of no-confidence**: the HoR may withdraw its confidence in other ways, such as defeating core government policy/legislation, or blocking supply in either the HoR or the Senate. Immediate resignation or a govt-moved motion of confidence are required following this.
- **Fadden**: 1941, Fadden's minority govt defeated after the HoR voted to reduce its federal budget by 1 euro.
- **IMR**
- Ministers are personally accountable to Parliament for their probity and propriety. They must not mislead Parliament, be personally or politically corrupt, have any conflicts of interest between their private actions and official duties, bring Parliament into disrepute, or avoid responsibility for issues arising in their departments.
- **Ministerial codes of conduct**: written standards for the behaviour of ministers set and enforced by the PM of the day. Intended to reinforce the accountability of ministers and therefore minimise potential damage to the government from breaches of ministerial responsibility.
  - **Rudd**: 2007, two new additions: ministers must deal openly with lobbyists, and may not undertake employment in their area of ministerial responsibility for 18 months after retiring from parliament. Good as they increased expectations on ministers and responded to criticisms of Howard's govt, but bad as both are still enforced by the PM.
  - **Abbott**: his Ministerial Standards code set out standards in relation 'to pecuniary interests, shareholdings, gifts and post-ministerial employment. It forbids ministers from employing family members in their ministerial or electorate offices...It requires ministers to stand aside if charged with a criminal offence and to resign if convicted. It also says a resignation may be required if the Prime Minister "is satisfied" the Standards have been breached "in a substantive and material manner"



- **Wilson Tuckey:** 2003, survived pressure to resign ( from outer ministry) after he attempted to seek the cancellation of a \$183 traffic fine acquired by his son. Admonished by Howard but not forced to resign – however, subsequent ministerial reshuffle saw him lose his portfolio.
- **Joel Fitzgibbon:** 2009, Minister for Defence in the Rudd Government was forced to resign due to inappropriate use of his ministerial office and a conflict of interest issue, personal corruption. Fitzgibbon failed to declare trips to China were paid for by a Chinese businesswoman Helen Lui and didn't declare hotel accommodation paid for by the NIB.
- **Sussan Ley:** resigned January 2017 due to increasing speculation about her spending of taxpayers' money during trips to the Gold Coast, at one point even purchasing an investment property. She was not forced to leave, but did so amidst the media outrage.
- Concept is that a minister shall still be expected to explain themself to Parliament after having done something wrong; even though they will not always be forced to automatically resign, they are still made to face consequences for their actions.
- **Censure motion:** is a convention that makes it theoretically possible to sack a minister for the conduct, competence, or decisions. Based on section 64 - must be drawn from parliament.
- Limited effectiveness as a means of sacking a minister, but still an effective accountability measure as it allows for other MPs to draw attention to the matter, and can cause embarrassment sufficient enough to force resignation
- PM makes their own code of conduct, meaning their ministers are accountable specifically to them. PM decides whether or not the minister is to resign

#### House of Reps:

- Has never passed, as major party will always vote as a bloc to protect a motion of censure against one of its own members. However, moving them in Parliament can be an effective delaying tactic as it allows the Opposition time to speak, can be used with other pressuring tactics, and will often receive media coverage.
  - **Mal Brough:** implicated in the wrongful behaviour of procuring & copying the personal diary of Speaker Peter Slipper.
  - **Jamie Briggs:** inappropriate behaviour with a female staffer during a business trip in Hong Kong
  - **Stuart Robert:** misrepresented himself on a personal trip to China, causing accusations of a conflict of interest.
  - These three ministers were subject to censure motions between 2015-16. None of these motions were successful, however the pressure applied & embarrassment caused forced the three to resign anyway.

#### Senate:

- Censure in the senate is a uniquely Australian feature, as it is only in Aus' Westminster system that the Senate is such a powerful upper house and that ministers can also be senators.
  - **Senator George Brandis:** Attorney General for Abbott & Turnbull govts, successfully censured March 2015. This was due to backlash after he heavily criticised Human Rights Commissioner Gillian Triggs. Tony Abbott stepped in to defend him extensively.
  - **Fiona Nash:** 2014, Assistant Health Minister was censured by the Senate for misleading the Upper House over links to the confectionary industry and conflicts of interest. A website showing healthy food ratings was taken down after it was established that the minister's Chief

of Staff was a shareholder in a lobbying company owned by his wife. The minister did not resign but her Chief of Staff did. Nash here did not need to take responsibility for her departments poor conduct.

