
Bronwyn being Removed
from Parliament


REMEMBER AUSTRALIA
CHANGE OF PRIME MINISTER MEANS
CHANGE YOUR SMOKE ALARM BATTERY

UNIT 3


Turnbull
Australian
Prime
Ministership
Peter Dutton
Scott Morrison


NEW ROYAL BABY?
MIGHT SEE IF I CAN KNIGHT IT

Legislative, executive and judicial powers with reference to the CW Constitution and with comparison to one non-Westminster political and legal system

Legislative power

The legislative power is vested in the commonwealth Parliament (which formally includes the Queen). It is the longest chapter of the constitution and is about half of the whole document. It contains various parts

- Power to make statute laws.
- Section 1 creates bicameral commonwealth (House of Reps, senate)
- Queen and her head of state (GG) comprises the Head of State
- Statue laws are universal and powerful instruments for social control and they need to reflect the will of the people in a democracy. Achieved by s7 and s24
- Constitution creates a federal nation - one in which the powers of government are divided between one central and six state governments
- Federalism creates a limited sovereignty for the Commonwealth Parliament, which is achieved by specifying and enumerating the areas in which it can make law. Specific powers are written and are called heads of power
- CW makes laws covered by a head of power, if not they can be challenged in the high court. In this respect the CW parliament is similar to the US congress and contrasts with the British Parliament, which has almost no restriction on its law making powers and enjoys a wide ranging parliamentary sovereignty

Executive power

The exec power is vesting in the Queen and is exercisable by the Governor General - This is a very short chapter and establishes the appointed formal or constitutional executive. Importantly there is no mention of the political executive, the PM, and cabinet. Chapter 2 must be understood within the context of the conventions of Responsible parliamentary govt.

- Power to carry out or execute by developing policies and implementing statutes. This is done through a wide range of elected politicians, agencies and government employees and is often referred to simply as the government
- Section 61 vests exec power in the GG
- Constitution makes almost no mention of the political executive. The political executive or government is comprised of the
  - Cabinet composed of the PM and senior ministers
  - Outer Ministry made up of junior ministers and assistant ministers (formally called parliamentary secretaries)
- Cabinet ministers are chosen by the PM from elected members of parliament
- Executive branch also includes the public service, comprised of government departments, agencies and statutory authorities. This can be thought of as the administrative executive. It is appointed and governed b yeti Public Service Act 1999 and other statutes. The constitution makes almost no mention of the public service.

Judicial power

Judicial power is vested in the high court of Australia and allows the parliament to create other federal courts. It establishes the independence of the judiciary as well as the original and appellate jurisdictions of the High court, including its unique jurisdiction to interpret the constitution

- Judicial power is the power to adjudicate and to make legally binding decisions. It is the power to make decisions about rights and obligations by interpreting and applying laws. Courts resolve disputes, Court decisions are law
- Section 71 vests judicial power in the High Court

USA

Legislative power

- vests legislative power in the Congress of the US, consisting of the Senate and the HOR.
- US congress is the leg body within American federation and is created by Article 1 of the US constitution.
- Bicameral legislature with a HOR and a Senate, both directly elected by the people. Co-equal in power however the senate cannot initiate a money bill.

- **Specific powers**
- Article 1 - legislative power is vested in the Congress, which shall consist of a senate and house of representatives, meaning that it is only part of the government that can make new laws or change existing laws.
- **Article 1, section 8** : enumerates the legislative power which include to make all laws necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States
- The senate maintains several powers, which include the powers to ratify treaties by a two thirds, super majority vote and confirms the appointments of the President by a majority vote. The consent of the HOR is also necessary for the ratification of trade agreements and the confirmation of the Vice president. e.g Trump administration currently controls both chambers of congress. In December 2017, the senate approved the Republican tax bill in a 51-49 vote.
- **Section 8** : congress shall have power to lay and collect taxes, duties, imposters and excises,
- **Section 7** : all bills raising revenue shall originate in the HOR but the senate may propose or conquer with amendments as on other bills.

Limitations on the powers of congress

- Constitution lists powers that are denied to Congress (article 1, section 9). the Bill of rights prohibits Congress from making laws that limit individual liberties. Under the system of checks and balances, the president can veto a law passed by Congress, or the supreme court can declare a law unconstitutional.

Exec power

- Vests the executive power in a President / Vice President (always elected together)
- largest distinction between Aus and US system is in the Exec
- US - head of state and head of govt is the President of the US, single office that is directly elected by the people
- President and Vice president are elected together and then appoint a cabinet of secretaries who each head departments and agencies in the US administration. Secretaries are appointed and accountable to the President (not members of Congress or elected officials accountable to Congress)
- Key point in differences is there is no USA constitutional equivalent of Australia's section 64.
- **Specific powers**
- President has the power to either sign legislation into law or to veto bills enacted by Congress, although Congress may override a veto with two thirds vote of both houses.
- **Section 2 article 2** - President shall be commander in chief of the army and navy of the US and of the militia, and shall have power to grant reprieves and pardons for offences against the united states except in cases of impeachment.
- He shall have power, by and with advice of the senate to make treaties, provided two/3 of the senators concur, and he shall nominate, and by and with the advice and consent of the senate shall appoint ambassadors, judges of the Supreme court and all other offices of the Unites States.
- The president has the authority to negotiate treaties with other nations. These formal international agreements do not go into effect, however, until ratified by a two thirds vote of the senate. Although most treaties are routinely approved, the Senate rejected the Treaty of Versailles (1919) which ended world war

Judicial power

- vests the judicial power in the supreme court and allows the Congress to create other inferior courts. establishes the independence of the judiciary and the original and appellate jurisdictions of the supreme court, including its unique jurisdiction to interpret the constitution
- establishes the Federal judiciary.
- Was the model for Australia's chapter 3
- Entirely separate and independent from the other two arms
- Powerful check on powers of Congress and President. Final court of appeal
- Supreme court has found that the legislation about the travel ban is constitutional
- Section 2 - delineates federal judicial power, and brining that power into execution by conferring original jurisdiction and also appellate jurisdiction upon the Supreme Court. Additionally, this section requires trial in all criminal cases, except impeachment cases
- Appointment of federal judges

- The president appoints all federal judges including Supreme justices for a life term. Federal judges are confirmed by a majority vote of the senate, often following hearings before the Senate Judiciary Committee. Federal judges may be impeached and removed from office if found guilty of the charges. Judges in the district courts and courts of appeal are required to live with the geographical boundaries of their courts.
  - Trump has spent his first year rapidly filing Article 3 judgeships at Supreme, appellate and District Court levels. A times Data analysis found Trump is ranked No. 6 of 19 presidents appointing the highest number of federal judges in their first year.

2 powers of the legislature in a non-westminster system
- Money bills shall start in the HOR and the senate may amend but not refuse
- Impeachment - integrity or validity
- page 116 - look at it in creelman

Functions of the CW parliament in theory and practice, including Sections 7, 24, 51, 53 and the decline of parliament thesis

Parliaments four main functions:
1. **legislation** (making laws) - to legislate for the peace, order and good government of the CW s51 and 52
   - Initiating, debating and approving changes to statute law (act of parliament). Bills should be thoroughly scrutinised and amended by Parliament
2. **Representation** (acting on behalf of voters and citizens) - being a voice for the interests of individual citizens, electorates and for the expression of 'majority will' as well as reflected in electoral results. Represent the people through the HOR and the senate
3. **Accountability** (examining the govt) to make and unmake governments/check the executive
4. **Forum for national debate**

*they also authorise the govt to spend public money (expenditure s53)

- **IMPLIED RIGHTS - ROUACH V ELECTORAL COMMISSION**
  - The Howard Government's 1996 legislation removing the right to vote of anyone serving a prison term at the time of an election was struck down. The majority relied on s. 7 and 24 of the Constitution, which provide for elections for the House and Senate, therefore implying a right to vote.Since the voting franchise at the time of Federation was restricted in various ways, this decision is an example of the Court applying contemporary values to its interpretation of the Constitution.It upheld the previous restriction that parliament legislated on the voting rights of prisoners serving sentences of three years or more.

  - **Section 51:** contains a list of 40 'powers of the Parliament' but this is not an exhaustive list as other powers are located elsewhere within the Constitution

    - the longest section of the Constitution. Specifies and enumerates most of the 'powers of the Parliament'. The wording of this section does not include 'exclusive' therefore the 40 powers are 'concurrent' and may also be exercised by the states. Several are 'exclusive by their nature'

- **Section 53**: imposes a limit on the Senate's power to legislate money Bills but otherwise states that the Senate has equal powers to the House.

  - prohibits the Senate from originating or amending appropriations or taxation Bills. effectively guarantees that the form of the Australian executive must be 'responsible government'

LEGISLATING in theory: a bicameral statute law making institution. Makes laws that, in theory:

- are scrutinised by the 'statutory process' in which speeches, debates and in-depth analysis in committees ensures 'good' legislation
- have a diversity of input, reflecting the diversity of the Australian electorate whose reps are there legislators
- can be initiated by MPs - including those the exec. and Private Members.
- follows the 'statutory process' - involve deep scrutiny and provide opportunity for diverse input

Legislating in practice…

- Parliament sits for approx. 160 days per year. 2013 - passed 149 Bills example of speed with which Parliament can react - July 2015 - emergency amendments were made to close loopholes in the **Migration Act** by the Abbott government - High Court case threatened to declare detention of asylum seekers in foreign countries unlawful. Passed in 2 days.
- Private members bills are usually not successful - likelihood increases when there is a minority government
- limited scrutiny - dominance of the executive
- partisan discipline
- control of parliamentary agenda
- control over standing orders (control question time)

REPRESENTATION - THEORY

- Elected representative in the lower house acted in the interests of their constituents according to the following theoretical models:

a. Delegated representation

b. Trustee representation (member is entrusted by those who elect them to make representations to the parliament.

Senate has the following theoretical representative role

c. Sovereign State Interest

- selected by the people s7 and s24
- reflect the diversity of the Australian population

In Practice….

- Political parties are the dominant players involved in representing the people in modern Australia. Most voters cast votes for parties whose ideologies and policies most reflect the voters personal views and preferences rather than elect a delegate or a trustee to represent them in Parliament
- one dominant party which then forms govt and one clear loser who becomes the opposition.
  - reinforce a two party system. This means the Parliament divides along two clear partisan lines

- in 1949 the Senate electoral system changed to the Single Transferrable Vote (STV) system, a proportion voting system that converts the percentage of votes a party received into roughly the same percentage of the seats in the senate. (greater diversity of representation than HOR)
- nature of the senate candidates selected by the parties tends to be more diverse because voters who vote above the line vote for a party rather and a candidate below the line (means most voters are unaware of who their votes actually elect to the senate - permits parties to select more diverse candidates)
- Under STV system the Senate has many more women, people with migrant backgrounds, minor parties such as Greens, micro parties such as Nick Xenophone Team, and independents, thus the senate is more heterogeneous than the House
- lengthier term in Senate means the senator can break with the party on specific issues since there is time to repair the relationship or the senator does not want to be re elected. this reduces the partisanship experienced in the Senate
    - representing the party and its policy rather than acting as delegates or trustees. this does not always represent the views of the community as the geographic's of the parliament may have different view points of the community. E.g dominated by White males, minimal female representation, lack of indigenous individuals in parliament, lack of representation of disabilities. However in certain cases the senators / members can be seen to vote with their electorate rather than their party e.g equality of marriage act
- the proportional voting system allows the Senate to be more representative
- Partisan nature
- people vote for a party based on their leader
- preferential voting favours the major parties - HOR
- Question time allows individual members / senators to stand up for their electorate

Accountability / Responsibility

in theory …

5. a govt exists only so long as it maintains the support of the lower house - a successful vote of no-confidence by the House will dismiss a govt. **Collective ministerial responsibility** This is the convention by which whole govt are held to account by the lower house of parliament
    - cant support the leader / cabinet - must resign
6. **Individual ministers responsibility** may be dismissed by censure motions - this is the convention of individual ministerial responsibility by which the conduct and competence of Ministers is held accountable
    - Barnaby Joyce
7. Ministers must answer questions put to them by Members of Parliament during Question Time and must not mislead the parliament when responding. QT is a major accountability procedure. Members of Parliament from any party may ask questions without notice (to which a Minister responds immediately) or the minister may take the question on notice if the question is complex and requires

advice from the ministers department or agency - usually answered in writing. Misleading parliament theoretically leads to a censure of the minister.

8. Scrutinising govt spending. The exec can only spend money in accordance with the law. Requires the passage of the annual Budget and other appropriations (money) Bills through Parliament. These Bills follow the same 'statutory process' described above and include opportunities for debate and referral to committees. Thus Parliament scrutinises exec actions and activities through the approval of govt spending

9. Parliament has many standing and select committees formed of members of parliament and which have a powerful investigative capacity. Committees may inquire into matters relating to exec power.

In Practice …

1. the dominance of disciplined political parties means that the party with the majority of seats in the House (therefore the govt) will almost never lose the support of the lower house since it controls the votes of the members who make up the majority. Via this mechanism the govt dominates the House. This is referred to as executive dominance and is the main reason why the theoretical 'responsibility function' does not operate well in the modern Australian Parliamentary system.

2. Motions of no-confidence and censure motions moved by Opposition or other non-governing party Members of Parliaments will always be defeated 'on party lines' in the House of Representatives - members vote with their parties. However at times they have been successful in the Senate. Though successful these have no legal or conventional impact in the Senate and as such there were no consequences for the Ministers other than embarrassment

3. (1 & 2) above mean that the conventions of individual and collective ministerial responsibility are not effective in practice. So long as a govt can enforce party discipline on its member it will never lose a critical vote on the floor of the House.

- There are rare occasions where no party wins a clear majority of the seats. This is rare because preferential voting tends to amplify a small majority of votes into a larger majority of seats. However, in recent decades the vote for the two major parties has been in decline and in contrast the vote for minor parties has increased. Majority govt is in practice one of the most common form of exec govt
- minority govt is one in which no single party wins a majority of seats in the House. After the election the larger parties will negotiate with minor and micro parties as weak as independents hoping to secure their support. if they are successful in persuading other parties and independents to guarantee confidence and supply (always vote with the governing party on motions of no-confidence and money bills) then a govt may be formed.
- IMR Not upheld :
  - partisan disciple
  - Dominance of exec
  - PM

Forum of national debate

- issues of national debate are raised and evaluated. Parliament is a place where the issues of concern or importance to the people represented are openly discussed. This is also enhances the representational, legislative and responsibility functions of parliament.

In theory…

- Parliament is the nation's highest forum for the debate of issues
- is the way in which many of the other functions above are carried out.
- e.g effective legislation needs wide ranging discussion about Bills so that laws reflect the community's values and wishes. Debate helps keep the govt accountable and is critical when Members of Parliament are representing their constituents

1. a number of opportunities exist for Members of Parliament to debate - the types of debates include Grievances, Urgency Motions, Matters of Public Importance, Private Members Business, Ministerial Statements, Adjournment Debates , Second reading debates and Question Time - all provide Members of Parliament with opportunities to debate. Most of these debates are linked to the other functions e.g
    I. Grievances, Urgency Motions, Private Members Business and Matters of Public Importance are linked to the representative function
    II. Second reading debates are linked to the legislative function
    III. Ministerial statements and question time are linked to the responsibility function

2. Parliamentary Privilege protects debate and creates the ultimate freedom of speech. Privilege is a protection from the normal restrictions on speech, such as the civil tort of defamation. Allows the MP any topic of issue without fear. The parliament itself regulated Privilege through its Privileges committees in both houses. Committees may sanction MP if they abuse Parliamentary Privilege.

in practice in parliament …

- In practice the debate function suffers from the same executive dominance that undermines the theoretical operation of the other functions described above:

1. Govt can restrict opportunities for debate when it allocate time for the sitting day. Govt business is usually the longest item on the sitting day agenda and can be extended by a vote of the House, which the govt will always win
2. Grievances, Urgency Motions, Matters of Public Importance, Private members business, Adjournment Debates and other debate opportunities are diminished when the govt extends Govt business
3. gags and guillotines limit debate during the legislative process, as discussed above
4. The floor of the house is highly adversarial as the govt and opposition compete with each other for political advantage. Some debate in the House, especially during QT is heavily influenced by this need of the parties to score political points in front of the media and public. This can reduce the quality of the debate in these circumstances.

- Debate occurs within the House committees as well as on the floor of the house. Committees are much less adversarial than the floor of the parliament itself because they operate away from the media spotlight

and the MHRs do not need to score political points. There is genuine cooperation within committees and debate here is more effective in practice.

- Debate is more effective senate due to lack of exec dominance. Engages in longer debates with more non govt senators able to speak.
- Second reading is where majority of debate occurs
- Committees is where debate occurs
- question time is where debate occurs
- **In parties…**
- each party has a party room, a regular meeting of all the parties HMRs and Senators.
- Party room meetings are not held in public nor is the media present, there is no need for political point scoring and all members of a party have a voice to speak their minds. New and effective venue for the exercise of the debate function. Members debate policy, community concerns, national issues, current or potential crises, pol strategy, represent their constituents and other issues of the moment.

Decline of parliament thesis (dopt)

- decline of parliament thesis is a belief that the pol exec (PM and Cabinet) is gaining greater control over the processes of parliament
- Term argues that the party dominance of parliament prevents it fulfilling its essential functions, such as representation and accountability. The decline of parliament thesis claims that parliament is simply a 'rubber stamp' that expresses the will of the exec.
- the theory that parliament is an institution in decline due to executive dominance of the lower house, parliament no longer fulfils its expected functions. can be summarised as follows
- **representative function declined due to :**
  - Predominant position of political parties that demand loyalty from their parliamentary members, forces them to be partisan and prevents them acting as delegates or trustees for their constituents
  - A majoritarian electoral system that virtually guarantees a two and a half party system, eliminating much community diversity from being reflected in the HOR which is the house of the people and the house of govt.
  - Howard govt 2004 - 2007 controlled over both houses of govt. Got his work choices legislation (900 pages) go through both houses in 4 days
  - Australians are still represented, however if members of parliament are forced to vote in a particular way

NOT IN DECLINE DUE TO

- The senate representing the social and cultural diversity of the community more than the HOR
- senate being a check and balance on the executive dominated HOR
- **Leg function declined due to :**

- dominance of the exec deriving from the disciplined party system, in proposing and selecting bills for introduction the HOR. Prevents Private members bills from non governing from being introduced, debated and passed
- dominance of the political exec in the house and its committees virtually guarantees the passage of government initiated legislation and enables it to floodgate Bills as well as gag and guillotine legislative debates.
- In the lower house bills pass without scrutiny -

- **not in decline under scomo govt**
  - doesn't have the numbers in the lower house - cant rely on the numbers to get legislation through - needs to compromise and use independents
  - Evidence amendment (journalist Privilege) Bill 2011 Andrew Wilkes PMB
  - Senate - means parliament as a whole is not completely in decline - lower house is because the govt
- **Accountability**
  - Overwhelming dominance of the exec over the HOR in times of majority govt - the most common form of govt in Aus History
  - Ability of the pol exec to create and pass the standing orders of the house at the start of each term of govt especially the rules around QT
  - undermining of the theoretical Westminster conventions of responsible govt, such as the conventions of individual and collective ministerial responsibility, by the dominance of the party forming the exec in the HOR. few if any motions of no confidence or censure will pass
  - Not fulfilled because motions of no confidence wont succeed - never had a successful censure motion - Senators don't have to resign if they are censured, only in the lower house do they have to resign however censure motion wont succeed because the government has majority therefore the motion will be denied.