- **Committees:**

- Standing committees operate continuously, and select committees are established by the Parliament, relevant to specific contemporary issues eg the NBN committee.
- **Parliamentary Privileges and Members' Interests Committee:** can contribute to ministerial accountability as they can inquire into reports of contempt or breach of privilege, and can investigate supposed conflicts of interests.

- **Senate estimates committees:**

- Investigate issues and bills so that Parliament can be well informed when making decisions of national significance. Free from influence of executive dominance, as ministers are not eligible to sit in the SEC. Theoretically, any member of the public service may come before the SEC in a public hearing, but it is often heads of departments, eg the Chief of the Defence Force. Ministers are expected to attend. These hearings can allow effective scrutiny of government expenditure and policy. Senate SO 26 (v) allows for ministers to be questioned directly by the committee.
- Twice a year estimates of proposed government expenditure (taxpayers money) are referred by the Senate to the 8 legislation committees for investigation and reports are then presented - 8 committees include community affairs and economics, education, and employment.
- The hearings for 2017-2018 were on the 22-25 of May and supplementary hearings took place 23-24 October 2017.
- **Scrutiny procedure:** Treasurer presents annual federal budget and explains expenditure by portfolio -> each of the 8 committees scrutinise the budget statements respective to their respective areas -> committee hearings begin; ministers & public servants explain revenue collection and the delivery of government procedure which may highlight inconsistencies in figures -> after initial hearings in May, committees present reports highlighting areas of concern -> later hearings in October allow Senators to check and further question -> ministers can be called to account for mistakes they have made.
- **Legislation referred:** recently, more and more bills have been referred to the Senate Estimates Committees from both houses of Parliament. Just before the 45th Parliament, 14 bills have been referred to committees, compared to the 10 that were referred by the 44th.
- **Problems:**
  - HoR ministers not required to come Committees, although they must be represented by a Senator; meaning some ministers can avoid SECs and not be held accountable
  - Senators who representing Ministers from the HoR may rely on the senior public servants present to know their department's budget. Under intense questioning, department officials/Ministers may reveal details of about govt decisions and events that have previously not been public
    - **Cash:** October 2017, Michaelia Cash (Min for Employment) had to admit one of her staffers did give advance notice of a raid on the AWU to journalists even though she had previously denied the allegation. However Senator Cash then refused to answer questions as there was a criminal investigation in place and claimed 'public interest immunity'
- **Advantages:** Hon. John Faulkner - "the best accountability mechanism of any Australian parliament"

- Senior ministers giving evidence and explaining actions is how the SEC promotes accountability. These ministers and officials are held accountable as they are remaining answerable to Parliament.
  - **Mitch Fifield:** Minister for Communication and the Arts was asked questions on notice during the supplementary budget estimates for 2017-2018 by many ministers including Anthony Chisholm, Pauline Hanson, and Sarah Lee-Young, and all were answered.
- Senators are able to question a large number of both ministers and public servants directly, rather than just ministers as in QT, so they have a great opportunity to gather information on the operations of govt.
- The SEC hearings play a significant role in accountability as accountability is about both explanation and information. Ministers must explain why they are spending taxpayers' money, not just how. The threat of such scrutiny can serve as an incentive for executive to remain accountable to Parliament/a catalyst for improved management and administration in the public sector.
- Also, ministers must answer truthfully, and investigations can be made into almost any area, not just the budget.
  - **Abbott:** from 2013, Abbott govt avoided SEC scrutiny into the activities of the Department of Immigration and Border Force, which had been given the power to tow boats of asylum seekers travelling from Indonesia back into Indonesian waters. The govt however determined that all matters relevant to these manoeuvres were "operational matters" regarding national security; hence to disclose details would endanger national security, thus avoiding scrutiny from the SEC. The govt also had the power to classify certain matters as "secret", and did this to all "on-water" matters.
  - **Larry Marshall:** 2016, Chief Executive of the CSIRO, cut 350 jobs from the Cth-funded agency, and was questioned about this during a public hearing. This instigated widespread debate across many media outlets over the value of educated scientists in the future for handling increasingly concerning issues such as adaptation to climate change.
  - **Mark Scott:** former ABC Managing Director questioned about supposedly allowing an extremist Muslim man to express radical views on the Cth-funded ABC program QandA. Similarly sparked widespread debate.
  - **Senator Parry & Mitch Fifield:** November 2017, the Senate Standing Committees on Legal and Constitutional Affairs submitted its report on whether the conduct of Senator Mitch Fifield was complicit with the ministerial code of conduct after it was found that he did not act on his knowledge of former Senator Stephen Parry's dual citizenship status, which under s.44 made him ineligible to sit in Parliament.
- **Parliamentary Joint Committee on Human Rights:**
  - *Human Rights (Parliamentary Scrutiny) Act 2011* establishes the PJCHR, making it a standing committee. Responsible for scrutinising all Parliament legislation for compatibility with the seven international covenants and conventions Aus has agreed to, including: the *Convention on the Rights of the Child*, and the *International Covenant on Civil and Political Rights*.
  - The committee consists of five MHRs and five Senators. Ministers are ineligible to be members of this committee, to keep it free of executive interference.
  - Each sitting week it publishes a scrutiny report to each house of Parliament, concerning any human rights issues discovered. By ensuring that all bills and executive regulations are complicit with the

human rights standards established in these seven covenants, the committee maintains the status of them in Australia.

### - **Cth. Auditor General**

- *Auditor General Act 1997 (Cth.)* establishes Auditor General of Australia and the Australian National Audit Office (ANAO). It is a statutory authority, and the Auditor General acts as an independent Officer of the Parliament, a part of the “architecture of accountability”. Its website describes its role as: “providing an independent assessment of selected areas of public administration, and assurance about public sector financial reporting, administration, and accountability”. An appointed official who conducts independent audits of government spending to ensure that those responsible for expending government money do so legally and efficiently.
- The ANAO is the body which supports the AG.
- Necessary as outdated methods of as CMR & IMR are largely ineffective with a modern-day Australian Parliament, compared to how effective they once were with the older Westminster systems they were designed for.
- The current Auditor General is Grant Hehir. They are appointed by the Governor General, on advice of the PM and the Joint Committee of Public Accounts and Audits; appointment by committee means that the Auditor General is both a person of bipartisan support and free of political agenda.
- **Performance Audits:** inspection of how a govt department or agency carries out its day to day business. Observes everything from how stationery is ordered, contracts handled, and human resources managed. The AG advises Parliament on how money is being spent and whether outcomes are being achieved.
- **Financial Audits:** check financial statements and records of a dept or agency. These can find corruption or inefficiency in handling the money that was allocated to that dept or agency in the budget.
- **Assurance Reviews:** the Australian Public Service is governed by - a code of conduct, the Public Service Standards, and the *Public Service Act*. AG must ensure that all govt entities abide by these guidelines. They do this by ensuring these entities are always up to date with changes in these three things, is using the correct information.
- Role of the AG can be contentious as executives may be sensitive to the implied criticism of their department’s policies.
  - **Parakeelia:** private IT company set up by the Liberal party to collect a database of constituents in electorates. The company charges ~\$2500 per year for Liberals to access to the database. That ~2500 was mainly derived from Cth electoral funding paid to Liberal MPs. within three years, the company was found to have donated over \$1 million.
  - ALP and Greens claim it is simply a vehicle for the conversion of electoral funds into Liberal revenue. Shorten: “This looks like a Liberal Party washing machine turning taxpayer dollars into Liberal party profits,” claimed it was a “scam”.
  - **Sophie Mirabella:** held the Liberal safe seat of Indi until the 2013 federal election. Nearing the 2016 election, she revealed that Indi had missed out on \$10mil of funding for a hospital in Wangaratta when they didn’t vote her in in 2013. Bill Shorten, leader of the opposition in the house, referred this matter to the AG, as MPs are not allowed to offer inducements in return for votes. The matter of whether \$10mil had been withdrawn after she lost the seat of Indi was investigated.
  - The AG is here acting as an officer of the Parliament as it is investigating an issue referred by the Parliament, about the Parliament.

- ANAO publishes the Better Practices Guide and the AUDITFocus newsletter online to make all in the public service, particularly senior public servants, aware of all aspects of good administration and the role and practices of the ANAO. These also make the public aware of the watchdog of ANAO.
  - **Gillard government:** 2012, was forced to hand over millions of dollars of taxpayers' funds in compensation to Sky News after mishandling the \$223 million tender to run the Australia Network international television service. Cabinet twice overruled unanimous public service advice that Sky News be given the 10-year contract to provide Australia's international "soft diplomacy". Instead, the government aborted the tender process and handed the job to the ABC. The Auditor-General has completed a report, which is yet to be released, that is highly critical of the handling of the tender.