NOT IN DECLINE DUE TO

- The government can spend no taxpayers' money except by law. Therefore, the parliament must pass money bills to grant government access to public funds. This necessity gives the parliament an opportunity to scrutinise,question and even block government activities by cutting its supply of fund
- The difficulty of winning a Senate majority usually prevents the dominance of the executive (or the opposition) in the Senate.
- **Debate**
  - the ability of the exec to gag and guillotine debate through its control of standing orders in the house of representatives
  - Majoritarian electoral system that creates a lack of diversity in the HOR results in a deficiency of views being expressed in the nations premier forum for debate
  - Agenda and control of standing orders / speaker
- no accountability

- not in decline under scomo govt
    - doesn't have the numbers in the lower house - cant rely on the numbers to get legislation through - needs to compromise and use independents
    - Evidence amendment (journalist Privilege) Bill 2011 Andrew Wilkes PMB

NOT IN DECLINE DUE TO

- Question time allows members to ask questions of the government without fear of consequence

---

Roles and powers of the Governor General, including Sections 61, 62, 63, 64, 68, 28, 57, 72 and the 1975 crisis

ROLES OF THE GG

- **Constitutional roles**
    - Exercise those powers that are vested in the office through the constitution. These can be classified as either legislative or executive

Legislative powers

- Chapter 1 confers significant legislative power to the GG. The GG usually exercises their legislative powers on the advice of the Federal Executive Council (EXCO). This is seen as appropriate in a democratic system such as Australia where there is a representative democracy
    - Leg powers
    - **Proclamation** of the parliamentary session within thirty days after an election
    - **Proroguing** or suspending parliament between sessions and dissolving the House Of Representatives after an election
    - **Dissolving** the house of reps
    - Issuing **writs** for a general election
    - Dissolving both houses in the event of a double dissolution election and convening a joint sitting of the parliament
- GG Peter Cosgrove exercised his legislative power under section 5 of the constitution to recall parliament on the advice of the PM Turnbull on the 18th April 2016. The recall of parliament enabled the Senate to debate proposed legislation regarding the Australian Building and Construction Commission which it had already rejected previously.
- Section 58 gives the Governor General the power to grant royal assent to bills. Implies that the GG may withhold assent which would effectively act to veto a bill that has passed through both houses of the Parliament.
    - **Executive powers**
        - Chapter 2 outlines the executive powers of the GG
        - Under section 61 executive power is vested in the Queen and is exercisable by the GG.
        - Exec roles include
        - GG is to select and appoint a Federal Executive Council (EXCO) *section 62
        - Act on the advice of EXCO
        - Appointment and dismissal of Ministers of State *s64
        - Appointment of senior government officials *s67
        - Executive roles of the GG that conflict with the idea of responsible government are generally inactive. In theory GG has the ability to act independently on such ammeters such as the appointment of Ministers *s64. By convention the GG usually acts on the advice of the PM
        - Political decision making about the commitment of troops to conflict, peacekeeping or other activities are made by the PM in consultation with the Cabinet. However they do not have the legal power to make this commitment and must rely on the GG to act on the advice given.
        - Government chose to ignore this process i the case of the commitment of troops to the 1991 and 2003 wars in Iraq. In both cases the Minister for Defence used his authority under section 8 of the Defence Act 1903 which was amended in 1975.

Ceremonial roles
- Receiving and entertains visiting Heads of State, Heads of Government and other prominent visitors to Australia
- Opening new sessions of the CW Parliament
- Receiving the credentials of foreign diplomats and High Commissioners appointed to represent their countries in Australia
- Conducting Investitures at which people receive Awards under the Australian Honours system

Non-ceremonial roles
- Travelling widely in order to meet with people from all different walks of life
- Accepting patronage of various charitable, cultural and other organisations
- Attending services and functions
- Speaking at, and opening national and international conferences and
- presenting awards at major public functions

Types of power
Express power
- There is no direct reference in the Constitution to either the PM or the Cabinet which is where true power lies
- Under the Aus system of responsible government, exec power is in fact exercises by the elected government while the Queen plus a symbolic role as head of state
- In reality, the GG usually exercises power on the advice of the Ministers who are responsible to the Parliament. These powers are conveyed through the Federal Executive Council (EXCO)
- Express powers include the dissolution of Parliament and the issuing of writs for a new election as well as the granting of royal assent to new laws *s58. Other express powers include
  - Acting on the advice of Ministers to issue regulations and proclamations under existing laws
  - Appointing federal judges s72
  - Appointing high commissioners to overseas countries and other senior government officials
  - 2Establishing Royal commissions of inquiry
  - Exercising the prerogative of mercy (similar to US Presidents pardons)
  - Authorising many other executive decisions by Ministers such as raising government loans or approving treaties with foreign governments

Reserve power
- Reserve powers are those powers which the GG may exercise without or contrary to, ministerial advice. In practice, these reserve powers exist to only be used as an instrument of last resort such as during a political crisis and are exercised at the discretion of the GG
- Includes power to
  - Appoint a PM if an election has resulted in a hung parliament *s64
  - Dismiss a PM where he or she has lost the confidence of the parliament
  - Dismiss a Prime Minister when he or she is acting unlawfully *s64
  - Refuse to dissolve the House of Representatives despite a request from the PM *s5 & s28
- In reality, the use of reserve powers by the GG is limited by the conventions of responsible parliamentary government

Section 63:
The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Section 68
The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Section 57

the Governor-General may dissolve the Senate and the House of Representatives simultaneously. After the dissolution the GG may convene a joint sitting of the members of the Senate and of the House of Representatives.

Section 61
Under section 61 executive power is vested in the Queen and is exercisable by the GG.

Section 62
GG is to select and appoint a Federal Executive Council (EXCO)

Section 64
Appointment and dismissal of Ministers of State

Section 28
Refuse to dissolve the House of Representatives despite a request from the PM *s5 & s28

Section 72
Appointing federal judges

Definition
- The GG is the Queens representative in Australia. He/She has the ability to exercise vice regal power. This power is granted under section 61 of the Constitution.

Roles and powers of the PM, Cabinet and the Ministry. Roles and powers of the opposition and the shadow ministry at the Commonwealth level

- The following links form the **Westminster Chain of Accountability.** There are five links in the chain:
  - The people directly elect a Paramagnet in a general election
  - The lower house of the Parliament chooses a government by giving its confidence to a group of Ministers who form a Cabinet or government - note the people have thus indirectly elected their government
  - These indirectly elected Cabinet Ministers head the appointed government departments and provide democratically mandated policy direction
  - Government departments implement the mandated policy under their Minister's direction and provide expert advice to the Minster
  - The Parliament, representing the people, holds the Ministers collectively and individually responsible for their administration of government under Westminster convention

<u>Roles and Powers of the Prime Minster</u>

Definition : The PM is the head of government and leader of the executive government. He or she is the person who leads the party or parties that command majority support in the House of Representatives. The Prime Minister is the chief advisor to the GG.

Role
The Prime Minister is the most powerful person in Parliament. They have many tasks, including:
- chairing meetings in which the government discusses
- policies and examines bills (proposed laws)
- selecting members of the government to be ministers
- leading Cabinet (Prime Minister and ministers) in deciding government policy
- acting as the chief government spokesperson
- representing the Australian Government overseas

- advising the Governor-General about important issues such as the appointment of ambassadors and heads of government departments
- advising the Governor-General about constitutional matters
- deciding when to call a federal election and leading the government in the election.

Power derived from

1. Being the leader of the majority party in the HOR

2. Being the chairperson of Cabinet Meetings

- **Tony Abbott -** used his power extensively and was criticised heavily for making 'captain's calls' on a number of issues including the reinstatement of Knights and Dames (2014) within the Australian system of Honours and an attempt to delist 74,000 hectares of Tasmanian Wilderness World Heritage Area in 2014.

3. Access to information

- The PM is the most informed individual in the entire political system in AUS. Ministers have access to advice from within their own departments, but the PM receives advice from all departments and agencies. PM has their own dedicated department - the Departments of PM and Cabinet (PM&C).
- PM&C briefs the PM, the Cabinet Secretary and the Parliamentary Secretary to the PM and consults extensively across the Australian Public Service (APS) to ensure that the advice provided draws on the most appropriate sources"
- No other member of the Executive is so well served in terms of information

4. Patronage

  - Steve Irons promoted to Assistant Minister for Vocational Education, Training and Apprenticeships 2019 Morrison govt
  - David Fawcett was defence minister now has no ministerial role 2019

5. Determining the election date

- Morrison govt was able to remain in parliament by determining the election date for July 2019

6. Being the public face of government

- Morrison went to Thailand in 2019 and strengthened our connection with China

PM's power is limited by;

Lack of solidarity and unity in Cabinet

- A 'leaky' Cabinet is a clear sign of weakness of the PM. Dissatisfied Ministers can 'leak' the proceedings of Cabinet to the media as a way of undermining their PM or giving their point of view more leverage.
- in 2015 the Abbott Cabinet suffered frequent leaks relating to foreign affairs and the foreign aid budget; changes to legislation stripping citizenship from Australians who had served in foreign states in support of ISIS as well as the decision of the PM to ban Ministers from appearing on the ABC's Q&A current affords program. This decision followed the screening of a previous episode where Zaky Mallah, an Australian who had been charged under new counter terrorism laws, had been included in the studio audience and allowed to ask a question of them Parliamentary Secretary Steve Ciobo.

Having rivals within Cabinet or the Parliamentary Party

- Scott Morrison was Treasurer in Turnbull govt - became PM

The constraints imposed by their own party

- Kevin Rudd and Tony Abbott. Just prior to the 2013 general election, Julia Gillard was deposed by her own party via a Caucus motion and replaced by Kevin Rudd for his second short lived term as PM .
- After the 2015 Liberal Party leadership spill motion was defeated, Tony Abbott declared that he would change his style and consult more widely with his party colleagues. following the party room vote he knew that at least 39 members of his party room no longer supported him and that to continue with his previous leadership style he might suffer the same fate as Kevin Rudd in 2010 (he did)

The constraints imposed by a coalition party

- Agreements for coalition are made between the leaders of the parties in coalition. As a result of the leadership change from Tony Abbott to Malcolm Turnbull the new PM agreed to hand the Water portfolio to Barnaby Joyce, the Deputy Leader of the Nationals

Size and nature of the House Majority

- Julia Gillard presided over a minority government. This made her PM one of constant uncertainty. The majority that kept her in power was fragile because it relied on non-Labor Members of the HOR

- Julia Gillard lost office when her party lost faith in her ability to win the next election as PM, replacing her with Kevin Rudd

Minority Government

- Gillard was able to form a minority govt after the 2010 general election. This made her govt and her position as PM, dependent upon the support as PM, dependent upon the support of several non ALP members of the HOR whose votes in parliament she could not control because ALP discipline did not extent to them. One of these MHR's was the Greens party rep for the seat of Melbourne, Adam Bandt. As part of the deal to form a govt, the Greens forced Gillard to accept their demand that her govt introduce a price on carbon (Carbon Tax). This was despite the fact that she had made a promise before the election that "there will be no carbon tax under govt I lead". This compromise ultimately proved fatal to her PM with the opposition mounting constant attacks on her and her govt for breaking this promise
- A PM forced to compromise with other parties and independents in the HOR can seriously undermine their power

Cabinet

Definition

- Not mentioned in the Constitution, comprised of senior minister who are also members of Parliament. Is the central exec organ of Government. Is the main collective decision making group of the Federal Government consisting of the PM and Senior Ministers who introduces legislation to the Parliament through its Ministers.
- The Cabinet's position in the political executive comes from constitutional practice or convention. It is for the government of the day and in particular the PM to determine the shape and structure of the Cabinet system and how it is to operate
- **s64** does provide for "Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth"
- Cabinet Ministers are generally decided upon by the PM after some consultation with his senior colleagues. As a general rule those who hold the most important ministerial positions will form Cabinet (the 'inner' ministry). These include the government leaders in the HOR and Senate, the Treasurer and the Minister for Defence.
- Cabinet is the apex of the executive government and it sets the broad direction of government, takes the most important decisions facing government and resolves potential conflicts within government

What are the roles/powers of Cabinet?

- set overall government policy and direction
- Is responsible of the annual budget
- Initiates most legislation
- Settle disputes between Departments and between Ministers
- Handles crisis issues

POWERS:

Developing and implementing policies

- Policies can be implemented in two ways
  - By **legislation**: Laws passed through Parliament may be necessary to implement some policies, such the Abbott Government policy to 'axe the carbon tax'
  - By **regulation:** The exec itself, using powers delegated to it under statutes - by regulation - may implement others, such as the Abbott Government issuing an 'investment mandate directive' to the Clean Energy Finance Corporation to stop investing in wind power
- Over 95% of legislation is introduced into the Commonwealth Parliament comes from Cabinet. Policies drive this legislative agenda

Acting as an information exchange

- Advice comes to Cabinet from many sources, including public service, parliamentary committee reports, reports from various inquiries, court decisions and other sources.
- Wealth of information needs to be sorted and prioritised before being acted upon.

- PM&C and the cabinet Secretariat (also part of the PM&C) provide administrative support to Cabinet and help it manage the flow of info. Ensures Cabinet power is exercised consistently and in response to correct info

Responding in crises

- Events such as natural disaster or international emergencies may impact on Australia
- e.g 2004 Boxing Day Tsunami and the 2008 Global Financial Crisis had to be dealt with as emergencies by Cabinet
- Cabinet can exercise power rapidly and decisively in these cases

Cabinet meetings

- usually meet weekly with the Cabinet considering a range of policy proposals. It manages the policy proposals. It manages the policy directions and business of the government

Cabinet solidarity

- Cabinet follows a collective decision making where Ministers assume collective responsibility for their decisions. The Minister is expected to support the decision in public or resign.

Control of parliamentary standing orders

- effective control over the agenda and the standing orders of the HOR which allow Cabinet to use the 'gag and guillotine' to push through legislation.

Factors affecting the functioning of the Cabinet

Relationships between Minsters (and parties in a coalition)

- Abbott cabinet 2015 experienced some breaks in unity, illustrated in the case of Agriculture Minister Barnaby Joyce, who as the Deputy Leader of the Nationals (the junior coalition partner) expressed his disapproval over the issue of the Shenhua Calming in his New England electorate. Highlights the sometimes difficult relationship between the parties in Coalition governments when their core interests do not align.

Timing

- A new govt may struggle with decision making because of its lack of experience in government while a mature government may make decisions easily and a long term government may lack vigour and/or new ideas
- Most radical Cabinet was Whitlam after the ALP won office in 1972 following 23 years in Opposition. His first Cabinet consisted of himself and Deputy PM, Lance Barnard and between them they held all 27 portfolios for 2 weeks before the full Cabinet was sworn in by the GG.
- Whitlam govt is famous for their lack of experience, two characteristics that contributed to the dismissal

Nature of the decision

- some decisions are deliberative with much time and discussion devoted to them. Others may be crisis decisions such as Howard govt response to the East Timor crisis in 1999 and the 2001 Al Qaeda terror attacks in New York
- exercise of power is very dependent on the nature of the circumstances Cabinet finds itself dealing with at any particular time

Opposition

Definition

- The Opposition is the main non-governing party in the House of Representatives. The Opposition is the second biggest party or coalition of parties voted into the House of Representatives, whose main roles is to highlight alternatives to specific government initiatives, scrutinise government bills and administration and to develop alternative politics. It is a recognised institution within the Parliamentary/Westminster system with offical status which is by convention seen as the alternative government

Main roles

- Provide a credible alternative to the party in power
- Work on committees that examine legislation and important national issues
- Scrutinise, put forward amendments to legislation
- To scrutinise and hold government / Ministers to account
  - ask questions / with or without notice

- To bring a censure motion against a Minister
- To move a vote of no confidence in a Minster/government

Although they typically lack resources, the opposition can hold the executive to account through
- the use of 'questions without notice'
- Questions with notice
- The estimates committees
- Other committees, which may have an investigatory purpose
- Grievance and adjournment debates may also have an accountability function
- Budget in reply speech
- On occasions it may be possible to block, delay legislation or improve legislation in the Upper house
- The opposition through its Shadow Cabinet as the alternative government with a counter set of policies keeps the Government to account as the likely replacement in office
- The opposition may employ critical findings of accountability agencies such as the Auditor General

Opposition responsibilities

The responsibilities of the opposition include:
- scrutinising (closely examining) the work of the government
- asking the government to explain its actions
- debating bills (proposed laws) in the Parliament
- working on committees that examine bills and important national issues
- providing alternatives to government policies.

Private members
- all members of parliament who do not form a part of the Ministry (and therefore the exec) are Private members. Includes the Shadow Ministry and the Leader of the opposition as well as govt backbenchers. Any Bill that the opposition proposes or imitates in the House is thus a private members bill

Powers

1. question time
- Labor has targeted Scott Morrison over the credentials of Chinese-born MP Gladys Liu, asking what steps he had taken to ensure she was a "fit and proper" person to sit in parliament.

2. Censure motions
- Barnaby Joyce (2018) - Personal behaviour. Nationals leader, Deputy PM and Minister for Infrastructure resigned following allegations of sexual harassment, revelations about his affair with a staff member and an investigation into his travel expenses.

3. No confidence motions
  - In Australia, a motion of no-confidence in a government has never passed. In 1975, the House passed a vote of no confidence in the Fraser government after Gough Whitlam had been dismissed as prime minister. Fraser did not have a majority, but had already obtained agreement from the Governor-General, Sir John Kerr, to dissolve both houses. The motion passed, but Kerr's decision pre-empted it, so it didn't technically take effect4. Debate
- Tony Abbott in March 2013 called for a motion of no confidence against Julia Gillard's government, however, the motion to suspend parliamentary business for a motion of no confidence was lost with votes split 73 in favour and 71 against, but short of the overall majority required.
  -

5. Calling for quorum
- Minimum number of Members of Parliament required in the House (or Senate) for a valid vote to be taken. The law specifies that the quorum for the HOR is one-fifth of the total number of MHRs. There are 150 MHRs, therefore the quorum is 30 - which includes the speaker

7. Senate
- The ALP Shorten Opposition used the Senate very effectively against the Abbott Govt by refusing to pass significant parts of its first budget, including the $7 GP co-payment, the pair parental leave scheme the higher education funding scheme as well as the AUS building and construction commission bills calling into question its ability to govern effectively

- The Senate cannot bring down a govt in the way the House may. However in 1975 it did block the Whitlam Govts money Bills in highly controversial circumstances leading to Whitlams dismissal by the Governor general sir john kerr. More commonly the Senate can render a govt's legislative program unpassable. The opposition in the Senate requires the support of sympathetic cross benchers who typically are a highly diverse group with divergent agendas of their own to achieve this outcome

8. Being a viable alternative government

9. Governments are made and unmade by the HOR

- Gillard govt 2010-13 was a minority government and was constantly threatened by the Abbott Opposition, which hoped to bring about the collapse of the government in the House and thereby either force an election or form government itself

10. Being prepared for government

- being a viable alternative government requires that the Opposition is a serious contender when an election is called but it must also be seen to be competent to assume office at any time, particularly if the government is a weak minority government
- to present as a 'viable alternative government' the opposition must
  - Have its own policies
  - Present a unified coherent vision to the nation
  - Present as competent and ready to govern

11. Policies

- The opposition is organised as a 'shadow cabinet' or a shadow ministry n which there are shadow ministers heading shadow portfolios which mirror those of the actual government. Besides scrutinising and challenging their opposite numbers in the government, the Shadow ministry leads its own party room and plays a very significant role in its own party's policy platform

Factors affecting the success of an opposition

Impartiality of the Speaker

  - From her appointment of Speaker on Nov 12, 2013 to her last sitting day in June, Mrs Bishop has sent out 400 politicians under Standing Order 94a. Of those booted out 393 (98%) were labor and seven were coalition

Lack of resources

- The PM decided the resources allocated to the opposition. For example oppositions get approx 21% of the governments staffing levels.

Exec Dominance

- Effectiveness of the opposition is the overwhelming dominance of the exec government over both the HOR and the sources and flows of info.

Shadow Ministry

- comprised of senior members of the opposition party who directly oppose a corresponding Minister of the govt
- A shadow minister whose job is to scrutinise and oppose the Minister for education is referred to as the opposition spokesperson for education and so on
- Sometimes referred to as the opposition front bench

Cabinet and Ministry - Difference between the Cabinet and the Ministry

While the Cabinet and Ministry are part of the Executive arm of government, with members of Cabinet by default automatically being members of the ministry, not all members of the Ministry are part of the Cabinet

Ministry and Shadow Ministry

- The shadow Ministry is connected to the Opposition whilst the Ministry is connected to the Government; the Shadow Ministry's role is to propose alternative policies whereas the Ministry proposes government policy; the SM questions and scrutinises governmental policies, actions and legislation whilst the Ministry proposes and justifies/defends governmental policies, actions and legislation.