#### - Administrative Appeals Tribunal (AAT)

- Created by the *Administrative Appeals Act (1975)* and implemented by the executive.
- An administrative decision is any decision made by a government dept or agency in the course of carrying out the law.
- The tribunal behaves in a manner similar to a court, in that parties with standing are able to challenge administrative decisions before a panel and receive an adjudication on the case which will enforce or recommend a change. However they differ significantly in that they are not endowed with the same judicial power as a court. They do not interpret or create law, and consider more than just the facts of a case. A tribunal considers the merits and circumstances of a case, to determine the decision being disputed's "fairness" or morality. They emphasise informality, timeliness, and efficiency, unlike courts. However, appeals are possible from the AAT to the HCA.
- Parties represent themselves before a panel of adjudicators and argue their case in plain English.
- The AAT's jurisdiction is created by 400+ current acts or regulations which allow for it to decide administrative decisions. It's website states that the three most common decisions for review are those concerning child support, worker's compensation, and welfare entitlements; however, they can range anywhere from aviation to disability.
- The AAT is a powerful accountability mechanism due to its broad jurisdiction. As of July 2015, the Migration Review, Refugee Review, and Social Security Appeals Tribunals were all abolished and replaced by it. Its website describes it as a "one stop shop for independent review". It is effective as it helps nearly anyone in Australia to test the administrative decisions affecting them, and determine if the public service has served them effectively. It shows whether a decision was not just legal, but also right.
  - **Kashkooli and Minister for Immigration and Border Protection (Citizenship) [2016]:** Armin Kashkooli, Iranian citizen granted a refugee visa in Australia, was charged with shoplifting August 2014. He applied for Australian citizenship November 2014, but predated it to May 2014, and answered "no" to any criminal convictions. An official of the Dept of Immigration and Border Protection made the administrative decision to deny his application on the grounds of bad character. This was challenged in the AAT, and the decision was upheld. The fact that the decision was reviewed shows that the dept was held to account. The case involved referring the law, and previous AAT and HC decisions.
  - **Penis case:** a man injured his penis when he spilt caustic soda onto his clothes at work, and failed in his legal bid to claim the disability support pension

#### - Judicial review

- Role of the HCA is to review the decisions/actions of the executive, including:

- 1) decisions/actions by the executive in terms of the High Court's original jurisdiction s.75 (3) and (5);
- 2) the constitutional validity of executive decisions
  - **Combet and others v Commonwealth of Australia (2005)**: the Government's multi-million dollar industrial relations advertising campaign was outside the authority of the Budget Bills, however the Court ruled that the campaign was covered by the Appropriation Act.
  - Judicial remedies 4 administrative wrongs -
  - Writs of Mandamus: created by s.75(v). a court order requiring a government official to carry out (or not carry out) a specific act that the official is obliged to do by law. These keep the govt accountable for the lawfulness of their actions.
  - Injunctions: writs which prevent certain actions.
  - **Plaintiff S99 v Minister for Immigration and Border Protection [2016]**: S99 was an African refugee who was raped during an epileptic fit where she was being kept in the Nauru detention centre, and fell pregnant. She wished to have an abortion, which is illegal on Nauru. The Australian govt's assistance came in the form of transferring her to PNG for a medical abortion. S99 requested to receive an abortion in Australia, as she believed that PNG medics did not have a sufficient understanding of her epilepsy. The Australian government claimed that she was Nauru's responsibility, and offered her either a transfer back to Nauru or the abortion in PNG. She contacted Australian refugee lawyer George Newhouse, who was able to receive an injunction preventing the govt from either transferring or arranging an abortion for S99. ultimately, the Minister for Immigration and Border Protection was found to have put her in the way of significant medical harm.
  - **Pacific solution**: policy adopted by the Howard govt which introduced mandatory detention in the offshore detention centre of Nauru. Was criticised as harsh and unethical, however achieved its goal as a deterrent of reducing the number of deaths at sea and boats arriving in Australia.
  - **Malaysian solution**: *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011)
    - A deal made between the Gillard govt and Malaysia that would exchange 4,000 processed and confirmed refugees from Malaysia for 800 Australian asylum seekers. This was introduced to avoid reinstating the offshore detention of the Howard govt which ALP had harshly criticised, and to deal with the increased number of asylum seekers arriving by boat following Rudd's abolition of the Pacific Solution and increased boats due to civil war in Sri Lanka.
    - August 2011, David Manne, refugee advocate and lawyer, challenged the Malaysian solution under section 198a of the *Migration Act 1958*. This section requires that countries that Australia transfers migrants to provide sufficient protection to them. Chris Bowen, minister for Citizenship and Immigration, claimed that the refugees would be safe in Malaysia. However, the HCA found this to be incorrect, as Malaysia had not signed the Refugee Convention and was not bound by international or domestic law to provide sufficient protection to them.
    - The Gillard govt attempted to hurriedly amend the act so that the solution would be lawful, but as a minority govt, was unsuccessful. Gillard voiced that she believed the HCA was interfering in areas where it should not.
  - **Williams 1 2012**: Ronald Williams, father of children attending schools which would receive chaplains under the program, challenged the Constitutionality of the NSCP which the Gillard govt.