Political mandates in theory and in practice, including competing mandates

Mandate definition

- A mandate is the authority given by the voters to the party/parties (government), with a majority in the HOR to implement the programs and policies outlined in it election platform

Sovereignty definition

- Refers to the supreme authority to government in an independent nation. In constitutional democracies sovereign power is based on the consent of the people and operate through the rule of law.

Different competing mandates :

- The different competing mandates arise when the Government, the Opposition and the Minor/Micro/ Independents all argue that they have a mandate to implement their policies. These competing mandates all relate to the authority or support given to the different groups in being elected and gaining representation in parliament

Government or majoritarian mandate

- An election victory gives the government a mandate. Therefore, they have a right to carry out their policies they took to the people at the election and the administrative authority to respond to any other crises that arise between the next election
- Governments justify their dominance of the HOR by arguing the the will of the people is expressed through elections as elections provide the most valid democratic outcomes as seats are allocated proportionally to population. Majority governments earn the majoritarian mandate in order to give them the right to implement their policies
- An argument by the government against Opposition or Balance of Power mandate blocker or opposing government legislation, is that the government is formed in the lower house and the governments policies and programs have been endorsed by the electorate
- Advocates of the notion of a political mandate say it takes into account the practical importance of party policies as it imposes a broad meaning on election results as well as providing a way of keeping governments to their words or promises both for and against programs. Voters it is asserted have not only chosen between sets of candidates, but also between party policy packages. As a consequence, a government could claim a mandate to introduce their policy, on the basis the government with its majority in the HoR should be able to introduce this without impediment in the Senate
- There is also a tendency for a government of the day to use its mandate to argue its right to introduce/ implement a policy, when the Opposition/Minor parties/Independents/ Senate tend to oppose and raise problems when legislation is presented, such as the introduction of legislation immediately after an election and being confronted with a hostile Senate e.g. Rudd post 2007 (revocation of Work Choices); or the Coalition's retreat from the new schools funding system in November 2013, on grounds of the absence of actual signatures from states that had agreed anyway. In response Opposition Leader Bill Shorten stated, "Now we are seeing the Abbott government breaking a promise to every Australian family who's got a child at school, breaking a promise to every teacher in an Australian school, and breaking their promise to all of the states."
- A mandate is an authority to use power. A 'political mandate' is a claim for authority to exercise political and legal power within a state or nation. It means the legitimate right to control the institutions of state power - especially the legislative power and the executive power - the right to make and carry out laws
- In modern liberal democracies those who win elections claim a political mandate. They claim that their authority to use power is granted by the people at an election

MANDATES IN PRACTICE

- Representative government requires elections so that the people may regularly re-delegate their sovereignty to their parliament and through it, their government. In Australia, general elections are held every 3 years. They are the mechanism by which the people delegate or entrust their sovereignty to:
  - A Parliament of law makers
  - A government of executive ministers

Governments will of the majority mandate

1. Pass specific new laws - Malcolm Turnbull called the 2016 double dissolution election on the basis of reintroducing the Australian Building and Construction Commission, the Bills for which had been twice rejected by the Senate. The ABCC bill was the reason for the election and the Turnbull government was returned to office. He also promised to introduce company tax cuts worth $50 billion in the 2016 election
2. Repeal specific old laws - 2013 Tony Abbott's Liberal Opposition promised to repeal the carbon tax and the mining tax
3. General approaches in a specific policy area - 2013 Tony Abbott's Opposition promised to Stop the Boats a policy that required the co-operation of neighbouring countries as well as changes to Australia's Mitigation Act 1958. The Turnbull Government promised to reform superannuation in the 2016 election campaign
4. Implement broad changes designed to achieve a general goal - 2013 Tony Abbott's Opposition promised budget repair and to return the federal budget to surplus. The re-elected Turnbull Government had the same objective in 2016

Specific mandates

- If a party should win the election it may claim that it has a will of the majority mandate from the people to implement promises and policies taken to the election. If a winning party made specific promises during the election campaign it may claim a specific mandate to implement these policies or pass these laws. 1 and 2 above are recent examples of specific mandates
- After winning the 2013 election the Abbott Government repealed the Carbon and Mining taxes using the will of the majority mandate to convince Senate cross benches to pass the necessary bills

General mandates

- Parties have general ideological principles that inform their whole policy platform and their responses to situations which develop during their time in power. Naturally, some of these situations will develop after the election and therefore there is no specific electoral mandate for action. In these circumstances a governing party may claim that is has a general mandate from the peel to develop policy and legislation based on its ideological principles. Adopting general approaches in a specific area and Implement broad changes designed to achieve a general goal are both general mandates.
- A general mandate may offer a government justification for breaking election promises. E.g 2013 election campaign Abbott promised not to reduce funding for education, health and the ABC. The first Abbott Budget 2014 saw heavy cuts or new taxes in these areas. Opposition accused govt of breaking mandate but was argued that it was unaware of the state of the nations finances before taking power and that the new cuts were necessary.

Senate cross bench balance of power mandate

- The balance of power arises when the Opposition opposes a government Bill in the Senate. This means that the minor parties or independent Senators on the cross benchers will decide whether a Bill succeeds or fails. This is an extraordinary power given that minor parties and independents represent small constituencies because only small number of voters given them the first vote and can determine whether a government bill (for which the government may claim either a specific or general mandate) can pass and become law. In order to justify this extraordinary power, minor/micro party senators and independent senators claim a balance of power mandate

Arguments in favour of the balance of power mandate

- Section 7 states "The senate shall be composed of Senators for each state, directly chosen by the people of the state. Thus, State voters directly elect the senate giving it a democratic mandate to wield power over legislation

- Fact that some voters are dual voters and report voting for a major party in the House (the parts they wish to form the government) and a different party or independent Senator in the Senate (a party or independent they wish to hold the government accountable through the Senates House of Review function). The percentage varies between elections but some 15% of voters are dual voters. Minor parties and independents assert that this expresses a democratic intention to hold the government to account through the Senate and justifies their exercise of the balance of power.

Arguments against the balance of power mandate
- For the HOR; Section 24 of the constitution helps to ensure that the people are represented according to the principle of one voter one value by insisting that "the number of members chosen in the several states shall be in proportion to the respective numbers of their people"
- For the Senate: Section 7 states "until the parliament otherwise provides there shall be six Senators for each Original State." Since the Constitution came into effect the parliament has 'otherwise provided' by increasing the number of Senators per state first to eight and now to 12.
- In the 44th Parliament Senator Nick Xenophon from SA is another example of an independent 'small state senator' with extraordinary power- although he does not possess the refusal power alone. PM Paul Keating famously referred to the Senate as 'unrepresentative swill' due to this undemocratic feature of the upper house

Conflicting mandates : will of the majority v balance of power

Structural conflicts : a feature of the system
- One can see that a government in the lower house may claim a will of the majority mandate to pass specific or general legislation and the opposition will oppose it in the upper house giving the Senate cross benchers the opportunity to employ their balance of power mandate
- These conflicting mandates are a result of
  - Westminister style executive based in the HOR elected using an electoral system (preferential voting) that delivers a strong majority of seats to the winner
  - Co-equally powerful senate elected using proportional representation creating a consensus style hung house

Philosophical conflicts: Liberalism and democracy
- Mandates are justified on philosophical grounds for both the will of the majority and balance of power mandates. Australia like most modern democracies is a liberal democracy. This term combines two political philosophies that are in fact in tension with one another.

Real meaning of a mandate
Types of mandate
- Will of the majority mandate, claimed by the government
- Balance of power mandate claimed by senate cross benchers or minor parties and
- Right to oppose claimed by the opposition.

How much authority does a mandate really confer
- The Westminster system, in theory and in practice, is the real authority for power. The reality of power is summarised as follows
- The Institutions within which it is exercised limit power. Parliament actually does limit the power of the executive - more so in the Senate than the House. If a Senate can block a government bill and wishes to, it will - regardless of the government's claim to a specific or general mandate. The Abbott Liberal and Green Opposition to the Rudd Governments specifically mandated CPRS provides evidence
- If a government can force a bill through both houses of Parliament, it will. The Howard Government's use of its rare 'executive dominance' in both houses in 2005 (when there was no Senate balance of power at all) to pass WorkChoices provides evidence
- If a new Opposition has just been seriously mauled in an election, fears of the consequences of standing up to the new government's mandate, may make it give in and pass Bills it would normally oppose, if it conflicts with their former legislation. The Nelson and Turnbull Opposition's compliance in passing the

Rudd Governments Bills for evidence. Here is a genuine respect for a mandate but probably motivated more by pragmatism and fears for the Oppositions future political survival

- If a government lacks a majority in its own right and is weak, like a shark sensing blood, its opponents will exploit its lack of authority and ignore any mandate claims it may make. The 2010 Gillard minority government provides an example

---

Lawmaking process in parliament and the courts, with reference to the influence of, Individuals, political parties, pressure groups

Ordinary law

- Law making institutions established by the Constitution produce ordinary law. Parliaments make statute law and courts make common law

Statute law

- Statutes are Acts of Parliament. They are made by the statutory process - a set of conventions that outline the way the Parliament introduces, debates and amends Bills to pass acts. The two houses of parliament are chosen by the people, making it a democratic institution. Acts, therefore, have a democratic legitimacy the other types of law lack. This is an important distinction. Statues have different purposes.
  - Policy legislation
  - Financial legislation
  - Amending legislation
  - Consolidating legislation
  - Repealing legislation

	Individuals	Parties	Pressure
Parliament			
Courts			

Common law

- Judges make decisions in cases brought before the courts. Judges apply the doctrine of precedent to cases before them. Mainly follow precedent.

Influencing common law

- When individuals, pressure groups or political parties attempt to influence common law it will always be as a party in a case. The party will then argue on the basis of the facts of the case and how the law should be applied and interpreted. If a law or a new way of interpreting statute law. The higher the court, the more authority and impact a change in the law will have
- High Court cases involve interpretation of the Constitution and have the potential to dramatically influence the law of both the courts and the Parliament by redefining the way the system of government actually operates. The High Court cases can result in the overturning of common law, such as in Mabo 1992, or the invalidation of statute law such as Williams No2

INDIVIDUALS

Individuals and their influence on law making in the parliament and courts

- Some individuals can be very active, highly motivated or powerful. Some may also be independent Members of parliament. Individuals are usually not influential in law making because:
  - They lack resources - meaning they do not have enough money or time
  - They lack access to the key decision makers such as government Ministers and
  - They lack organisational support - they are on their own

They can have a major influence if they are determined e.g Williams

Williams v Commonwealth of Australia (2014) HCA 23 "Williams No 2" - in courts

- Ronald Williams second case was against the constitutionality of using section 51(xxiiiA) to pay for chaplains in schools. High Court voted in favour of Williams. payments were not "benefits to students" and struck down the amended *Financial Management and Accountability Act 1997;*
- Both the Abbott and Turnbull Governments now had to fund the National Schools Chaplaincy Program through specific purpose payments to the states - a mechanism that Constitution allows under Section 96. In the two previous arrangements, defeated by Williams, the Commonwealth sought to fund the National Schools Chaplaincy Program by bypassing the states and paying service providers and schools directly. Section 96 grants must be made to states and the states may reject them to interpret the conditions attached to them in ways the commonwealth may not intend.
- Williams successfully used the HC to influence parliamentary law making on two occasions and under successive governments. Williams was highly motivated and was able to finance his HC challenges because his cause attracted private donations from many like-minded parents and other supporters of secular non-religious education in state schools

Private Members Bills

Medivac - Andrew Wilkie

Amends the *Migration Act 1958* to: require the temporary transfer to Australia of transitory persons on Manus Island or Nauru, and their families, if they are assessed by two or more treating doctors as requiring medical treatment; and require the temporary transfer of all children and their families from offshore detention to Australia for the purpose of medical or psychiatric assessment.

Marriage equality - dean smith

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. Senator 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 the third reading stage in the House on 7 December 2017 and received Royal Assent the following day.

Why can independents be successful?

- Independent Members of Parliament can be successful if their support is necessary for a government to retain office or pass Bills. For most of the Gillard minority government the support of independents was critical. This situation gave Rob Oakshott and Tony Windsor influence over law making in Parliament that they would not otherwise have enjoyed. Andrew Wilkie demonstrates how influence can evaporate once a government no longer needs the support of an independent
- Capacity of independents to influence law making may increase over time as electors drift away from the Liberal National Coalition and the ALP and increasingly support independent Members of Parliament
- The 2016 general election has seen several independents returned to the House of Representatives, including Cathy McGowan and Bob Katter. In the aftermath of the election, Malcolm Turnbull visited them all and sought to secure their support in the event of another hung parliament. The final result saw a majority Turnbull Government formed with a one seat majority. Such a narrow majority leaves open the prospect of reliance on independents if a by-election or a backbench defection costs the Turnbull Govt its slender majority

What makes individual successful in influencing law making

- Individual has resources - Clive Palmer
- Individual is an independent and or has a position of power within the Parliament - Cathy McGowan
- Individual is persistent - Ronald Williams
- Individual has skills and/or backing from a (pressure) group - David Manne is the executive director of the Melbourne based Refugee and Immigration Legal Centre
- Individual has a public profile - Antony Green

PARTIES

Political Parties influence on law making in the courts and parliament

Political parties and law making

- Major parties have a major influence as the two party system allows them to have more influence over legislation
- Independents can make a really big difference or none at all e.g marriage equality legislation
- Minor parties can have large influence when they make up the cross bench in an minority government. Following the 2010 election Gillard formed an agreement with the Greens and secured the support of three independents

Left and Right

Left

- Ideology based on fairness and believe in values such as equality. They develop policies and try to make laws aimed at social justice.
- ALP and Greens are left wing. Greens more left than ALP.

Right

- Ideology based on individualism and tend to argue for individual self reliance and reward for effort. These parties will try to make laws reducing the interference of government in the lives of citizens - a smaller role for government.
- Liberal/Nationals are right

Ideology and winning elections

- Parties have learned they cannot win elections by being too ideological. Howard 2007 loss was in part due to its WorkChoices industrial relations policy, which was unpopular with the public because it was seen too ideological - to far to the right for most voters
- Failure of Abbott govt 2015 was partly due to its right ideological inspired policies. Joe Hockey, Treasurer at the time had declared the End of the Age of Entitlement and proceeded to introduce measures in the 2014 budget and such as Medicare co-payments, cuts to welfare and reductions in education and health funding. All of these policies reduced the role of government in the economy and society, all were right wing policies -seen as unfair

Pragmatism wins elections

- Major party cannot influence the law if it cannot win power. Both major parties tend to be pragmatic their policy platforms and law making. Pragmatism means focusing on what is common sense and achievable - and that means, above all else, adopting policies that will not alienate the electorate. for a political party that is serious about winning enough seats to form government and influence law making, pragmatism means abandoning strictly ideological positions and moving to the centre of the political spectrum on most matters. The ALP and Liberal parties have both done this, approaching the centre from the left and right respectively. This is known as ideological convergence. It means that law making by both parties is actually quite similar in practice.
- Ideology convergence has been a defining characterise of Australian politics since 1983 when the Hawke Labor government abandoned the more leftist policies of earlier ALP governments and adopted 'centre right' market based policies. Hawke govt and successor Keating govt sold government enterprises like the CW bank to the private sector, deregulated the Australian dollar and reduced tariffs on imports, exposing Australian industry to foreign competition. All these policies were very un-labor like and yet the Hawke govt was the longest serving govt in Australian history being in power for 13 years. Australian voters reward competent pragmatism

- Howard govt was very pragmatic until last term. Presided over a large increase in welfare spending, such as the 'baby bonus' paid to mothers having a child, this being only one example. The expansion of welfare, made possible by massive increases in tax revenues from the mining boom, is very un-liberal like and yet Howard remained in office for 11 years, the second longest serving PM in Aus history. In his last term Howard moved his govt to the right by introducing tough new industrial relations laws - WorkChoices. His government lost the next election; and he became only the second PM to lose his own seat. Australians punish ideological extremism

Rating political party influence

- substantial, if they have significant power over legislation by being able to generate lots of bills and pass acts of parliament
- Strong, if they have significant power over legislation by being able to force amendments to Bills or block their passage
- Moderate, if they have some power to suggest amendments that are adopted or combine with other parties to enhance their power over legislation
- Limited, if they have little or no power to influence legislation

How parties influence law making in Parliament

- Once elected to Parliament, political parties can influence law making in the following ways
- Introducing bills
- Debating Bills
- Seeking amendments to bills in the committee stages of each house
- Participating on the eight Senate legislation committees
- Voting on bills

- All members of parliament have the right to contribute to debate on Bills. Parties may seek to influence the content of a Bill as it passes the Second Reading debate stage. However, the government can shut down debate and curtail non-government parties' opportunities for debate by passing gag or guillotine motions. Debate in the Senate is much more effective for non-government parties because gags and guillotines are much less frequent. The long debates before the passage of the Electoral Amendment Acts 2016 through the Senate, here the Greens were able to influence the Senate electoral system
- Consideration in detail and committee of the whole are the committee stages of the House of Representatives and the Senate respectively. During these stages Bills are scrutinised line by line and many amendments are negotiated between the party representatives. The less adversarial nature of the committee work enhances cooperation across party lines and provides a good opportunity for parties to suggest and vote on amendments to bills.
- The eight Senate legislation committees provide one of the best opportunities for parties to influence a Bill as it passes through the legislative process.
- 8 Senate legislation committees provide one of the best opportunities for parties to influence a Bill as it passes through the legislative process. Any Bill requiring deeper scrutiny is referred by the Senate Scrutiny of Bills Committee to one of the eight Senate legislation committees depending on the type of Bill and committees specialisation.
- The Senate is a diverse chamber where the minor parties and micro parties have the greater representation than they could achieve in the lower house. They may have one or more of their senators on these committees. If the Opposition opposes a government Bill in one of the legislation committees, the minor and micro parties are dealt significant power to influence the Bill
- Before a Bill can move through any stage of the legislative process it must be voted on. There are many votes on a Bill during its passage through the parliament. The government will always win a vote in the HOR but non government parties have more power to block or force changes to Bills by withholding support in the Senate.

Parties and the courts

- Parties can also influence law making through the courts but this is much rater than their influence in the Parliament
- Haar case

- Pressure groups are associations of individuals with broadly similar views that:
- Tend to focus on a narrow set of objectives
- seek to influence law making in Parliament and/or the courts either by
  - Lobbying government and government Ministers
  - Taking direct action
  - Using the courts
  - Using media - both traditional and social
  - Other means such as contributing political donations to a political party
- Pressure groups can be distinguished from 'community groups' by their objectives. Pressure groups aim to influence law making. Community groups are associations of individuals with common interests, such as hobbies, sports, cultural interests and so on
- As a rule, community groups do not take steps to influence law making, although they may become pressure groups if their areas of interest become the subject of government policy. An example might be surf lifesaving clubs who may become concerned about a government policy to protect beach goers by culling sharks. In this case, the clubs may take action to influence that policy

Types of pressure groups

Sectional groups

- Represent the self interest of sections of the community. A section is a part of something - sectional pressure groups represent parts of society - not the interest of the whole community
- Examples of sectional pressure groups and who they advocate for are:
  - The Business Council of Australia for business and companies;

Cause groups

- Motivated by a principle, aim or movement which they perceive of benefit to the whole of society
- Examples of cause groups and the principle or aim they advocate are
  - Recognise - supports constitutional recognition of Aboriginal and Torres Strait Islander peoples and the removal of race-specific sections of the Australian Constitution
  - The Australian Conservation Foundation - supports environmental protection and conservation

Hybrid groups

- Hybrid groups combine features of both sectional and cause groups. They advocate for the interests of a section of society but also for related policies which they believe are in the wider interests of society
  - Examples of hybrid groups are;
    - Returned Service League which advocates for better treatment of returned soldiers, sailors and air force personnel (pensions, injury cover and so on) and at the same time promotes defence in the national interest

Peak bodies

- Many pressure groups belong to larger associations of similar pressure groups. For example, many trade unions are members of the Australian Council of Trade Unions (ACTU). Each state has a farmers association - in WA it is WA Farmers. Each state's farmers group belongs to the National Farmers Federation (NFF)

Other ways to classify pressure groups

Insider groups

- Groups that represent important sectors of society or the economy are regarded as legitimate by government. Governments will often respect their advice or even seek it out before making laws. Most insider groups are sectional pressure groups. NFF is very close to the Nationals - both represent the same constituency. The mining sector of the economy is another case in point with the Minerals Council of Australia being an example of an insider group
- These groups are often well resourced because of their ability to raise funds through membership fees. They can employ professional staff, such as lobbyists, lawyers, advertising and marketing personnel and may have offices in Canberra, close to the seat of power. These offices often mirror the structures of the companies they represent, with a strong hierarchical organisation and high degrees of professionalism. Membership is often restricted; they are exclusive. They can be formidable organisations

Outsider groups
- Many cause groups are outsider groups because they represent causes, principles or aims that are less central to the core business of government - the economy in particular.
- Usually poorly resourced, relying on donations of time from volunteers or money from sympathisers. They lack the professionalism and centralised organisation of insider groups. They tend to have a flat structure - with perhaps one or two paid executive officers and the rest of the staff being volunteers. They do not have the professionalism of insider groups but often have high degrees of motivation because their members passionately support the cause they represent. Membership is usually open to anyone; they are inclusive. Effectiveness is variable. Depends on the status of the cause they represent, public opinion, media interest and so on

Pressure group strategies
- Direct lobbying
- Submissions to Parliament - statement or argument from a party seeking to influence the law making process in Parliament
- Direct action
- Court action
- Advertising
- Online campaigns
- Celebrities

Rating pressure group influence
- Strong, if they have access to government, those who wield actual power, resources and they represent powerful sectors of the economy. Governments are more likely to pay attention to such groups
- Moderate, if they have large memberships or represent sectors of society that the government is sensitive too. These groups influence can depend on circumstances. For example a pollution crisis on the Great Barrier Reef may temporarily raise the influence of environmental groups
- Limited, if they have small memberships, limited resources or represent less critical sectors of society. A group representing fringe causes one that is not important to the economy or does not have the attention of government - will be much less influential

pressure groups in parliament -
AMA - plain packaging - The introduction of plain packaging for tobacco products will remove the reinforcement that packet design and brand imaging have on tobacco consumption. There is also evidence that plain packaging will have a deterrent effect on smoking. In this submission, the AMA urges the Committee to recommend that the House of Representatives pass the Tobacco Plain Packaging Bill 2011

Roles and power of the High Court of Australia, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision

High Court
Section 71 specifies that the Parliament shall have power to create "other federal courts". This gives exclusive power to the Parliament to legislate for new federal courts. Over time this power has been used to create a federal court hierarchy, referred to in the Constitution.

Parliament did not exercise this power significantly until 1970's. 'Cross-vesting' allowed most federal matters to be adjudicated by State and Territory courts using federal jurisdiction 'invested' in them. In 1930 the Federal Court of Bankruptcy was created, followed in 1956 by the Australian Industrial Court. Both of these courts were highly specialised courts. Section 71 allows the Parliament to 'invest' other courts with federal jurisdiction, granting State and Territory courts the power to adjudicate in cases involving federal laws. This process is known as 'cross-vesting'. A State court may therefore exercise federal jurisdiction, reducing the need to establish a separate and costly federal court hierarchy in each State and Territory.

HC interprets and strictly defines **Section 71** 'judicial power'

- There have been occasions when the HC itself has interpreted its own, and chapter three courts, judicial powers. These occasions have occurred when it has been required to adjudicate the meaning of Section 71. This has ensured that only the HC and other Federal courts, created by tech CW, can exercise judicial power to the exclusion of all bodies.

Guaranteeing judicial independence - **section 72**

- The separations of powers is a key principle of any democracy. of the Constitution achieves this by two mechanisms
  - The executive appoints, but only the Parliament may remove judges on the grounds of proven misconduct or incapacity
  - The executive cannot reduce judges pay
- These two elements of s72 ensure the involvement of the other two branches of government in the appointment and removal of judges. The power to remove a judge is deliberately separated from the real executive because the government is often a party to cases. It also has significant power that may be used to pressure judges, as happens in non-democratic countries
- The parliament's power to remove judges is conditional - it must only be on grounds of 'proven misconduct or incapacity'. There is no constitutional definition for any of the words proven, misconduct, incapacity. Proven may not mean proven in a court. Misconduct could be less than criminal conduct. Incapacity could refer to mental and physical health or even bankruptcy. The vagueness of these words is deliberate - it makes it hard to sack a judge. No federal judge has ever been removed by Parliament using this power.
- Section 72 was changed by referenda in 1977 - change makes it compulsory for judges to retire by the age of 70 years

Types of jurisdiction

- **Appellate** jurisdiction refers to the power of a court to review the decisions of lower courts. Appellate jurisdiction applies to certain areas of law and to certain courts. Only those at the intermediate and superior levels in the court hierarchy have appellate jurisdiction. It is noteworthy that only courts with appellate jurisdiction may create common law precedents
- **Original** Jurisdiction refers to the power of a court to hear cases in the court of first instance. This means that these cases may be heard for the first time in that particular court. In the first hearing of a case the court will apply the law and consider the fact when adjudicating.

Section 73

- **Appellate jurisdiction** of the HC
- Grants power to hear appeals on all civil and criminal matters arising from lower courts throughout all State and Territory hierarchies and the federal hierarchy. It may also hear appeals from cases heard by a single judge of the HC itself
- S73 also grants the Parliament the power to determine which appeals the HC may hear. S35A of the Judiciary Act 1903 sets out the circumstances under which a so called Special Leave to Appeal may be granted. This is designed to control the case load of the HC by giving it power under the Act to decide if it will hear an appeal. Thus, there is no automatic right to appeal to the HC. Most cases in which a party is seeking Special Leave to Appeal will already have been appealed to a Supreme Court, the Federal Court or a specialist Court of Appeal such as the WA Court of Criminal Appeal or the NSW Court of Appeal. As a rule, the HC will only grant Special Leave to Appeal if there appears there may be;
  - A miscarriage of justice
  - A question of law, which creates the possibility that new common law may be made i.e. a new precedent may be set
  - A conflict between courts
- If the HC rejects an application for Special Leave to Appeal the case ends and decision stands. The parties will have then exhausted all appeal options
- The HC is a final court of appeal but not a general court of appeal because Special Leave to Appeal may not always be granted

The High Courts original jurisdiction - Section 75 and 76

- Constitution grants the HC original jurisdiction in two sections
- S75 grants the HC original jurisdiction and includes matters concerning treaties with other countries or international organisations such as the United Nations, or cases involving the States or the CW as parties.
- S75(v) grants the HC jurisdiction to adjudicate writs of Mandamus, prohibiting or injunctions - the three most significant remedies that can be made by a court when a party believes the government is acting unlawfully. Mandamus is a remedy that can compel a specific government offical to do something. Prohibition and injunctions are remedies that can prevent a government from doing something. They are strong checks on the executive power wielded by the public service
- **Section 76 allows the Parliament to grant additional original jurisdiction** to the HC besides that already granted under s75. This section permits some flexibility for the power of the HC to be amended by the Parliament as it sees fit and as circumstances change. It is an example of how our Founding Fathers attempted to make the Australian Constitution adaptable to future needs
- Interestingly, the HC well known original jurisdiction in constitutional cases is granted by Parliament under s76, which in part states

Roles of the HC

- Determining constitutional cases
- Hearing appeals, some of which may lead to new common law

Constitutional cases

- Australian constitutional systems is actually a combination of written and unwritten rules that create, define and allocate powers. They also provide the rules for the process of governance, outline citizens rights and provide for other key institutions and practices of the Australian system of government
- Unwritten part of the Australian constitutional system, the Westminster conventions are non-justiciable, meaning that they are not able to be adjudicated by a court, precisely because they are not written. The written part of the Australian constitution system, the CW of Australia constitution act 1900, is an act of the westminster parliament.

Common law cases

- Section 73 grants the HC its power to hear appeals from all Federal, State and Territory courts and bodies exercising judicial power. It is through the appeals process that the HC most often makes common law
- An appeal occurs when a party to a case decided by a lower court wishes to have the judgment tested or reviewed by a court with the appellate jurisdiction. As outlined above, the HC must grant Special Leave to Appeal before an appeal can be heard by the HC
- Common law is created by appellate courts. The HC is the ultimate appellate court. It may create new common law when it:
  - Reverses a case on appeal
  - Interprets statute laws in new ways and declares the law
  - Overrules existing precedent

Citizenship 7

In the case, the High Court, acting as the Court of Disputed Returns, found that four of the six senators referred to it, and the only member of the House of Representatives (Barnaby Joyce), were disqualified under Section 44 of the Constitution. With the exception of Xenophon and Canavan, it was found that the MPs had never been validly elected.

Constitutional case - must involve the constitutional matters

Citizenship 7 - 2017

- section 44(i) - literal interpretation
- court of disputed returns
- had legal standing
- Precedent - Sykes v Cleary (1992) - literal interpretation
- Ministership invalid
- Govt lost their majority in the lower house (74 seats) - government is subject and bound to the law - not beyond the law
- Resulted in a by election

- Some MP's resigned

Legal power issue
- High court holds the power
- section 76 - additional original jurisdiction
- Legal power to interpret meaning (of section 44(i))
- As an unelected body they can invalidate an election body
- All elected parliamentarians are subject to the law and their position in Parliament was invalid
- 5 invalid and 2 valid
- consequence / effect - MPs position was invalid
- Could of been a no confidence motion passed against them
- Impact on the lower house
- by-election - Barnaby Joyce
- created citizenship registrar
- Joint standing committee
- Discussion of a referendum to remove section 44i
- shows independence of the judiciary
- Shows rule of law

political power contemporary example - contemporary senate

Norrie

- Non specific sex person - sought to be registered under the Births, Deaths and Marriages Registration Act 1995 (NSW) as non-specific sex. - Initially approved by the NSW registrar of Births, Deaths and Marriages but was later revoked and deemed invalid as the Act only permitted male or female - Appealed to NSW Administrative Decisions Tribunal in which it was rejected. Norrie appealed the Tribunal's ruling in the Court of Appeals NSW in which the court found favour of Norrie and declared she could be assigned to a category other than male or female. NSW Registrar then applied for Special Leave to Appeal in which the High Court was called upon to determine whether the Births, Deaths and Marriages Registration Act 1995 (NSW) allows for a person's sex to be ambiguous or indeterminate. The High Court made an unanimous decision in April 2014, ruling that the Act does allow for male and female sexes however binary classification is not applicable to everyone. The Court stated it was the job of the Registrar to simply record information provided by members of the public, not too decide moral or social judgements about the success of sex affirmation surgery. In its ratio, the High Court noted that to meet Norrie's request to be registered as 'non-specific' sex "would be no more than to recognise, as the Act does, that not everyone is male or female."

Federalism in Australia with reference to - Constitutional powers of state and commonwealth parliaments, including exclusive, concurrent and residual powers, Sections 51, 52, 90, 107 and 109.

definition: is the division of power and responsibilities between a central authority and 2 or more regional governments. Federalism requires a written constitution and constitutional court (high court) for the settlement of disputes.
Federalism is a requirement for a nation the size of Australia.

FEDERALISM IN AUSTLALIA
- The decision to develop a federalism system of government had important implications for the institutional design of the Australian system.
- Australia has an entrenched constitution that prevents the abolition of the states by the Commonwealth, outlines the division of powers and which can also be changed at a referendum
- Constitution also establishes a strongly bicameral parliament and provides the basis for the High Court
- Many Australian politicians have been hostile towards these power dispersing institutions and to federalism more generally. A key reason for this is that federalism conflicts with the principle of responsible government, which is also central to the Australian System.

- In the UK the idea of responsible government is closely associated with the idea of **parliamentary sovereignty** which means that parliament exercise supreme legal authority. No other institution - including a court or entrenched constitution can lawfully prevent the UK parliament from passing whatever laws it wants.
- Australia does not have parliamentary sovereignty because the authority of the Commonwealth parliament has been limited by an entrenched Constitution, and the existence of independent state governments. Many Australian politicians have regarded this as a deeply regrettable state of affairs because the British approach was seen as the most efficient and democratic form of government.

WHAT IS MEANT BY 'FEDERATION?'

- Six colonies united to form a federal nation on January 1, 1901. The colonies united under the Commonwealth constitution. A federal system of Government was established between the six colonies and the new federal government

DIVISION OF POWERS

- The allocation of powers to the Commonwealth Government and state governments, or a formal arrangement allocating the responsibilities of government between different levels of government
- In Australia, the commonwealth constitution, s52 identifies matters over which the commonwealth has exclusive power
- The allocation of powers is sometimes referred to as the federal balance

EXCLUSIVE POWERS

- Are legislative powers which can only be exercised solely by the commonwealth parliament. Only the commonwealth parliament can make laws in these areas e.g s52(i) seat of government of the commonwealth s52(ii) matters relating to any department of the public service
- s90 customs and excise duties are exclusive to the commonwealth
  - Exclusive powers of the commonwealth are powers in which only the commonwealth has the authority to pass legislation
  - Ability to make trade agreements with other countries. - 4th march 2019 - Indonesia-Australia Comprehensive Economic Partnership Agreement
  - Ability to collect customs and excise tax

CONCURRENT POWERS

- Are law making powers over which both the commonwealth parliament and the state parliaments share jurisdiction over. All powers in the constitution not made exclusive to the commonwealth are concurrent powers
- s51 and s39
  - Powers that are shared between the commonwealth and the states
  - Examples would include taxation **(s51.2)** - allows the commonwealth and the states to both collect tax for example the commonwealth (from 1941) has the ability to collect income tax whilst the states has the ability to collect stamp duty.
  - s109 - the commonwealth will prevail in a dispute between the commonwealth and the states

RESIDUAL POWERS

- These powers are those law making powers left with the states at the time of federation and not listed in the constitution
- Section 107 which assigns the state jurisdiction over policy areas that are not exclusively vested in the commonwealth or withdrawn from the parliament of the state
- S109 when a law of 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
  - Powers that are the states powers
  - Anything that isn't in the constitution is Residual - there are sections in the constitution
  - Any power that a state has before the constitution they get to keep 107
  - 106 - any constitution written before 1901 - they get to keep
  - Education and health - most important residual powers
  - very important to the states however because they are not in the constitution they can be weakened

EXCLUSIVE AND CONCURRENT POWERS

- s51 sets out the concurrent powers upon which the commonwealth is permitted to legislate, and example of this is the s51 (2) tax and s51 (20) corporations
- Whereas section 52 differed as it deals with exclusive powers. Section 52 sets out the commonwealth parliament to legislate in respect to the seat of government (ACT) commonwealth public service etc

How the Commonwealth doesn't always win

Williams brought proceedings in the High Court challenging the validity of the funding agreement and the making of payments under the funding agreement. Mr Williams contended that the Commonwealth did not have power under s 61 of the Constitution to enter into the funding agreement, and that the funding agreement was prohibited by s 116 of the Constitution.
High court found funding agreement and the making of payments pursuant to that agreement were beyond the executive power of the Commonwealth

---

the financial powers of the Commonwealth Parliament, including Sections 51(ii), 87, 90, 92 and 96; and change in the balance of power since Federation, with reference to the financial powers, including vertical fiscal imbalance, horizontal fiscal equalisation and the Grants Commission;

IMPACT OF S109…

- s109 provides a mechanism to resolve conflict and inconsistencies between state and commonwealth laws that can sometimes arise in the area of concurrent powers
- Under 109 if there is such conflict, then the commonwealth law will prevail, to the extent of the inconsistency between the two pieces of legislation. The provisions of the state law will be invalid

FINANCIAL POWERS OF THE COMMONWEALTH PARLIAMENT INCLUDING TAXATION POWERS, TIED OR SPECIAL PURPOSE GRANTS INCLUDING SECTIONS 51(II), 87, 90, 92, 96

s87

- between 1901 - 1911 - one forth can be collected by the Commonwealth and the
- doesn't count anymore because the 10 years is finished
- advantage for the commonwealth

- Taxation power technically concurrent s51(ii)
- s87 Braddon blot
- exclusive power of commonwealth to collect customs and excise duties s90
- s92 free trade i.e Trade, commerce and intercourse amongst states, by internal carriage or by ocean, shall be absolutely free (this was a reason for federating)
- Tied or SPG s96
  - **tied grant** - allows the commonwealth to give money to the states on terms and conditions that they see fit
  - changed the federal balance - coercive federalism - 1941 onwards the power has only gone towards Canberra - the commonwealth has become more powerful than the states because they have more power.
  - before 1941 the states had the power to say no
  - commonwealth has more financial power - control of income tax
  - **shifted** the federal balance towards the commonwealth because of s96

Section 96 grants power

Asset Recycling Scheme

On 17 February 2015, the ACT Government signed an agreement with the Commonwealth Government to sell territory assets as part of the Asset Recycling Initiative. This means that in addition to the sale price of the asset, the territory receives a 15 per cent bonus payment from the Commonwealth to fund infrastructure projects; in the ACT's case the incentive payments are used for stage one of the territory's light rail network.

SOURCES OF COMMONWEALTH FINANCIAL POWER- TAXATION
SECTION 51: TAXATION

- During WW1 the level of commonwealth expenditure rose dramatically. Both the Commonwealth and states had begun collecting income tax
- Under the UTC of 1942 the Commonwealth government became the sole collector of income tax
- The commonwealth then imposed uniform progressive income tax, equal in value to all existing direct taxes
- The conditions under which the Commonwealth provides funds to the states is also a source of Commonwealth power

INCOME TAX

The main revenue which the Commonwealth raises is through income tax. Income tax from individuals constitutes more than 50% of its revenue, and the income tax on companies contributes a further 23%. Indirect taxes and levies make up the rest.

SIGNIFICANCE OF INCOME TAX

- At the end of the WW2 the Commonwealth did not hand back a share of the administration of income tax to the states
- The states could not realistically charge additional income tax either
- Over the next 50 years the Government expanded its collection of personal and company income taxes until they accounted for over 45% of total government revenue
- This meant that the states dependency on the commonwealth increased
- Reliant on minor taxes such as payroll tax, land taxes and gambling taxes

SOURCES OF COMMONWEALTH FINANCIAL POWER- CUSTOMS AND EXCISE DUTIES

- **Section 87**. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.
  - The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.
  - Section 87 specifies that 75% of the revenue collected from customs and excise duties was to be handed back to the States. However, this requirement (often called the '**Braddon Blot**') lasted only ten years. After that time the Commonwealth was free to determine the size of grants to the states.
- **Section 90** establishes that the collection of customs and excise duties is an exclusive power of the Commonwealth
- This demonstrates that the financial arrangements in the constitution that protected the states were quite weak. THIS LITERALLY MEANS THAT TRADE AND COMMERCE AMONGST THE STATES SHALL BE ABSOLUTELY FREE.
- has prevented many a Commonwealth and State Labor government from nationalising industry, and so it has often been said that in the Australian Constitution s. 92 is to private enterprise what s. 96 is to public enterprise. There were also various clauses preventing the Commonwealth from discriminating against particular States in the exercise of its powers, e.g., in taxation, customs, bounties, and trade and commerce. They also served indirectly to protect the smaller States from predatory behaviour by the larger States, something the small States had demanded as the price of joining the federation, along with the creation of the Senate as a States' House with all States having equal representation.