had been funding without legislation. The HCA found that s.61, which creates the executive, enforces that the Cth. must legislate for programs they wish to finance. The govt was forced to amend the *Financial Management and Accountability Act 1997 (Cth.)* to include the NSCP as a “social service”, under the constitutional head of power of section 51 (xxiiiA) “social services power”.

- **Pape v Commissioner of Taxation:** Bryan Pape, a law lecturer and barrister, argued in the HCA that the Tax Bonus for Working Australians Act (No 2) 2009 (Cth.) was not supported by any constitutional taxation power. The act would give \$250-900 to working, tax-paying Australians with under \$100,000 taxable annual income, as part of the Rudd Govt’s “economic stimulus package” following the GFC. It was introduced as a “bonus”, which Pape argued was actually a gift. His standing to refute this act in court was derived from the fact that he was eligible for a bonus of \$250 from the act. The HCA found in favour of the Cth, and that the act was valid under the appropriations power (81 + 83), and the executive power (51 xxxix + 61), however not to the taxations power (51 ii).
- **Plaintiffs 297 2015:** *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016)
- The High Court invalidated federal legislation that exempted offshore resource activities from visa requirements. The Court ruled that a Determination made by the Assistant Minister in 2015 which negated certain visa requirements that applied to non-citizens in offshore projects exceeded the powers conferred on the Minister by s9A of the Migration Act.

## ACCOUNTABILITY OF THE GOVERNOR-GENERAL

### SYLLABUS: the extent of the accountability of the GG and the Office of the GG

- **Through appointment**
- **Through removal**
- **The “1975 crisis” and the “Hollingworth affair”**
- **Cosgrove:** 2016, critiqued for showing weakness when he used his office to prorogue and recall Parliament on the advice of PM Turnbull, so that Parliament could debate the ABCC. since 1977, Parliament had not been prorogued/recalled once, despite it happening 28 times before then. Senator Conroy claimed Cosgrove had demeaned the office by interfering with the democratic process, and likened his actions to the “long, dead arm of Sir John Kerr”.
- **Origins of the Office:** first ever Governor was Captain Arthur Phillip who wished to represent the interests of the Crown in the new colonies. Due to the distance and apathy of the British Parliament, Phillip had almost absolute power; both executive and legislative. Since then, the roles of the GG have been significantly limited by convention and the constitution.
- **Appointment:** made at the “Queen’s pleasure” under section 2. Awarded “such functions of the Queen as her majesty may be pleased to assign to him”. This implies the formal mechanism of accountability to be appointment and dismissal by the Queen.
  - **Historically:** made by the monarch on advice of the Colonial Office in London. Meaning many GGs appointed were UK born and ill suited to the position. Until 1965, all but 2 GGs (Sir Isaac Isaacs, 1931 and Sir William McKell, 1947) were born in the UK.
  - **Today:** since the 1930s, selection had been made by PM after consulting with colleagues. Selected candidate is asked whether they are interested, and if so, a recommendation is made to the monarch. Monarch may decline, request another nomination, or even appoint someone of the own choosing.