SIGNIFICANCE OF THE HA CASE (1997) ON COMMONWEALTH FINANCIAL POWER

- In the HA case 1997 the high court ruled that the commonwealth has a constitutional monopoly over excise taxes
- This meant that the court ruled that the state levies on Tobacco, Petrol and Alcohol were invalid
- This further reduced the financial base of the states and improved the financial dominance of the Commonwealth
- Section 90 - example of the influence of high court interpretation on commonwealth financial power

SOURCES OF COMMONWEALTH FINANCIAL POWER- TIED GRANTS
- Tied grants may also be called 'specific purpose payments SPP'S or Specific purpose grants
- This means that the commonwealth can determine the terms and conditions of the grants it makes to states
- This provides the Commonwealth with a means of influencing state government policies and this the ability to intrude on areas of state powers

SPP'S AND TIED FUNDING
- The federal government may also provide funding to the states for a specific purpose. The states have to consent to receiving the funding (which is not usually a problem) but it does mean that the federal government cannot impose programs on the states that they vehemently oppose
- This funding is tied to a particular project, where the federal government provides the funds and the state carries out the project. Grants such as these have been used regularly to fund education and health projects in the states meetings regular reporting requirements or achieving certain milestones

•PROVIDING FUNDING TO THE STATES THROUGH SPECIFIC PURPOSE GRANTS ALLOWS THE FEDERAL GOVERNMENT TO HAVE GREAT INFLUENCE ON POLICY AREAS THAT HAVE TRADITIONALLY BEEN WITHIN THE PURVIEW OF THE STATES.

Change in the balance of power since federation, including increasing commonwealth power due to:
- Financial powers including vertical fiscal imbalance and horizontal fiscal equalisation, the grants commission
- Referral of powers section 51(XXXVII)
- COAG
- Co-operative federalism as opposed to coercive federalism
- High court of Australia constitutional interpretation, including external affairs power section 51 (XXIX), corporations power section 51 (XX) and taxation powers section 51(II)

WHAT IS THE FEDERAL BALANCE?

- The term federal balance refers to the division of powers. That is the formal arrangement allocating the responsibilities of government between different levels of government in a federation. In Australia this arrangement is formalised by the commonwealth constitution (Australia) and the powers are divided between the Commonwealth government and multiple state governments

ROAD TO FINANCIAL DOMINANCE
- The way commonwealth financial power has increased is through:
  - states loss of taxing powers
  - CW's use of section 96
- At the time of federation, Alfred Deakin identified this (financial relations) as the likely area of expansion of Commonwealth power by arguing the States were going to be bound to the chariot wheels of the Commonwealth
- **BRADDON BLOT S.87-** Commonwealth would provide 3/4 of its revenue it received from customs and excise duties to the states. Limited to a 10 year period. By 1910 it had expired.
- Greatest blow to the financial independence of the states came from the **CW's assumption of sole control over income tax during WW2**
- The states were impeded from raising their own tax revenue with the **HA** case of 1997, which made them even more financially dependent on the CW
- **Introduction of GST** - CW would provide the states with an assured source of revenue and the states agreed to abolish a number of taxes. Source of United Funding
  - INCREASED VFI.

GRANTS COMMISSION

- The Commonwealth grants commission is the body which operates under the Commonwealth grants commission act 1973
- It is a statutory whose role is to provide advice to the Australian government on the allocation of funding to the states, particularly the GST

Financial powers including vertical fiscal imbalance (VFI) and horizontal fiscal equalisation (HFE)

- VFI - Vertical fiscal imbalance (VFI) is a situation which exists when the commonwealth has a revenue surplus, but the states do not raise enough revenue to cover their expenditures. VFI allows the Commonwealth to use
- Ensures dependency of states on Commonwealth funding
- The commonwealth raises 82% of total tax revenue, the states and territories 15% and local government 3%

Vertical Fiscal imbalance

- refers to the fact that whereas the states have the responsibility for delivering expensive services such as health and education. It is the Commonwealth that has vastly greater revenue raising capacity.
- At federation the major source of governments revenue was excise taxes (goods for domestic market) but the power to tax customs and excise was given the Commonwealth as it was necessary to create a national economic union
- Initially the Commonwealth was obliged to pass on a fixed amount of the revenue generated to the states but this only applied for the first ten years following federation - expected that the CW and states would make a permanent agreement after that
- No agreement was reached
- Over time income tax became a more important source of revenue than excise and both commonwealth and states had power to raise funds this way - changed in WW2 - CW threatened to cut its funding to any state that levied income tax
- Was challenged in Uniform Tax case (South Australia v the Commonwealth 1942) - ruled in favour of the CW
- Other High Court deacons have ruled out other revenue sources for that states including taxes on alcohol and cigarettes
- Undermining the fiscal autonomy of the states was the use of tied grants which are technically known as specific purpose payment (SPP) - basis is s96 - may grant financial assistance to any state on such terms and conditions as the Commonwealth sees fit
- Allows CW to provide grants on the proviso that they spend the money in a particular way leading to further Commonwealth encroachment in policy areas (predominantly state responsibility)
- Use of tied grants changed significantly with the new Intergovernmental Agreement of Federal Financial Relations - introduced by Rudd govt
- Commonwealth state financial relations occurred in 2001 when Howard Govt introduced the GST - revenues raised are passed on to the states to spend as they see fit, this gives states access to major growth tax. However although the GST has increased the states revenue base it is not a sure fire way of securing their financial independence.
- States still receive purpose payments from CW which they use to fund activities. CW could use this as leverage to force the states to behave in a certain way, threatening to reduce these payments if the states do not accede to the Commonwealth's wishes

Horizontal fiscal equalisation

- Refers to the redistribution of financial resources across the Federation in order to equalise the relative position of each state - based on idea that within reasonable limits citizens in all parts of a federation … should have comparable access to public services.
- CW Grants Commission plays a central role in the process of horizontal fiscal equalisation.
- advises CW on how the revenue raised through the GST should be allocated, working on the principle that each state should be given the capacity to provide the average standard of state type public services, assuming it does so at an average level of operational efficiency and makes an average effort to raise revenue from its own sources. In effect this means that part of the GST revenue raised by people in some states is transferred to be spent by the governments of other states

- WA received $1413 million less in GST revenue than it would have received had GST revenue been distributed on an equal per capita basis, while Victoria received $133.20 million less than its equal per capita allocation (budget 2011-12, Appendix A, Box A.1)
- Notifications for horizontal final equalisation are equity and social solidarity
- Distribution of CW funding to sates has long been a source of controversy with state governments frequently complaining that they are not getting a fair deal
- "The current form of fiscal equalisation is too extreme - it fails equity tests, penalises hard work, encourages welfare dependency and is now a divisive rather than unifying influence
- Majority of the GST pool should be allocated on a simple per capita basis and the remaining pool should be allocated according to need

HFE

During WA mining boom the State received large royalties from mining that most other states lacked. States such as SA and Tasmania which both have small populations and low taxes bases, would have a much lower standard of living than WA if not for HFE

CAUSES OF VERTICAL FISCAL IMBALANCE

- s87 Braddon Blot
- 1942 uniform income tax agreement act 1 - which gave the CW power to levy income taxes
- 1942 uniform income tax agreement act case - which confirmed the existence of the act beyond WW2. Followed by the 1957 - uniform tax agreement case 2
- 1997 HA case - where states lost the excises on tobacco and alcohol

NOTE: S.96 IS NOT A REASON WHY THE VFI EXISTS, BUT DOES EXACERBATE IT.

Financial powers including vertical fiscal imbalance (VFI) and horizontal fiscal equalisation (HFE)

- HFE : refers to the approach used by the CW grants commission where states receive different levels of funding from the CW/GST redistribution because states have differing abilities to provide comparable levels of service because of demographic and economic disparities between them
- It is based on the idea that within reasonable limits citizens should have comparable access to public services, universities, hospitals etc (HUEGLIN AND FENNA 2006)

HORIZONTAL FISCAL EQUALISATION

- Arguments for:
  - Important that all Australian citizens should have roughly equal access to the services that governments provide
- Arguments against
  - Produces and maintains inefficiencies in the allocation of resources
  - It is a disincentive for states to strive for greater efficiency in the provision of services and the building of infrastructure

COALITION REVEALS DETAILS OF RADICAL ATTEMPT TO FIX GST FORMULA- JULY 2018

- The government says the current GST distribution system, which attempts to lift the fiscal capacity of every state to the same level as the strongest state, is no longer working. It proposes moving to a new benchmark where the fiscal capacity of every state is at least the equal of NSW or Victoria (whichever is highest)

- **the commonwealth is in a more financially dominant position than the states for 2 reasons**
- **weak constitutional provisions**
  - weak when it protects the states financial interests
  - states power is residual so its hard to protect because it isn't in the constitution e.g **s51**(ii) gives the states power however it also gives it to the Commonwealth. In addition to 51(ii) section **87** gives the constitution demanded that the CW give money back to the states for a period of 10 years.
  - section 90 - only the CW will collect duties or customs - $40 billion a year that the states cant touch
- **Decisions of the High Court**

- income tax - $223 billion - up until 1941 this was collected by the states
- 1942 - high court had to decide if the 4 acts of parliament were constitutional
- citizens of Australia have to pay the income tax to the Commonwealth first
- States lost the practical ability to collect income tax
- section 96 has allow the commonwealth to introduce upon areas of previously held residual power - if the commonwealth wants more power they will take education and health
- HAAR case 1997
- prior 1997 - NSW was forcing businesses to pay a license fee for selling cigarettes

---

the referral of powers;

Referral of powers Section 51(xxxvii)

- That the referral of powers under the Commonwealth constitution enables state parliament(s) to refer / transfer matters to the commonwealth parliament
- That the referral gives the Commonwealth power to pass laws about these matters and that such laws only apply to the state(s) concerned
- Process of ROP involves states agreeing to hand over an area to the Commonwealth
- e.g terrorist acts inside Aus. When this decision has been reached, the state parliaments pass an Act giving their law-making power to the Cth and the Cth passes an Act accepting this power from each state that has referred its power
- The IMPACT of the ROP is that there is a change in the DOP between the states and the Cmth in favour of the Cmth
- In 2003 it was agreed between the CW and the states that it was necessary to expand the
- defence power contained in s51(VI) to include internal security. This was done by the states referring their power to make laws regarding terrorism to the CW
- The water (commonwealth powers) ACT 2008 (VIC) was passed to refer certain matters relating to water management to the CW parliament.
- In 2009 the NATIONAL CONSUMER CREDIT PROTECTION ACT (CTH) transfers regulatory responsibly for credit from the states and territories to the commonwealth

REFERRAL OF POWERS THAT HAVE NOT BEEN SUCCESSFUL

- April 2013 the Australian has reported that gang crime and unexplained wealth laws will not be referred to the CW just yet as states and territories at the recent council of Australian governments (COAG) meeting in Canberra failed to reach agreement on handing over powers to the federal government

cases that limited cw power

State banking case 1947 - case struck down cw legislation that attempted to force the States to bank with the CW bank on the grounds that it discriminated against the states

STRENGTHS AND WEAKNESSES OF REFERRAL OF POWERS

- The Council of Australian Governments (COAG)
- The council of Australian governments (COAG) is the peak intergovernmental forum in Australia
- The members of COAG are the PM, state and territory first ministers and the president of the Australian local government association (ALGA). The PM chairs COAG
- Established in 1992. Its role is to manage matters of national significance or matters that need co-ordinated action by all action by all Australian governments
- COAG usually meets twice a year
- The outcomes of COAG meetings are contained in Communiques published at the end of each meeting. Where formal agreements are reached, these may be embodied in intergovernmental agreements, including national agreements and national partnership agreements
- Come to play a pivotal role in the processes of government in Australia

referral of powers

- only go from the states to the government
- **anti terrorism laws**

- 51(37)
- 1975 - the states of SA and Tasmania's - refereed over this power of non metropolitan railways - expensive to maintain the railways
- only happened on limited occasions

Referral of powers
Security Legislation (terrorism) Act 2002 - to create special category of crime by criminalising terrorist acts - crime a state power - states referred power to the CW to pass this legislation

---

the Council of Australian Governments (COAG)

COAG AND NON-COOPERATION
- Act rejects public hospital funding deal at first COAG meetings of 2018
- 2016 states ruled out levying their own income tax after a proposal by Malcolm Turnbull at COAG

Council of Australian Governments
- Intergovernmental interaction generally occurs between the PM and premiers, minsters and public servants. This executive federalism reflects the dominance of the executive branch over the legislative branch in Australia
- Premiers conference largely played a symbolic and political rather than administrative role because the broad outline of the CW budget was determined prior to the meeting. It is also an occasion for signing agreements that had been decided upon prior to the meeting or referring issues to committees for further examination
- Conference also gave each head of government the opportunity to assess their counterparts and to share information about key political issues
- 1992 the Council of Australian Governments (COAG) was formed. COAG includes the, state premiers, territory chief ministers and the head of the Australian local government association
- COAG originally met twice a year to discuss issues that were not covered in the Premiers Conference
- Much of the impetus for the formation of COAG came from the Commonwealth attempt to secure microeconomic reform in the mid 1990's
- 1995 the CW and the states ultimately reached agreement on a National Competition policy thereby illustrating that national policy reform is possible even when it requires extensive intergovernmental cooperation - collaborative federalism
- Howard Governments agenda became increasingly focused on issues that required close cooperation with the states and this renewed COAG's importance
- E.g 9/11 attacks 2001, Bali bombing in 2002 and the London tube bombings in 2005 - Howard government wanted to pass a series of reforms in the area of counterterrorism and national security.
- In the lead up to 2007 election the Rudd-led Labour opposition promised to strengthen COAG
- COAG continued to met more frequently than it had in the past with eight meetings in 2008-09
- July 2012 the Labor Govt had held 14 COAG meetings in its 4 and a half years in office. This is the same number of meetings the Howard Government held in eleven and a half years in office.

coag doesn't always work bc cw has more financial power (income tax), weak constitution for states, the states might not all agree on issues, in addition to having to work in agreement to the cw you also have to find agreement between states

COAG
29 June 2018. The National Disability Insurance Scheme (NDIS) supports people with a permanent and significant disability that affects their ability to take part in everyday activities.

---

co-operative federalism as opposed to coercive federalism;

EXAMPLES OF CO-OPERATIVE FEDERALISM

- concept of federalism in which federal, state, and local governments interact cooperatively and collectively to solve common problems, rather than making policies separately but more or less equally
- Detailed commitments of the council of Australian governments (COAG) may be recored through intergovernmental agreements or statements of co-operation. In many instances, agreements have been the precursor to the passage of commonwealth or state and territory legislation
- Bilateral agreement between the commonwealth of Australia and the state of South Australia on the national disability insurance scheme - 29 June 2018. The National Disability Insurance Scheme (NDIS) supports people with a permanent and significant disability that affects their ability to take part in everyday activities.
- Intergovernmental agreement on the National redress scheme for institutional child sexual abuse - 4 May 2018. The National Redress Scheme has been created in response to recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission into Institutional Responses to Child Sexual Abuse listened to thousands of people about the abuse they experienced as children. The abuse happened in orphanages, Children's Homes, schools, churches and other religious organisations, sports clubs, hospitals, foster care and other institutions.

coag - works to settle concurrent and education issues

COERCIVE FEDERALISM

- A term used to describe an imbalance of power in a federal system where the central authority effectively dominates the regional government
- In Australia since WW2 the Commonwealth has become financially dominant over the states and can direct spending programs of the states through the use of tied grants
- The change in the financial relationship from independence to dependence.

EXAMPLES

•**COOPERATIVE:** Consensus reached on a number of issues and the collaborative action to be taken to achieve those strategies and objectives - see COAG meetings 2018/2017 FROM ABOVE.

•**COERCIVE**: 2017 Gonski 2.0 schools package. Federal government decided how much funding the schools would get which is also tied to acceptance of reforms

- It is not possible to describe the governments education reforms as simply a means to achieve better funding for schools. If that was the sole aim, it could be done by providing the money without new conditions and powers. This legislation clearly goes beyond that aim by significantly expanding commonwealth power - Anne Twomey
- This process can be seen with the Abbott governments $80 billon cuts to state funding for schools and hospitals, forcing the states to secure an increase in tax receipts and ways of achieving it.
- High court cases that have contributed to changing the balance of power between the federal and state parliaments
- High courts of Australia constitutional interpretation, including external affairs power section 51 (xxix), corporations power section 51(xx) and taxation power
- External affairs power: Koowarta and Tasmanian Dams
- Corporations power: work choices

COMMONWEALTH OF AUSTRALIA & ANOR V THE STATE OF TASMANIA & ORS [1983] HCA 21; AKA THE TASMANIAN DAMS (1983)

- The CW was able to move into a law making area previously left with the state (residual)
- Increased law making power of the CW
- This could also lead to the CW assuming power over other issues involving internal treaties
- s109 saw the CW act prevail over the Tasmanian act
- Both Tasmanian Dams (1983) and Koowarta (1983) allowed CW to use a concurrent power to influence areas regarded as part of states residual authority (e.g lands policy)

THE STATE OF TASMANIA:

- Argued in HC that the Cmth Parliament had passed law in an area of state responsibility, and the law was therefore unconstitutional
- COMMONWEALTH'S REPLY:
- Argued that the law they had passed was within its law-making power under the 'external affairs' head of power. Basically that it had the power to intervene because s51 (xxix) gave it power to make laws relating

to external affairs and the proposed dam area was an external affair because it was covered by World Heritage listing (an international treaty).
- The Cmth also relied on the corporations power s51 (xx) and the precedent established in the Concrete Pipes case because the Hydro-Electric Commission was a trading commission and sold electricity to the public
- COURT'S RULING:
- The HC decided that as all aspects of Aus's relationships with other countries are included under the external affairs power, and because the Franklin River area was covered by an international treaty, it came under the external affairs power. This decision interpreted the words 'external affairs' to include any area covered by an international treaty
- The Court ruled that the Cmth held the power to prevent construction of the dam as Australia was a party to an international convention protecting world culture and national heritage; the Franklin River was listed on the World Heritage List.
- AS A RESULT of the HC's decision there was an inconsistency between the Cmth Act and the Tasmanian Act and under s109, the Cmth Act prevailed and the Tasmanian Act was made inoperable

***NSW V COMMONWEALTH* (2006) AKA WORK CHOICES CASE**
- Corporations power allows the CW to make law with regard to industrial matters between employers and employees
- Greatly reduce the ability of the states to regulate workplace relations at the local level
- Greg Craven : 'This effectively means that the CW has an open cheque to intervene in almost any field of state power which catches its eye, from education, through health to town planning and the environment
- Lawyers weekly said "…PUT AN END TO HOW WE HAVE UNDERSTOOD POWER TO BE SHARED BETWEEN THE COMMONWEALTH AND THE STATES SINCE FEDERATION IN 1901…" - shows the huge impact of the high courts actions
- Decision meant Commonwealth could regulate employment conditions and labour relations – previously assumed to reside with the States.
- The plaintiffs (NSW, WA, SA, QLD, VIC, the Australian Worker's Union and Unions NSW) challenged the constitutional validity of the Cmth's *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth), an Act that brought about major changes in the area of industrial relations
- State industrial relations systems were eroded by the implementation of national industrial relations systems
- That is, s51 (xx) corporations power allowed Cmth to pass industrial relations laws
- HC ruled in favour of the Cmth after these laws were challenged by 6 States
- The decision also overrode specific reference to s 51 (xxxv) reference to state industrial powers and s109 rendering invalid any conflicting state industrial relations .

High Court of Australia constitutional interpretation, including the external affairs power, the corporations power and the taxation power

HIGH COURT CASES RELATING TO FINANCIAL POWER
•UNIFORM TAX CASE
•HA/HAMMOND

SOUTH AUSTRALIA V THE COMMONWEALTH OF AUSTRALIA (1942) 65 CLR 373; AKA THE FIRST UNIFORM TAX CASE 1942
- Important decision that led to a shift of the federal financial balance in favour of the CW
- Over the years the states have become increasingly reliant on the CW for their revenue and increasingly subject to its dictates about how those funds will be spent
- Prior to 1942 s51 (ii) taxation power was truly concurrent and income tax was payable to both the Cmth and State governments
- During WW2 the Cmth thought there that there was a need to coordinate income taxes for the good of the country – states did not agree – the Cmth passed four Acts implementing their c with respect to income tax

- As Australia was at war, the Cmth passed the Uniform (Income) Tax Agreement Act which allowed them to collect income taxes and that the Cmth taxes took priority over State taxes, thereby taking over income taxes from the States. A portion of this was to return to the States by way of a formula. The scheme was supposed to be a temporary measure but was later extended. It had 2 features:
- Use of taxing power s51(ii) to impose income tax
- Use of grants power s96, whereby Cmth would grant to the States an amount of money approx. equal to which it would have raised through its own income tax but on the condition that the State itself imposed no such tax
- States challenged the Cmth law in the High Court but the majority upheld all aspects of the scheme.