- **Sir Isaac Isaacs:** An Australian-born Jew in 1931. King George V argued that no Australian could ever be suited to the role. PM James Scullin insisted, referring to appointments of native born GGs in South Africa and Ireland in his argument. Statute of Westminster 1931 ratified the right of PMs to directly advise monarchs.
- Appointment by PM means that GG can be someone who reflects values and qualities which govt. wishes to see reflected in country.
  - **Sir Peter Cosgrove:** long history of military service reflects patriotism of notably conservative Liberal PM Tony Abbott.
- GG must take an Oath of Office, Oath of Allegiance, and issue a proclamation, showing the seriousness associated with the appointment. The formal acceptance is overseen by the PM, Chief Justice of HCA, and Presiding Officers of both houses - witnessed by representatives of all three branches.
- **Removal:** tenure is at the pleasure of the Queen, although typically lasts 5 years. Remuneration is set in the Constitution at 10,000 euros unless otherwise determined by Parliament. It is set throughout the term so that the govt cannot financially manipulate the GG to achieve desired political outcomes. Since *Governor-General Act 1974*, it has increased with every term. Currently, it is higher than the chief justice of the HCA.
- By convention, the Queen may recall or dismiss a GG before the end of the term on advice of the PM. Due to respect for the office, they are offered the opportunity to resign. As no GG has ever been asked to resign, it is unknown whether the Queen would agree to it.
- Section 4 allows the Queen to appoint a stand in administrator in the event of a GG vacancy; as happened with the resignation of Hollingworth.
- **Sir John Kerr:** 1977, claimed the resignation was to accept a position of Australian Ambassador to UNESCO in Paris, however was actually due to his untenable reputation.
  - **1975 crisis:** Kerr issued a letter to PM Gough Whitlam referencing his power under section 64 to remove ministers, and dismissed the entire ALP Whitlam govt after his refusal to call a double dissolution despite the Senate continually blocking supply.
- Kerr believed guarantee of supply to be a necessary component of the position, and that the Senate had a right to refuse supply; as they are the House of Review.
- The letter by Kerr demonstrates the need he felt to remain accountable to the people in committing such an unprecedented action; he justified it, saying the govt insisted on governing without parliamentary supply. He also sought the opinion of HCA Chief Justice Sir Garfield Barwick. Under section 63, the GG must follow advice of the PM; however, Whitlam had expressly prohibited him from a consultation with the Chief Justice. This action shows both the unconstitutional conduct of Kerr and his desire to remain accountable to the people.
- Whitlam argued that Kerr acted outside the conventions of responsible govt, which require the GG operate under the PM. Additionally, he expressed concern in consideration of the fact that the ALP govt had had a majority in the lower house; hence still held the confidence of the people.
- The court of public opinion held the GG to the fullest extent of accountability. Many people were unhappy with Kerr's use of reserve powers; he, his family, and his representatives were frequently met with jeers, attacks, and even protest in public. A quote that summarises the mood of Australia at the time was famously made by Whitlam on the steps of Old Parliament House: "well, may God save the Queen, because nothing will save the Governor-General". This shows the necessity of a GG to maintain support of the people if he is to serve his role well.



- Many of those in Parliament were similarly displeased; Gordon Scholes' letter to the Queen requested the "reinstatement of the former PM in which the House expressed confidence".
- A letter in response, written by the Queen's secretary, totally detached her from any involvement. It said an Australian PM was the "only person competent" to commission a GG. This casts doubt on the formal mechanisms of removal, because it suggests that the modern monarchy does not wish to play a hand in Australian politics.
  - **Hollingworth Affair:** Dr. Peter Hollingworth, previously Archbishop of Brisbane, appointed by Lib John Howard in 2001. In 2003, was met with allegations of covering up child sexual abuse in the Anglican church.
- Hetty Johnston, victims of child sex abuse advocate, led the campaign against him. In ABC program "Australian Story", Hollingworth admitted to having been unqualified to handle the issue, and appeared to blame a 14 year old victim, saying "this is not child abuse". He later apologised and condemned the actions of pedophile priests.
- In 2003, a report investigating the actions of Hollingworth was tabled in QLD Parliament, at the same time he had to defend himself against allegations of rape. Howard retained his support, but other senior ministers such as Treasurer Peter Costello suggested his resignation. Eventually, Hollingworth was forced to resign due to public pressure after bringing the office into disrepute in May 2003.
- **The Public Service:** amendment to *GG Act 1974* established Office of the Official Secretary to the GG being established as a statutory body.
  - Aids in meeting the ceremonial, non-ceremonial, and constitutional duties of the GG
  - Follows accountability measures such as production of an annual report on the programs, outcomes, and budgets of the year that is to be tabled in both houses of Parliament.
  - **Annual report 2014/2015** revealed that 11 Freedom of Information requests had been made that year and that the appropriations available to the office of the GG that year was \$17,660,000.
- **The courts:**
  - **Kline v Official Secretary to the GG (2013):** Ms Kline requested access to documents relevant to the substantive powers/functions of the GG of Australia, which was made in accordance with section 6A(1) of the *Freedom of Information Act 1982*, which allows for the disclosure of documents that "relate to matters of an administrative nature". Request was denied by Official Secretary to GG.
  - Kline appealed the decision to: the Australian Information Commissioner -> Administrative Appeals Tribunal -> Federal Court -> special leave to the High Court. Decision of Secretary consistently upheld, as HCA found that issues relevant to an "administrative nature" had to regard the "office 'apparatus' that supports" the GG.
- **Legal power issue**