UNIFORM TAX CASE (1957) 2

- This case merely upheld CW power over income tax in times of peace
- Reinforced this position in times of peace
- Although the states could still impose income tax none would as it would be politically untenable

HA AND ANOTHER V THE STATE OF NSW; WALTER HAMMOND AND ASSOCIATE•S.90.

- Significantly reduced the tax base of the states
- The states even more financially dependent on the CW
- PTY LTD V THE STATE OF NSW AND OTHERS (1997)
- AKA HA CASE 1997 At the time several Australian States introduced new taxes on alcohol, cigarettes and petrol which involved a licence fee with the aim to increase state revenues.
- The NSW Parliament passed the Business Franchise Licences (Tobacco) Act 1987 which required sellers of tobacco products to hold a licence and pay licencing fees to the NSW Gov
- The plaintiffs operated duty-free stores in metro Sydney that sold tobacco, but they did not hold the relevant licences. They were charged with evading $22 million in state franchise fees under the Act
- Plaintiffs argued that the fees were excise duties, which states were not empowered to impose, due to the Cmth's exclusive power in this area of law-making
- Ruled that s90 was an exclusive power of the Cmth (imposition of customs and excise duties).
- In a majority decision (4:7), the High Court determined that franchise charges imposed by NSW legislation were excise duties and as such they contravened s90 of the Constitution. Previous HC decisions had defined an excise as "any levy imposed upon goods at any point in the production and distribution chain", thus preventing the States from imposing sales tax on goods. However the States had attempted to overcome this by imposing licence fees on tobacco, alcohol and petrol. The HC struck them down, finding that the high rates of fees were designed to raise revenue, not to cover the cost of administration and policing.
- High Court ruled the licences to be excise duties and therefore could only be levied by the Cmth Government, weakening the States' financial base
- Dealt the blow to the revenue raising capacities of the States and Territories, throwing into doubt revenues of almost $5 billion, or 16% of their annual income (in 1996), further increasing State reliance on Cmth funding and subsequently increasing Cmth financial dominance over the States

OTHER IMPORTANT HIGH COURT CASES

CASES THAT LIMIT CMTH POWER/PROTECT STATE POWER

- Williams case relied upon federal considerations in interpreting the scope of the CW's executive power
- Placed importance on the federal system of government and the distribution of powers between the CW and the states. The CW cannot simply spend money on anything that it wishes and must have a head of legislative power to do so

THE STATES AND INFLUENCE OVER THE FEDERAL BALANCE OF POWER

- Refusal by state(s) to co-operate with the commonwealth within the context of COAG discussions and/or directions such as states collecting own income tax, hospital policy, the murray darling
- The refusal by state(s) to refer a particular power to the commonwealth (2013 CRIMINAL GANG LAW)
- Ability of state(s) to support and/or sponsor challenged to the constitutional validity of CW legislation such as work choices
- Ability of states to compete amongst themselves for a greater relative share of GST revenue (WA)
- The willingness of states to support co-operative federalism

STATES STILL PLAY A SIGNIFICANT ROLE IN FEDERATION…WHY?

- s106 which preserves the states constitutions
- s107 which saves the power of the states (unless the power has been exclusively vested by the constitution in the CW parliament) and s108 which states that all laws in force at the time of federation that relate to matters of that state shall continue to remain with the state
- states have important revenue - raising powers, even if insufficient to meet their needs
- States perform crucial functions of government, particularly in the delivery of essential services
- States (as opposed to territories) can innovate in ways that displease the CW. States can initiate and respond to national debates and do so with vigour when they know majority opinion within the electorate is with them; WA's poker machine free hotels and clubs, QLD's city of Brisbane, NSW's medically supervised injecting centre, Victoria's charter of rights. Federalism is never far from the political agenda
  - Turnbull government
  - NEG (national energy agreement)
  - Income tax
  - Abbott government
  - The 2014 budget made it brutally clear to the states what Abbott had in mind. The CW announced that it was withdrawing a$80 billion in health and education funding that had been pledged to the states by the previous labor government
  - Rudd - Gillard Government
  - Building education revolution
  - Minerals resources rent tax
  - National health and hospital network

Formal and informal methods of constitutional change and their impact - Referenda, High Court, Referral of powers, unchallenged legislation. Proposed reform

FORMAL CHANGE

- The referendum is the only process by which actual change to the text of the Constitution is possible. It is a formal process governed by the law of the Constitution itself.

INFORMAL CHANGE

- Effective constitutional change can be achieved by other mechanisms such as
  - High court decides constitutional cases, reinterpreting its meaning
  - States voluntarily surrender residual or concurrent powers to the CW, altering the balance of powers
  - CW passes legislation ultra vires but no case is brought before the High Court to challenge its validity. Such laws continue to operate because they have not been declared unconstitutional

---

REFERENDUM - Formal

DEFINITION : REFERENDUM

- Referendums are formal votes taken by the people to change the wording of the constitution. Referendums are outlines as the ONLY formal means of changing the CW constitution in chapter 8 Section 128 of the CW constitution.
- Despite being the only way to formally alter the Constitution, the referendum process has had a limited impact on the operation of the Constitution.
- An idea for a proposal to change the Constitution may come from the government, the parliament, parliamentary committee, an expert panel, a pressure group or through a review by a Royal Commission, Constitutional Convention or Constitutional Commission established by the Government.
- The last formal wholesale review of the Constitution was by the Constitutional Commission 1985-88 established by the Hawke Labour Government.

PROCESS FOR CHANGING THE CONSTITUTION

- A proposal to change the Constitution must pass as a bill through both houses of the Parliament (or the same House twice)
- The proposal must be put to the people, as a yes or no vote, no less than 2 months and no later than 6 months after it passes the Parliament.
- To succeed the proposal must achieve a double majority.
- Then must achieve royal assent

REASONS FOR SUCCESSFUL REFERENDUMS

- 8 out of 44 have passed. The 8 have some similar characteristics:
  - Involved minor procedural change e.g 1977 retirement of Judges (expansion of s.72).
  - Conferred benefits to the states e.g 1910 and 1928 proposals on State debts.
  - Continued existing benefits to voters e.g 1946 Social Welfare.
  - Do not generate strong no campaigns
- Can generally fall into three categories
  - **First** category - confer benefits to the states - 1910, 1928, 1946 - financial benefit - the cw takes over debts and the cw gives the states money
  - **Second** category- Reflected **universally** held values of Australians e.g 1967 referendum which gave the CW power to legislate with respect to Aboriginals and also the 1977 casual vacancies referendum for the Senate.
  - **Third** category - minor procedural change - 1977 judges and 1906

REASONS FOR FAILED REFERENDA

- 36 referendums have failed. This can be largely attributed to three major factor
  - Institutional
  - Political
  - Attitudinal
- The constitution was written in the 1890's however is still used in 2019 - it is outdated and does not always show the views and modern morals of Australian's
- Of the 36 failed referenda, 5 successes in winning a democratic majority (majority of voters) but failed to win a federal majority (majority of states)
- **First reason** - Extend commonwealth power over an area - if it extends cw power - 1911 *Legislative Powers - To extend the Commonwealth's powers over trade, commerce, the control of corporations, labour and employment, including wages and conditions; and the settling of disputes; and combinations and monopolies
- **Second reason** : Gets a simple majority but not a double majority - 1977 simultaneous elections - to ensure that Senate elections are held at the same time as House of Representatives elections
- **Third reason**: monumental change - change was too big - republic - 1999.
- 1999 also failed because it did not have bicameral support - both political parties did not agree. Liberals said no labour said yes but Howard did not want it to happen - worded the question to be too complicated. Citizens vote with their parties views
- Republican movement in Australia was split 1999 - some republics voted no because they did not agree on the style of the republic

1967 ABORIGINIES

- Alerted section 51 (xxvi) to allow the CW to make laws for Aboriginal and Torres Strait Islander peoples and deleted Section 127 to enable Aboriginal and Torres Strait Islander peoples to be counted in the census
- Was supported by both parties - A coalition government was in office but the Whitlam ALP Opposition was supportive
- Was unopposed by the States
- Was manifestly the right thing to do - 1960's was a time of increasing rights consciousness with the civil rights Movement in the USA in full swing. The momentum of history was on the side of change
- Had support from various pressure groups supporting a YES Vote
- Had no public funds or organised groups campaigning for a NO vote
- Was supported by the people who had taken ownership of the issue through street marches and other forms of direct action

- Achieved over 90% of all national yes votes and passed in all six states. Highest yes vote of any referendum in Australian History

Senate elections 1906
Altered section 13 - altered timing of senate elections - minor change
State debts 1910
Altered section 105 - expanded cw power to take over state debts - benefits to the states
State debts 1928 - s105(A) added to the Constitution giving the CW the power to set up a Loan Council responsible for allocating monies borrowed by state and CW - state benefits
Social services 1946
s51(23A) was added as an extension of s51(23). It gave the CW additional powers to legislate on allowances such as maternity allowances, unemployment benefits and child endowment.- state benefits
Territorial voters 1977
S128 was altered to allow electors in the ACT and NT (and any other territory under S122) to vote in referendum proposals and be part of the national majority.- Universally held values
Casual Senate Vacancies 1977
S15 was altered to require a Senate casual vacancy to be filled by a person from the party for which the previous senator was elected. Thus the State must in effect choose the party nominee.
high court judges 1977
S72 was altered and stated that a High Court Justice was appointed for a term expiring upon attaining the age of seventy years and thus the maximum age for Justices in any court created by the Parliament is seventy years. (It had previously been a lifetime appointment).

HIGH COURT DECISIONS - INFORMAL

- Section 76 of the Constitution empowers the High Court to interpret the constitution.
- Consequently the way in which the High Court interprets the meaning of the words, phrases and sections of the constitution will effect its operation.
- As the majority of the constitution is concerned with the distribution of power, this gives the High Court the power to cause power shifts in our federal system
- The words of the Constitution have changed very little since 1901. Changing interpretations of the constitution by the High Court have resulted in effective constitutional change without any significant change in the written constitution itself

POLITICAL AND LEGAL SIGNIFICANCE OF CONSTITUTIONAL HIGH COURT CASES
High court cases - affecting the federal balance of powers
ENGINEERS CASE
- The High Court adopted a literalist interpretation of the Constitution that looked simply at the literal meaning of the words of the Constitution. The court held that Commonwealth arbitration legislation applied to an industrial dispute between a national union and an engineering and saw milling works owned by WA state govt. Court held that Commonwealth law applied because s51(xxxv) gave the Commonwealth the power to deal with industrial disputes extending beyond the limits of any one state, thus overturning the implied immunities doctrines. Also overturned the doctrine of reserved state powers, rejecting the idea that the scope of the Commonwealths enumerated powers was limited by a set of exclusive state powers that were implied but not explicitly stated in the Constitution
- extends cw power
- allows constitution to be read concurrently
- CW is able to legislate on areas that the hc would of previously side with states

FIRST UNIFORM CASE
- Important decision that led to a shift of the federal financial balance in favour of the CW
- Over the years the states have become increasingly reliant on the CW for their revenue and increasingly subject to its dictates about how those funds will be spent
- Prior to 1942 s51 (ii) taxation power was truly concurrent and income tax was payable to both the Cmth and State governments

- During WW2 the Cmth thought there that there was a need to coordinate income taxes for the good of the country – states did not agree – the Cmth passed four Acts implementing their c with respect to income tax
- As Australia was at war, the Cmth passed the Uniform (Income) Tax Agreement Act which allowed them to collect income taxes and that the Cmth taxes took priority over State taxes, thereby taking over income taxes from the States. A portion of this was to return to the States by way of a formula. The scheme was supposed to be a temporary measure but was later extended. It had 2 features:
- Use of taxing power s51(ii) to impose income tax
- Use of grants power s96, whereby Cmth would grant to the States an amount of money approx. equal to which it would have raised through its own income tax but on the condition that the State itself imposed no such tax
- States challenged the Cmth law in the High Court but the majority upheld all aspects of the scheme.
  - **UNIFORM TAX CASE (1957) 2**
  - This case merely upheld CW power over income tax in times of peace
  - Reinforced this position in times of peace
  - Although the states could still impose income tax none would as it would be politically untenable

TASMANIAN DAMS 1983

- The CW was able to move into a law making area previously left with the state (residual)
- Increased law making power of the CW
- This could also lead to the CW assuming power over other issues involving internal treaties
- s109 saw the CW act prevail over the Tasmanian act
- Both Tasmanian Dams (1983) and Koowarta (1983) allowed CW to use a concurrent power to influence areas regarded as part of states residual authority (e.g lands policy)
- THE STATE OF TASMANIA:
- Argued in HC that the Cmth Parliament had passed law in an area of state responsibility, and the law was therefore unconstitutional
- COMMONWEALTH'S REPLY:
- Argued that the law they had passed was within its law-making power under the 'external affairs' head of power. Basically that it had the power to intervene because s51 (xxix) gave it power to make laws relating to external affairs and the proposed dam area was an external affair because it was covered by World Heritage listing (an international treaty).
- The Cmth also relied on the corporations power s51 (xx) and the precedent established in the Concrete Pipes case because the Hydro-Electric Commission was a trading commission and sold electricity to the public
- COURT'S RULING:
- The HC decided that as all aspects of Aus's relationships with other countries are included under the external affairs power, and because the Franklin River area was covered by an international treaty, it came under the external affairs power. This decision interpreted the words 'external affairs' to include any area covered by an international treaty
- The Court ruled that the Cmth held the power to prevent construction of the dam as Australia was a party to an international convention protecting world culture and national heritage; the Franklin River was listed on the World Heritage List.
- AS A RESULT of the HC's decision there was an inconsistency between the Cmth Act and the Tasmanian Act and under s109, the Cmth Act prevailed and the Tasmanian Act was made inoperable

WORKCHOICES -

- Corporations power allows the CW to make law with regard to industrial matters between employers and employees
- Greatly reduce the ability of the states to regulate workplace relations at the local level
- Greg Craven : 'This effectively means that the CW has an open cheque to intervene in almost any field of state power which catches its eye, from education, through health to town planning and the environment
- Lawyers weekly said "…PUT AN END TO HOW WE HAVE UNDERSTOOD POWER TO BE SHARED BETWEEN THE COMMONWEALTH AND THE STATES SINCE FEDERATION IN 1901…" - shows the huge impact of the high courts actions
- Decision meant Commonwealth could regulate employment conditions and labour relations – previously assumed to reside with the States.

- The plaintiffs (NSW, WA, SA, QLD, VIC, the Australian Worker's Union and Unions NSW) challenged the constitutional validity of the Cmth's *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth), an Act that brought about major changes in the area of industrial relations
- State industrial relations systems were eroded by the implementation of national industrial relations systems
- That is, s51 (xx) corporations power allowed Cmth to pass industrial relations laws
- HC ruled in favour of the Cmth after these laws were challenged by 6 States
- The decision also overrode specific reference to s 51 (xxxv) reference to state industrial powers and s109 rendering invalid any conflicting state industrial relations .

IMPLIED RIGHTS

- Implied rights begins with this case - found something in the constitution that wasn't there before
- **Australian Capital Television v Commonwealth (1992)**
- Implied rights - not written down but is implied that it is there - activist finding
- Interpretation of s7 and 24 - must be chosen by the people to create representative democracy - must be able to hear arguments of the political parties
- was a case in which regulations imposed by the Political Broadcasts and Political Disclosures Act 1991 limited political advertising during an election campaign and forces commercial television stations to broadcast free political advertising at other times. The broadcast companies challenged the validity of this Act in the High Court. HC found that s7 and s24 create a representative democracy in Australia and that such a system of government implied that the people, in order to exercise their democratic choice, must be able to hear the arguments of political actors (political parties and politicians). This means there must exist within the Constitution a right to political communication. The High court agreed with the broadcast companies and struck down the sections of the Political Broadcasts and Political Disclosures Act 1991 which banned political advertising, a form of political communication. Although no words were changed, the Constitution now contains a new right protecting political communication. This new implied right is now applied in future similar cases such as Theophanous 1994
- **THEOPHANOUS 1994.** Andrew Theophanous, a MP, unsuccessfully sued a newspaper for defamation after it published an article questioning his capacity as a MP. The High Court found that the newspaper was free to publish because the article was a form of political communication and was protected by the implied right to political communication. Theophanous seemed to create a broad right to political free speech.
- **NATIONWIDE NEWS -** The plaintiff (Nationwide News) was the holding company of the proprietor of The Australian (a nationwide Australian newspaper). In 1989 an article was published in that paper which contained an attack on the integrity and independence of the Australian Industrial Relations Commission and its members. The plaintiff was prosecuted under s299(1)(d)(ii) of the Industrial Relations Act 1988 (Cth) which reads 'A person shall not ... by wiring or speech use words calculated ... to bring a member of the Commission or the Commission into disrepute.' The defendant challenged the constitutional validity of s299(1)(d)(ii).The court held unanimously that the challenged provision was invalid, however, the way in which that conclusion was reached in the different judgments differs widely. Mason CJ, Dawson and McHugh JJ held that the provision was invalid on the ground that the protection it afforded the Commission was so disproportionate that it stood outside the incidental scope of the power in s51(xxxv) of the Constitution (the constitutional power to make laws with respect to conciliation and arbitration for the prevention of industrial disputes). Brennan, Deane, Toohey and Gaudron JJ held that the law may have been within the scope of s51(xxxv) but, in any event, the law infringed the Constitution's implied right to freedom of communication about matters relating to the government of the Commonwealth.