## ACCOUNTABILITY OF THE COURTS

### SYLLABUS: The accountability of the courts

- Through the appeals process
- Through parliamentary scrutiny and legislation
- Through transparent process and public confidence
- Through the censure and removal of judges, including section 72

### INTERNAL ACCOUNTABILITY

- **Appeals** are reviews by higher courts of a decision made by a lower court in the court hierarchy, which may be heard by an ordinary higher court or a special court of appeal (eg the Supreme Court of Appeals WA). Superior appellate courts have judges with a higher level of expertise and experience, and hence the power to reverse the decisions of lower courts. The process does not guarantee that the case will be re-heard, as the court may reject its grounds, or the appeal may not have been lodged within the time period.
- **Appeal by right:** on the grounds of an error of law, such as exclusion of relevant evidence or incorrect instructions to a jury.
- **Appeal by leave:** special permission is granted by the courts in the case of a claimed error of fact (or fact/law) or disagreement with the sentence.
- **Double jeopardy:** the prosecution cannot appeal a case on a matter of fact one they have been acquitted of a charge (they cannot be re-tried), but they can appeal on a claim of an error of the law or against the sanction applied.
- **HCA:** not a right to appeal; the HCA must agree to it. Only 5% are allowed. Can be made on several grounds - error of fact/law, verdict unsupported by evidence, miscarriage of justice; if appeal is successful, the HCA can reverse the conviction or send the case back to a lower court for retrial (as with Mallard).
  - Andrew Mallard
  - **Darryl Beamish and John Button:** two men accused and wrongfully convicted of crimes committed by serial killer Eric Edgar Cooke in the 1980s.
  - **Dietrich decision:** 1992. It was decided that those with no assets should be provided legal aid free of charge, however many who cannot afford them still can't justify paying it. Even when they are successful, individuals do not have the right of refund, which limits the justice system's ability to hold courts to account.
- **Ratio decidendi:** the judge's reasons for deciding. Published in that court's website or in law reports. They are examined during an appeal. A powerful check on judges as they must justify and explain their own actions.

- **Justice Michael Kirby:** “accountability by way of appeal is necessarily limited to accountability within the rules governing appellate intervention”. Promotes the idea that the rules surrounding appeals themselves can be a limitation. For example, higher courts may decide that there is no grounds for appeal or that the appeal has not been lodged within the time limit.
- **Attorneys General:** ministers in Cabinet who act as a “Protector of the courts”. Appointed by GG under section 72. The Cth and each state/territory has an Attorney General. Cannot directly interfere with the judicial process, but must assist it in areas such as making judicial appointments and recommendations, obtaining funding and making decisions.

### Natural justice & trials:

- Natural Justice is a principle of justice incorporating the rule against bias and the right to a fair hearing. Fair processes for determining the truth in a dispute, also known as “due process”. Courts and tribunals have a duty to act fairly.
- **Elements:**
  - Entails the right of all citizens to have access to due court processes before an unbiased judge and, where appropriate, be judged by their peers.
  - The right of appeal when the original trial contained flaws
  - Requires an unbiased system with impartial decision makers
  - Reasons for decision (*ratio decidendi*) must be made available, media must be able to report
- Internal checks and balances include the very old, traditional, publicly trusted processes used such as the adversarial system.
- **Fair trial:** natural justice requires “due process”, or a fair trial. Elements of a fair trial include:
  - The adjudicator (judge/jury) must be impartial
  - Each side must be able to present their case
  - Decisions must be based on evidence and law
  - Hearings must be open and transparent, unless in exceptional circumstances.
- **Nemo iudex in causa sua:** no one should judge their own cause; today means that biased judges or judges with a conflict of interest must remove themselves from the court process (declare the conflict and recuse themselves) or else they may cause a mistrial, and grounds for appeal. Biased adjudicators can be held to account in the case of an appellate court reversing or quashing the original conviction, or ordering a retrial.
- **Audi alteram partem:** hear both sides; today shown as trial and pre-trial processes which give both parties a chance to compile evidence and witnesses to form their own cases.
- **The adversarial system** has several main stages, regardless of whether it is employed in a civil or criminal case - examination in chief, cross examination, re examination, and each party may make objections can be tried by the same impartial judge. The judge’s role in this is to ensure procedural fairness, or else risk creating grounds for appeal.
  - Civil pre-trial: statement of claim and statement of defence made, evidence may be pursued through interrogatories and discovery of documents.
  - Criminal pre-trial: defendant has a right to know what they have been accused of and the evidence against them, the right to silence ensures that they do not have to contribute to the prosecution’s case against them.

- **Evidence based decisions:** strict rules of evidence are used to ensure only evidence of the highest quality is admissible and used in the search for truth and in making final decisions. Each party is free to present evidence and test the evidence presented. They can do this through objections, which the judge will then decide upon. Objections to inadmissible evidence may include: hearsay, opinion, irrelevant, or circumstantial evidence.
- In Western Australia, the judge must charge the jury. Meaning, they must instruct the 12 jurors on what evidence to take into account and what to disregard, and how the law is to be applied.
- **Public hearings:** in cases requiring protection of vulnerable witnesses or sensitive information, judges may decide to hold trials *in camera* - out of the public eye. In all other instances, court proceedings are open to the public. There are public viewing galleries in the courtrooms, and the media may publish reports on trials online or in newspapers. This open system ensures public confidence.
- **Public confidence in courts:** meaning the people's' trust that the courts are open, balanced, fair, impartial, justified.
- MPs are quite possibly the least trusted officials in Australia; they are frequently seen as partisan, self-interested, or incompetent. Comparatively, the public often finds it much easier to maintain confidence in the courts, as they are apolitical, have no agenda, do not have to appeal to populism or compete with each other as they are not elected, and have a much older and more established focused on achieving justice and discovering truth.

## EXTERNAL ACCOUNTABILITY

- **Traditional accountability - SOP**
- **Courts & Parliament:** lawmaking by the courts exists in the form of the complex common law; which is technically an infringement of SOP.
- Parliamentary/statutory sovereignty upholds SOP, as laws made by Parliament override those by courts. Statute may clarify a common law
  - **Ipp Report of 2002** found it was too easy to prove negligence in court and damages awarded were excessively expensive so, in response, most state Parliaments enacted statutes similar to WA's *Civil Liability Act 2002*.
  - **Native Title Act 1993** clarified the Native Title land rights created in *Mabo v QLD No 2* (1992), abolishing the legal principle of Terra Nullius. Was necessary to solve the confusion across Australia about the impact the case would have on pre-existing property rights.
- or abrogate (overrule) it if it feels it is developing in a way it wishes to check.
  - **Trigwell v State Government Insurance Commission (SGIC) [1979]**, in which the plaintiff Trigwell, a survivor of a fatal road accident caused by livestock straying onto a highway, sued the owner of the livestock and the SGIC, who had been the insurance company of the deceased driver. The HCA followed an old English common law precedent finding the owner of the livestock was not responsible. The Victorian parliament passed the Wrongs (Animals Straying on Highways) Act 1984 to abrogate the precedent which caused the decision.
- Mandatory sentencing in WA and NT limits the judicial discretion, which normally would allow judges a wide interpretation of statute to apply sentences that fit the crime, considering circumstances. These laws force a judge to jail offenders and were passed due to community concern that sanctions

were too light, with too much focus on rehabilitation and not enough on retribution, deterrence, and community protection.

- **Minimum 15 years imprisonment** for physical or sexual violence committed in the course of an aggravated home burglary in WA.
- Courts and Government
- Constitutional accountability
  - Justice Lionel Murphy