- extensive of legislative power - engineers, workchoices, tasmanian dams
- extension of financial power - uniform
- extension of implied rights - tv

Interpretation affects meaning

- A constitutional case arises when parties dispute the meaning of the Constitution or words therein. In other words, there is doubt about the meaning of the Constitution. When the HC decides these

constitutional cases it must come to a view on what the words actually mean. It decisions on these questions of definition may alter the way the Constitution operates in practice. Its judgements may be literalist or activist

Specified constitutional rights
- a freedom or entitlement that is explicitly expressed in the Constitution
- **Section 41**- transitional right to vote at the time of Federation
- **Section 80** - entitlement to trail by jury in federal indictable cases (not many federal cases - terrorism) - subject of some High Court interpretation. The effect of these cases has been to restrict the protections of trial by jury rather than expand them. As a result the HC has not changed the Constitution significantly in respect of Section 80.
- **Section 116** - Prevents Australia from having an offical religion - Scientology case 1983. Religious institutions are exempt from paying taxes, Victorian Commissioner stated that the Church of Scientology is not a religion. Argued in the HC - HC agreed with church

Implied constitutional right
- A freedom or entitlement that is not expressed specifically but can be inferred from the broader meaning of the Constitution
- Must be discovered as they are not expressed
- Discovery of implied rights will always be the result of an activist interpretation because judges must read beyond the actual words
- Any case that results in the discovery of an implied right will always be a landmark case because the discovery is rare
- Example - political communication - discovered in ACT v CW 1992

REFERRAL OF POWERS - Informal
- transfer of legislative power from state to cw
- only goes from states to cw
- once the power is given, can't get back
- virtually no impact

Section 51(xxxvii)
- That the referral of powers under the Commonwealth constitution enables state parliament(s) to refer / transfer matters to the commonwealth parliament
- That the referral gives the Commonwealth power to pass laws about these matters and that such laws only apply to the state(s) concerned
- Section 51(xxxvii) allows for a degree of flexibility in the allocation of legislative powers. In practice, the referral power has been quite important in allowing the C/w to enact legislation. (But most referrals have not changed the federal balance).
- Process of ROP involves states agreeing to hand over an area to the Commonwealth
- e.g terrorist acts inside Aus. When this decision has been reached, the state parliaments pass an Act giving their law-making power to the Cth and the Cth passes an Act accepting this power from each state that has referred its power
- The IMPACT of the ROP is that there is a change in the DOP between the states and the Cmth in favour of the Cmth
- In 2003 it was agreed between the CW and the states that it was necessary to expand the defence power contained in s51(VI) to include internal security. This was done by the states referring their power to make laws regarding terrorism to the CW - allowed the enactment of Criminal Code Amendment (Terrorism) Act 2003

Unchallenged legislation - Informal

DEFINITION:

- Unconstitutional laws that go unchallenged in the HC. Until struck down by the HC they remain active law. Statutes passed by the CW parliament can be unconstitutional because the parliament packs a head of power within the Constitution granting it the legislative power to make the law.
- To be lawful, CW legislation should meet the following criteria
  - Law should reference a head of power within the constitution. Heads of power are the exclusive and concurrent powers specified and enumerated in the constitution or
  - If the law does not reference a head of power then it must avoid being challenged in the HC
- Commonwealth Government passes laws regarding areas of responsibility not listed in the constitution (residual powers belonging to the States)
- These laws are therefore most likely unconstitutional (ultra vires).
- State Governments do not challenge the validity of the laws in the High Court.
- High Court cannot declare laws invalid unless the matter is brought before them by a State Government or an affected person.
- Impact in shifting power minimal because if the States have a problem with this Commonwealth intrusion into residual power, they can challenge it
- **SNOWY MOUNTAINS SCHEME -** The threat of Japanese invasion during WW2 made the CW govt desperate to stimulate post war growth in Australia. It was seen as essential for Australia's future to populate or perish. Scheme was designed to achieve both economic and population growth. It is the largest engineering project in Australia's history. It was built to provide electricity for industry and stimulate growth in post ww2 Australia. It also provided employment for tens of thousands of displaced European migrants who came to Australia to work on the Scheme. It was constructed from 1949 to 1974. The CW lacked any constitutional authority for the Scheme so instead it passed the *Snowy Mountains Hydro-Electric Power Act* 1949 using the defence power in Section 51(vi). This was undoubtably a stretch; the project was no directly related to defence. Only the States have standing in this instance and none exercised their right to challenge. States which have power over land and rivers, passed their own legislation to support the scheme. Act has never been challenged

---

Reform proposal to change the CW constitution - Recognise Campaign

This reform focuses on two elements
- The first part of this reform proposal is to remove sections that discriminate against people in the future
- Second is to protect rights and acknowledge rights. 116A - racial discrimination against aboriginals, 127A for recognition of languages and to acknowledge and protect the role that languages have in Aboriginal communities. Is cemented in the constitution

Racial discrimination act - statute law
Needs to be put into the constitution as it protects it from being changed
- likely to pass as it secures rights

Process of national constitutional recognition
- Efforts began in 2011
- Australian constitution does no recognise Aboriginal or Torres Strait Islander peoples prior occupation and custodianship of their land
- Lack of acknowledgement of a peoples existence in a country's constitution has a major impact on their sense of identity, value within the community and perpetuates discrimination and prejudice. Recognition in the Constitution would have a positive effect on the self esteem of indigenous Australians and reinforce their pride in the value of their culture and history.
- An expert panel recommended to remove sections 25 and 51(xxvi) and adopt new sections
- Add Section 51(a) to recognise Aboriginal people's occupation of the land and continuing relationship with lands and water. The section would also pay respect to culture, language and heritage and state that the government can only make laws to the benefit of Aboriginal people
- Add section 116(a) to specifically prohibit racial discrimination for all Australians. It would forbid any government from discriminating against a person based on race, colour, ethnicity or national origin

- Add section 127(a) for recognition of languages and to acknowledge and protect the role that languages have in Aboriginal communities

Section 25
- Provides that certain races such as aborigines can be excluded from voting in the Census. It is therefore seen as an outdated provision which sits uncomfortably in today's society. It is offensive to modern values and its deletion would appeal to strong normative consequences
- According to the 1988 Constitutional convention, it is odious and has no place in modern democracy. As a proposal its deletion can be explained in non-technical terms and seems to have no practical consequences. There is basically no rational campaign against it, and the likelihood of success is large

Section 51(xxvi)
- provides that the CW can make special laws for people any race, as per its alteration in the 1967 referendum. However, the proposal seeks to repeal it, instead specifying that the CW can make laws for the benefit of aboriginal clarifying the ambiguity
- It is particularly complex, and a simple proposal put to the people in order to reach a common understanding may undermine its true complexity, providing a false sense of understanding in the Australian people and decreasing the likelihood of success of this individual proposal

Addition of Section 116A
- Addition of Section 116A to prohibit racial discrimination has obvious benefits, since any kind of discrimination is undesirable. However the 1988 referendum offers a warning, since despite the belief that Australians "would not reject the ideas contained in it" its defeat was the worst in history. Discrimination is subject to interpretation once again making the proposal extremely controversial
- It seems referendum proposals take on all or nothing character, where voters are unlikely to accept one proposal, if they are opposed to any of the others. Some may even argue that if we are willing to address fundamental rights, why do we stop there, rather than extending to protect gender, disability, right to a fair trial and free speech. Therefore it seems that this proposal requires considerable consideration if it is to be successful

History of Referenda in Australia
Formal method of constitutional change
Section 128
- Proposed change must be passed by an absolute majority in each House of Parliament
- Between two and six months after passing Parliament it is put to a referendum in each State and territory
- The bill must be approved by a majority of electors and by a majority of electors in a majority of States
- Bill receives Royal Assent

Success
- Since 1906, only 8 constitutional amendments have been successful
- Proposal that have led to constitutional change have involved
  - 1977 retirement of judges
  - 1910 and 1928 proposals on State debts were successful. The 1967 referendum which gave the CW the power to legislate with respect to Aboriginals
- As only eight referenda have been successful in achieving constitutional change, it can be argued that the difficult elements of the referenda process can hinder the likelihood of successful amendment proposals

Need for further change
- referenda have had a very limited impact upon formal constitutional, thus supporting the claim that further reform is needed to adhere to the current societal values of Australian citizens

How to achieve success
- Wording of the proposal is a key component in it attaining success
- Voters must have an understand behind the reasons for the proposal and its resounding benefits
- Strong bipartisan support

- Referenda may be all about the will of the people, but they can't be run by the people alone. The public responds to political leadership on issues of national importance. When that is absent, so it the communities interest

1. Section 25:
- Resounding benefit and is extremely likely to pass
- Provides that certain races, such as the Aborigines, *can* be excluded from voting in the Census.
- Outdated provision, which sits uncomfortably in today's society.
- Offensive to modern values and its deletion would appeal to strong normative consequences.
- According to the 1988 Constitutional convention, it is "odious" and has no place in modern democracy.
- Its deletion can be explained in non-technical terms and seems to have no practical consequences.
- There is basically no rational campaign against it, and the likelihood of success is large.

2. Section 51 (xxvi):
- Provides that the Commonwealth can make special laws for people any race, as per its alteration in the 1967 referendum.
- Proposal seeks to repeal it, instead specifying that the Commonwealth can make laws for the, "benefit" of Aborigines, clarifying the ambiguity.
- Judicial interpretation has shown that the current provision questions whether the Commonwealth can pass laws only for the benefit, or also at the detriment of Aborigines. This distinction between beneficial and detrimental depends on one's perspective.

E.g. Howard's Northern Territory intervention can, on one hand, be seen as beneficial in protecting children from sexual abuse and violence, and on the other, discriminatory for singling out certain Aboriginal communities.
- Particularly complex, and a simple proposal put to the people in order to reach a common understanding may undermine its true complexity, providing a false sense of understanding in the Australian people, and decreasing the likelihood of success of this individual proposal.

3. Section 116A:
- The addition of this section to prohibit racial discrimination has obvious benefits, since any kind of discrimination is undesirable.
- 1988 referendum offers a warning, since despite the belief that Australians, "would not reject the ideas contained in it," its defeat was worst in history.
- Discrimination is subject to interpretation, once again making the proposal extremely controversial.
- It seems referendum proposals take on an, "all or nothing," character, where voters are unlikely to accept one proposal, if they are opposed to any of the others.
- Some may even argue that if we are willing to address fundamental rights, why do we stop there, rather than extending to protect gender, disability, right to a fair trial and free speech.
- Therefore, it seems that this proposal requires considerable consideration if it is to be successful.

Likelihood of Constitutional Reform Proposal Being Successful:
- Since Federation in 1901, the Australian Constitution has had relatively few changes (only 8 out of 44) with over 35 years since the last constitutional change in 1977.
- A Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples has been established, providing suggestions for success, based on Australia's past record of change, particularly the 1967 and 1999 referendums.
- According to Professor George Williams, success is based on: bipartisanship, popular ownership, popular education, sound and sensible proposal and modern referendum process.
- Will be, "capable of succeeding at referendum," if accompanied by these changes.

No no campaign
High level of public support
Bipartisan support
simple wording

referendums only formal method change, const change needed more than ever

- **25** - doesn't give cw power - minor change - universal aust morals, - might not change if it was paired with the other referendums
- **51xxvi** - might pass - cw shouldn't have the power for special laws for a race, should be universal - not pass - northern territory intervention case - needed to make law to be able to ensure that safety of children if this section was taken out they would of not been able to do this
- **51** (**a**) - doesn't extend cw power, minor change, universal aus views, might not pass - similar to most recent unsuccessful ref 1999 preamble referendum - failed 40%
- **116**(**a**) - racial discrimination needs to be enshrined into constitution - do have protections against racial discrimination - do already have an act therefore not needed into constitution - OR say that bc its only an act it can be changed - constitution cant b changed ALSO definition of race can change over time so act can be better as amendments can occur 1975 racial discrimination act. so important that it needs to not be able to be changed so no future government can repeal the legislation
- **127**(**a**) - minor change - starts to open up challenges to english being the offical language - so many languages

UNIT 4

Glossary of terms:

- **Accountability** can be defined as a set of relationships through which political and bureaucratic actors must account for their integrity and their performance. It is thus the requirement that all public officials, both elected and appointed, should be directly or indirectly answerable to the people.

- **Rights:** characteristics, abilities of human beings that should not limited by laws. Examples include the right to free speech and right to religious expression.

- **Governance**: means a process of decision-making by which decisions are implemented (or not implemented). Governance can include the rule of law, political accountability and administrative transparency, as well a respect for democracy and open participation.

- **Participation**: usually encompasses voting for all representatives; the right to join political parties and interest groups, freedom to criticise and challenge government, and freedom to communicate through the media. This is extended to all citizens.

- **The rule of law**: A concept that all authority is subject to, and constrained by, law. Government is not arbitrary. All citizens/persons operate within the law and are controlled by it. Everyone is entitled to have a matter heard by an independent and impartial court or tribunal.

- **Human rights:** Rights that belong to all people simply because they are human beings. A basic principle of a free society if that people have inalienable rights that cannot be 'given away' or legitimately reduced by the actions of government. An example is a person's fundamental human rights include legal rights such as the right to a fair trial.

- **Civil rights:** The rights of citizens to equality and liberty. Sometimes referred to as 'first generation' rights. Civil rights ensure peoples' physical integrity and safety. This includes protection from discrimination on grounds such as physical or mental disability, gender, religion, race, national origin, age, or sexual orientation; and individual rights such as freedoms of thought and conscience, speech and expression, religion, the press, and movement.

- **Political rights:** A political right is a right/power to participate directly or indirectly in the establishment or administration of government. An example of a political right includes freedom of assembly and the right to vote.

- **Economic rights:** Second generation or positive rights. Rights that concern the production, development, and management of material for the necessities of life. E.g. the right to work, the right to a minimum wage, the right to form a trade union, the right to strike or the right to own property.

- **Social rights:** A second generation or positive right. Rights that give people security as they live and learn together, such as in families, schools and other institutions.

- **Cultural rights:** Second generation or positive rights. The right to preserve and enjoy one's own cultural identity and development which may include language or religion. They deal with groups of people, rather than with individuals.

- **Open government:** Degree to which processes of government are transparent and accessible to the public and are sufficiently explained to the parliament/public.

- **Consensus:** Governments trying to obtain, or seeking, agreement from those involved in the decisions being made or impacted upon by the decisions being made.

- **Effectiveness:** the degree to which a government's processes and decisions facilitate transparency and accountability.

- **Natural justice:** refers to the right of a person to procedural fairness and to be given a fair hearing and the opportunity to have a decision made by an unbiased judge. It also incorporates the principle of the right of appeal.

- **Equity:** decree to which citizens are treated with equal fairness by the procedures and personnel of the legal system or more broadly in their treatment by society in general.

- **Commonwealth parliament definition:** The institution in the Australian political system that represents the people and the states. It makes the laws, debates the important issues of concern to the nation. It is a sovereign and the foundation of Australian representative democracy. The parliament of Australia (officially the federal parliament, also called the Commonwealth Parliament) is the legislative branch of the government of Australia. It consists of three elements: the crown (represented by the Governor General), the Senate and the House of Representatives.

- **Elections:** Parliamentary elections – are fundamental to democracy in allowing voters to choose the politicians they believe will provide good government and dismiss governments they find are no longer acting in the interests of the people. Australia has a compromise electoral system, the House of Representatives have a preferential voting system and the Senate have a proportional voting system.

- **Standing orders:** The rules by which each house of parliament operates. The Constitution gives power to each house to make its own rules. Enforced by the presiding officer of each house - Speaker of HOR, President of Senate. They may be suspended by motion of the chamber. This is seen in s.50 of the constitution

Through elections for the House of Representatives and the Senate

The functions of democratic elections include:

- Providing a peaceful means of political change.
- Ensuring that there is democratic choice (alternative leaders, parties and policies and can dismiss from office).
- Providing governments with the right to rule (political legitimacy and a specific mandate to carry out their policies).
- Creating accountability to the people of political representatives in general and governments in particular.
- Providing a basis for the duty of citizens to uphold the law (laws have legal authority because they are passed by freely elected governments).

Hence, in elections voters can choose the politicians they believe will provide good government and dismiss governments that are no longer seen as acting in the interests of the people.

Elections and accountability

- In elections, voters can elect to parliament the political representatives that they believe will provide good government and can dismiss governments that are no longer seen as acting in the interests of the people. Elections are considered to be the most powerful mechanism of accountability – and can result in a Member or Senator losing their seat when the electorate loses confidence.
- The basic accountability relationship in a democracy is between political representatives and the electorate. Free and fair elections are the cornerstone of this relationship. Elections are the primary mechanism for holding members of parliament, and by extension, the government itself, to account.
- Without the certainty that they will face the electorate at regular intervals, governments are more likely to become secretive, unresponsive and dictatorial. Between elections, however, it is parliament which has the primary responsibility of holding the government to account.
- The Australian people do not directly elect the government but vote to choose members of parliament. Government is formed by the party or coalition of parties supported by a majority of the members of parliament, who are themselves answerable to the people and politically accountable.
- During election campaigns, rival political parties compete for majority support amongst voters by promoting particular policy and service mixes.
- As soon as a government is seen to be overstepping its relationship with the public, it will be removed. This is especially true if governments fail to full-fill their previous election promises, are seen to be indifferent to the nation's interests or are even out of touch with the public.
- The electoral process is an automatic accountability function. Although they cannot effectively hold a government to account for particular policies when they are enacted or for specific misdeeds when they occur, voters can return or reject a government on the basis of their perception of its performance between elections.

Key arguments – Evaluation of Elections and accountability: - Holds govt to account

- Regular elections for each House and the judgment of the previous 'parliament', keep the House of Representative and the Senate accountable. For example, Although, it was returned to office at the 2016 federal election, the Turnbull government had its share of seats reduced from 90 to 76. The government's reduced majority reflected the fact it was held to account by the electorate for perceived breaches of trust concerning cuts to health and education funding in the 2014 budget, as well as for errors of judgement made by former Prime Minister Tony Abbott with respect to his 'captain's calls'.

- Voters can return or reject their individual member of parliament on the basis of his or her conduct and competence between elections. For example, at the 2019 Federal Election the electorate of Warringah elected Independent Zali Steggall over long time sitting member Tony Abbott, based on his previous voting record on issues such as climate change, same sex marriage, national energy guarantee. - He is not representing the views of the electorate At the 2016 federal election, Jamie Briggs, a high-profile Liberal member of the House of Representatives, suffered a swing of 17.5 per cent against him to lose the blue-ribbon seat of

Mayo in South Australia to Rebekha Sharkie of the Nick Xenophon Team. Briggs was held to account for his questionable behaviour as a minister which had resulted in his resignation from the ministry in December 2015.

- The election of minor party representatives and/or Independents especially in the Senate with proportional representation system of voting and the resultant accountability are a means of holding parliament to account. For example, Fraser Anning and Clive Palmer. The election of Independent and minor party candidates to the Senate under the multi-member proportional representation system is a means in itself of holding parliament to account. At the 2016 federal election, for instance, the Greens won nine seats, the Nick Xenophon Team won three seats and Pauline Hanson's One Nation won four seats, with the Liberal Democratic Party, the Jacqui Lambie Network, Derryn Hinch's Justice Party and Family First each winning a seat, placing the balance of power in the hands of the twenty-seat crossbench. As such, since the election, the Turnbull/Morrison government had to negotiate the passage of its legislation through the Senate, enhancing the accountability of the lower house.

However, - Doesn't hold govt to account

- The Single Member electorate and preferential system tends to reinforce the two party - system and precludes minor party/independent representation in the House of Representatives limiting the argument that elections hold parliament to account.

- For both Houses, electors generally choose according to party preference rather than individual candidates so this reduces the direct accountability of individual members. E.g. Barnaby Joyce received a 2.5% swing towards him in the primary vote despite allegations of sexual misconduct and mismanagement of the buyback scheme during his time s Agricultural Minister.However, the 2016 Senate electoral reforms saw the abolition of group ticket voting, which saw electors being able to select which candidate they prefer over the party's choice, giving them greater control over the direction of their preference flows. However, the party still chooses the actual person on the group ticket, with the candidates at the top of its group ticket more likely to get elected.

- **Time span** between elections means elections as an accountability mechanism for individual members/Senators is limited. Some consideration that election mandates do not always come to fruition. E.g Michaelia Cash and the next half Senate election will only be in 2022 - might not be held accountable for.

- Many MHRs represent 'safe' seats which means that some members may not be held to account for poor performance due to partisan nature of the voting system. For example, Stuart Robert increased his two- party preferred vote by 2.9% in the safe seat of Fadden which he held before the election at 11%. He had resigned in 2016 after his visits to China were in breach of Ministerial standards. However, at the 2019 federal election, Tony Abbott suffered a 19 percent swing against him in Warringah on a two-candidate preferred basis. The swing against him on the primary vote was almost 13 percent.

- In elections for the Senate, an Individual candidate who gains a very small percentage of the primary vote can receive enough surplus votes and preferences to achieve the required quota to win a seat. This process is little understood by voters, diminishing accountability. In the case of the 2016 federal election, Malcolm Roberts of Pauline Hanson's One Nation was elected to the Senate as a Senator for Queensland with just 77 first preference votes. Surplus votes for Pauline Hanson's One Nation and favourable preference flows enabled Roberts to win the seat.

Through the House of Representatives and Senate Privileges Committees

- It is sometimes referred to as "Cowards Court" for the way it allows its members to make unsubstantiated claims without possibility of legal recourse by the other party
- Parliamentary privilege refers to special *legal rights* and *immunities* which apply to each house of the parliament, its committees and members
- The House and the Senate have standing committees which operate to investigate specific complaints of breach of privilege
- Their role is to investigate and report to the House or the Senate whether or not a breach of privilege or contempt has been committed, and it usually recommends what action, if any, should be taken
- Privileges allows debate in parliament - Westminster convention
- (committees always have the same two roles - to investigate and to advice)
- Needed as it can't be sued or go to court there still needs to be mechanism to keep it in control

Member of parliament

- Committee will look at it and will state if the member is in breach
- will then advice the house on a punishment
- seems effective however it is ***not binding*** - the house can over-rule it - not on either house
- e.g if you are member of government and you are a breach, the government can over rule
- privilege committee can take a while - Craig Thomson

Purpose:

- Protect certain rights and immunities of the MHRs/Senators
- Deal with offences (contempt's) which interfere with the functions of each of the Houses of Parliament

The following members of Parliament have been in breach of parliamentary standards: Craig Thomson, Peter Slipper, Susan Ley, Bob Day, Derryn Hinch, Pauline Hanson

House Privileges Committee - the case of Craig Thomson

- MPs thought to have abused parliamentary privilege may be referred to the House Privileges Committee to have their actions reviewed by and, if they are deemed to have infringed, to be handed a suitable punishment
- A finding of contempt by the House, and the condemnation that this would embody, in itself would be a very serious sanction
- In March 2016, the Privileges Committee in its report found that Craig Thomson's statement was 'at odds with the findings of the court' and that he had an intention to mislead the house
- In response to such a finding, the committee had the power to recommend a term of imprisonment of up to 6 months or a fine of up to $50,000. Instead, the Committee recommended, Parliament reprimand Thomson
- It can be argued that relying on parliamentary privilege to manage parliamentary members misconduct is beset by a number of challenges. Cases of misconduct are often not matters of parliamentary privilege. For example, the accusations against Thomson did not raise matters of parliamentary privilege except to the extent Parliament may be misled. The use of privilege in this case was particularly problematic, as the matter related to Thomson's conduct prior to

becoming an MP; the only aspect of conduct that occurred during Thomson's time in Parliament was the misleading of the House.

- The unity of parliamentary privilege may also be limited by political partisanship as the imposition of a penalty through parliamentary privilege requires support of the house. As a result, a government majority in the HOR may vote to protect its own members from scrutiny, while imposing more severe penalties on members of the opposite. As a former MP, however, Thomson was unlikely to be shielded from scrutiny by political allegiances
- The Thomson case provides an example of where parliamentary privilege proved ineffective to manage misconduct by a politician. The process took four years to be completed, by which time Thomson had left parliament; and the ultimate penalty - a reprimand - was very weak
- While range of accountability mechanisms for misconduct are already in place in the Australian Federal Parliament, the system has a number of gaps. There is currently no effective mechanism for securing short-term accountability for misconduct by members of parliament. As a result, rather being managed via a specific mechanism, matters of conduct tend to be played out in the federal Parliament and media, often in a way that enhances public distrust of politicians and public institutions while not actually resolving the underlying issue. According to former Independent MP Rob Oakeshott, the Thomson affair caused 'significant damage both short and long term with regard to public confidence and public trust in the Australian Parliament itself'.
- The Thomson affair reinforces the limits of the current system for securing accountability for parliamentarians' conduct and highlights the need for reforms to address gaps in the current accountability of members of Parliament

Senate Privileges Committee

- Labour Senator Sam Dastyari - not upheld / doesn't work
- Referred to by Attorney General George Brandis over his relationship with Chinese donors
- The committee consists of eight senators, four nominated by the leader of the government in the Senate, three nominated by the leader of the opposition in the senate and one nominated by a minority parts ad independent senators
- To investigate conduct that is "apprehended to obstruct the work of the Senate", and will only do so when it receives a reference from the Senate
- The prohibition Dastyari has been alleged to breach is paragraph 6(3) of the privileges resolutions, seeking to obtain a benefit from his role as a Senator; "A Senator shall not ask for, receive or obtain, any property or benefit for the senator, or another person, on any understanding that the senator will be influenced in the discharge of the senator's duties…"
- *Only two of those case have seen penalties imposed* - mere reprimanded, at that. Mostly, an apology or some other remedial activity has been considered sufficient. Section 7 of the Parliamentary Privileges Act gives each house the power to imprison for 6 months or fine up to $5000 ($25,000 for a corporation) anyone who has been found by that house to have committed an offence against it, but surreally, section 8 prohibits either house from expelling any member. For Dastyari to face prison time would, obviously be huge departure from the existing precedent. Only once has a contempt against parliament lead to a prison sentence, and it wasn't for a political, but for 2 journalists, imprisoned for 3 months in 1955 for publishing articles intended to 'influence and intimidate a member in his conduct in the house'.
- Dastyari resigned before the committee inquiry

Recommendations of the committee is not binding - if the govt controls senate/HOR then the govt is unlikely to proceed with that punishment

Right to reply Citizens' right of reply

- Senators are enjoined by a Senate resolution to exercise their freedom of speech responsibly. There is always, however, the possibility that members may unfairly defame individuals who have no legal redress and who, if they are not themselves members, have no forum for making a widely publicised rebuttal.
- One of the 1988 Senate Privilege Resolutions provides an opportunity for a person who has been adversely referred to in the Senate to have a response incorporated in the parliamentary record (Senate Hansard). A person aggrieved by a reference to the person in the Senate may make a submission to the President of the Senate requesting that a response be published. The submission is examined by the Committee of Privileges, and provided the suggested response is not in any way offensive and meets certain other criteria, it may be incorporated in the Hansard.
- Critics argue that it has been abused at times, allowing members of parliament to defame individuals in public, with the individuals having no recourse.
- As a remedy for this, the Standing Orders in both Houses allow individuals who claim that they have been unfairly maligned to have a response incorporated into Hansard. This is not an automatic right; however the individuals concerned are required to make a submission to the Speaker or President who then refers their request to the House Privileges Committee which make a ruling on the matter. The procedure does not apply to senate committees which are governed by other procedures for dealing with evidence that adversely reflects on another person
- Even if the defamed individuals request is successful, it can be argued that the fact they have been subjected to such allegations in the public domain may have besmirched their character, regardless of any right to reply.
- **Bill Heffernan 2002 - against justice Cergbby**
- Senator Bill Heffernan accused Justice Michael Kirby of improper use of CW cars to solicit male prostitutes in March 2002. He was eventually forced to apologise and was removed from the position of Parliamentary Secretary to Cabinet

Accountability of parliament within the processes and procedures of parliament

Issues :

- Dominance of the executive over parliament in Australia
- Partisan politics is evident in the lower house where the government has control

(ONLY ANALYSING MP'S/SENATORS AND NOT MINISTERS)

Processes :

Processes of parliament could include;

- **Reference to the House/Senate Parliamentary Privileges Committee for breach of parliamentary standards.**
  - e.g Bruce Billson - began receiving $75,000 salary months before he left parliament. In referring the Mr Billson to the committee, Speaker Tony Smith highlighted two matters for consideration:

- "The first is corruption in the execution of a Member's office as a Member … the acceptance by a member of either House of a bribe to influence him in his conduct as a Member, or of any fee, compensation or reward in connection with the promotion of or opposition to any bill, resolution, matter or thing submitted or intended to be submitted to either House, or to a committee is a contempt," he told Parliament.
- "The second is lobbying for reward or consideration … no Members of the House shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect … advocate or initiate any cause or matter on behalf of any outside body or individual; or urge any Member of either House of Parliament, including ministers, to do so, by means of any speech, question, motion, introduction of a bill, or amendment to a motion or bill."
- In September 2016 Derryn Hinch in his maiden speech in the Senate, named and shamed a number of convicted child sex offenders, under the protection of Parliamentary Privilege, with no formal action taken

Procedures :

- How do they keep all MPs accountable? How effective are they?
  - **Naming procedures under Standing Orders** for control of disorderly conduct in the chamber that results in suspension from the chamber (dependent on Presiding Officer's interpretation and open to accusations of bias)
    - 44th Parliament - Speakers Bishop and Smith. From her appointment of Speaker on Nov 12, 2013 to her last sitting day in June, Mrs Bishop has sent out 400 politicians under Standing Order 94a. Of those booted out 393 (98%) were labor and seven were coalition
    - Speaker Smith on average expelled 2.8 times each sitting day, comported to 2.7 times in the 44th parliament and 1.5 times in the 43rd Hung parliament
    - Question time - ask members of parliament questions (not government) - can use gag and guillotines - govt can stifle the debate in the chamber and therefore the accountability
    - **Can be named in parliament** - if named by the speaker there will be a vote on whether the member of parliament should be removed from parliament. Holds accountable to what you have said - unparliamentary language - Bronwyn bishop
  - **Censure Motions by a chamber against a Member/Senator** (only in terms of accountability of Parliament)
    - Bruce Billson - Bruce Billson did not notify the register of interests that he began receiving a $75,000 salary from the FCA before he retired from his seat. He also failed to declare a payment from a "friend" through his personal consultancy business. A parliamentary inquiry recommended he be censured
    - August 2017, Senator Brandis' motion to censure Senator Penny Wong over the actions of her staff re: Barnaby Joyce/citizenship. Failed on floor of Senate 34-29
  - **Hansard** - permanent record of everything said in parliament. - ensures that it can be proven of what is said in parliament - public don't look at it often so it doesn't keep them in account however media does have time to look at it - can influence what the public views.
    - All debates in both chambers of Parliament and in committee proceedings are recorded and the edited transcripts of these debates are published shortly after the chamber or committee proceedings have concluded. Hansard provides accurate records of the debate that has taken place. These are then published online and available for all to see. In this way, Hansard provides an element of accountability of the Parliament.

- Provides accurate records of the debate that has taken place. Published online

- **Matters of public importance in terms of accountably of Parliament**
  - This is a parliamentary procedure that allows members to speak in Parliament about current issues, if they have not been raised in other debates in the chamber. An interesting MPI took place in the HOR in 2012 following Craig Thomson's speech. This debate was devoted to the issue of how the House was going to deal with the Member for Dobell in light of the allegations against him and his statement made in that chamber. There was discussion about a possible censure as well as arguments put for and against suspending him from the service of the House. Mark Dreyfus, then Cabinet Secretary (ALP) warned against any action at that stage in terms of proper process as well as the presumption of innocence. In terms of parliamentary accountability this has only limited effectiveness. LIMITED EFFECTIVENESS

Through Judicial Review

Judicial Review Definition:

- The concept of judicial review is outlined in terms of the HC's power to review the constitutionality of legislation (sections 75 and 76(i).
- Statutes can be interpreted by courts and struck down by the High Court if they are ultra vires and Government policy can be declared unlawful if not within the scope of the law.
- Citizens/affected parties may take action through the HC to challenge the validity or otherwise of particular legislation within Parliament's powers.
- section 71 and 76

extent to which the HC can hold parliament to account is high

Legislation subject to judicial review includes:

- **Citizenship 7 Case 2017**
- High Court, sitting as the Court of Disputed Returns upon references from the Senate and the House of Representatives, unanimously held that 5 senators/ members were "a subject or a citizen … of a foreign power" at the time of his or her nomination for the 2016 federal election, and that each was therefore incapable of being chosen or of sitting as a senator or a member of the House of Representatives (as applicable) by reason of s 44(i) of the Constitution. The Court unanimously held that neither Senator the Hon Matthew Canavan nor Senator Nick Xenophon was disqualified by reason of that
- The court has declared all five seats vacant. The senators will be replaced through a recount from the 2016 election. The House of Representative seat of New England will go to a by-election on December 2, which Joyce will contest.
- In the meantime, Labor has refused to offer the Coalition a pair for Joyce's absence, and the Coalition will maintain government on a knife-edge, with 74 seats plus the support of the cross bench, and, if necessary, the Speaker's casting vote.
- all members are subject to the law and bound to the law - not immune
- reviewing the eligibility to run for election overturned their ability to be elected
- The reason all the parties accepted that there had to be some flexibility in the words, was that the High Court had held as much in a 1992 decision of Sykes v Cleary. Relevantly, this case did not concern people who were unaware of their foreign citizenship, and so did not directly address the main point that was in issue for the citizenship seven.
- Rather, the case stood for the proposition that a person may be a dual citizen and not disqualified under Section 44 if that person has taken "reasonable steps to renounce" their foreign nationality.

- it adopted a reading that, as far as possible, adhered to the ordinary and natural meaning of the words. It accepted that the literal meaning would be adopted, with the only exceptions those that had been established in Sykes v Cleary.

• *Financial Framework Legislation Amendment VIII (no.3) 2012* (High Court 2014 Williams #2) - The Second Williams case found that the Commonwealth funding arrangements for school chaplaincy services were unconstitutional by the High Court of Australia.

Williams v Commonwealth of Australia (2014) HCA 23 "Williams No 2" - in courts

- Ronald Williams second case was against the constitutionality of using section 51(xxiiiA) to pay for chaplains in schools. High Court voted in favour of Williams. payments were not "benefits to students" and struck down the amended *Financial Management and Accountability Act 1997;*
- Both the Abbott and Turnbull Governments now had to fund the National Schools Chaplaincy Program through specific purpose payments to the states - a mechanism that Constitution allows under Section 96. In the two previous arrangements, defeated by Williams, the Commonwealth sought to fund the National Schools Chaplaincy Program by bypassing the states and paying service providers and schools directly. Section 96 grants must be made to states and the states may reject them to interpret the conditions attached to them in ways the commonwealth may not intend.
- Williams successfully used the HC to influence parliamentary law making on two occasions and under successive governments. Williams was highly motivated and was able to finance his HC challenges because his cause attracted private donations from many like-minded parents and other supporters of secular non-religious education in state schools

The judiciary has the power to check and balance the power of the legislature. - such as the courts powers to restrain the Parliament.
There are two related but distinct aspects to the judicial review of Parliament
1. The High Courts power to adjudicate the constitutional validity of the Parliament's statutes
2. The High Courts and other federal courts' powers to interpret Commonwealth statutes.

Reviewing the Constitutionality of legislation

- statute law passed by the CW parliament may not be constitutional unless it is grounded in a constitutional head of power. Heads of power are the exclusive and concurrent legislative powers specifically granted to the Parliament by various sections of the Constitution. Many are located in section 51

- To be reviewed a statute must be challenged by a party with standing and brought before the High Court, before it can adjudicate the constitutionality of the law. The High Court cannot judge a law if it is not brought before the Court. Such unchallenged legislation stands as valid law.
- If a statute is challenged and the High Court judges that it is beyond the constitutional powers of the CW parliament to pass them, the Court will strike the law down.
- Striking down statutes is the ultimate accountability mechanism for the Parliaments legislative function. The HC is the most powerful check on the legislative power of the Parliament. Williams no2 the HC struck down amendments to the Financial Management and Accountability Act 1997 which authorised the payment of National schools Chaplaincy Program funds to the Scripture union of Queensland as a benefit to students under section 51(xxiiiA)

The accountability of the executive and public servants through collective and individual ministerial responsibility

INTRO - explain what public service is

THESIS

- external work better than internal apart from Senate estimates
- Some are stronger than others

Judicial review - also talk about AAT and standing committee

Accountability:
In terms of governance, answerable or responsible for legislation/action or incompetence, in a democratic policy, which encompasses the right to question e.g. CMR and IMR.

CMR and IMR doesn't have consistence - decreases its level of accountability

CMR Definition

- A political convention that is part of the Westminster system of responsible government. In Westminster style parliaments the government is the party (or coalition of parties) that can demonstrate majority support in the lower house of parliament. If a government cannot maintain this support the government must resign. The government is made and can be unmade by the lower house.

IMR DEFINITION

- the convention of Westminster system of parliamentary government. Under this convention Ministers are responsible to parliament for their probity and propriety.
- Ministers should resign from their post if they are censured by a majority vote of parliament. A censure motion may be moved if it is alleged that a Minister has lied to parliament, been personally or politically corrupt or otherwise have failed to meet required standards.

CMR

- Refers to a political convention that is part of the Westminster system of responsible government.
- The government is the party or coalition that can demonstrate majority support in the lower house of parliament. If a government cannot maintain this support it must resign. The government is made and can be unmade by the lower house.
- The **first element** of this convention is that governments are selected by parliament and can be dismissed by parliament if they no longer have majority parliamentary support (demonstrated by a vote of no confidence). In reality this does not occur as on most occasions the government has a majority in the lower house.
- **also requires** secrecy and solidarity of all cabinet members in relation to cabinet discussions and deliberations. There is a strict adherence to an agreed Cabinet decision which only applies to Cabinet Ministers unless a Minister outside Cabinet was involved in a particular decision. All ministers give support in public debate to decisions of Cabinet and of the full Ministry in public statements and the party room. The whole Ministry should observe the rule of Cabinet secrecy and a Minister should resign if they cannot support the decisions of the Cabinet/Ministry.
- secrecy considered important to ensure that discussion within cabinet is frank, open and honest without fear of the consequences of this information from the public. It also follows that the whole ministry will observe the rule of Cabinet secrecy which permits ministers to privately dispute policy but requires they all publicly support government decisions, or at least remain silent. If a Minister cannot support a decision, they are expected to resign.
- In practice there has been few examples of Ministers resigning because of their inability to adhere to the convention of CMR.

Requirements of CMR convention:

- Governments are selected by parliament (they must be able to demonstrate majority support in parliament to gain office)

- Governments can be dismissed by parliament if they no longer have majority parliamentary support (demonstrated by a successful vote of no confidence)
- The executive stands and falls together therefore the government 'speaks with one voice' and any minister unable to publicly support a cabinet decision must resign (cabinet solidarity)

Motions of no-confidence in the government
- Most important motion the HOR can move.
- Immediately take precedence over any other business and will be debated automatically
- Standing orders allow debate on the motion for up to 30 mins by the Leader of the Opposition, 30 mins by the PM and Minsters and 20 mins by any other member before a vote on the motion is taken
- Opposition can use as an opportunity to frustrate the exec and because they trigger an automatic debate, speak at length against the government. The Opposition might hope to highlight problems and embarrass the government
- The last Federal Government to fall as a result of a vote of 'no confidence' was in 1941. Such events are rare.
- Govt usually win the vote so, like IMR never successful in causing a govt to resign

EXAMPLES
- Gillard 2010, six resignations over leadership;
- Rudd 2013, six resignations over leadership;
- Tony Abbott in March 2013 called for a motion of no confidence against Julia Gillard's government, however, the motion to suspend parliamentary business for a motion of no confidence was lost with votes split 73 in favour and 71 against, but short of the overall majority required.

Leaks in Cabinet solidarity
- A 'leaky' cabinet often demonstrates declining prime ministerial authority. They may reflect personal ambitions, individual enmities or divided political loyalties. But suggests that cabinet 'unity' is not being upheld.

EXAMPLES
- PM Turnbull flashed a paper with a giant red CLASSIFIED stamp while speaking to media about ABC program Lateline obtaining a copy of a sensitive document detailing proposed changes to Australia's immigration program. Proposes drastic reform to Australia's humanitarian resettlement program, which will increase security monitoring of new arrivals and possibly make it harder to obtain permanent residency.

Hung Parliament
- A hung parliament exists where minor parties or independents hold the balance of power.
- An elected government that loses a vote of no confidence in the HOR must resign – can happen if this minority government relies on the support of independents and minor party MHRs or if party members 'cross the floor.'
- The last Federal Government to fall as a result of a vote of 'no confidence' was in 1941. Such events are rare.
- In Federal politics after the 2010 election the Labor government failed to obtain a majority and had to form minority government – they obtained agreement from the Greens and certain independents and were able to stay in government. However had to make concessions in order to formulate government policy.

Stewart West - CMR Minister for immigration and ethnic affairs resigned from cabinet because he disagreed with its decision on uranium mining 1984

Expected standards of Individual Ministerial Responsibility

1. Not mislead (lie to) parliament.
2. Not be personally or politically corrupt- not uses their position for personal gain or to gain unfair electoral advantage for themselves or their party. - only time when ministers would consistently resign
3. Avoid any conflict of interest between their private actions and their official duties.
4. Not bring parliament into disrepute – for example they should not engage publicly in any 'immoral' behaviour that is unacceptable to the community at large.
5. Take responsibility for problems in their Departments- such as any incompetence or corruption of senior public servants and major policy failures.

NOT UPHELD BECAUSE OF :

- It is at the discretion of the PM i.e. dismissing - It is possible for a PM to refuse to accept a Ministerial resignation, or not fire a Minister and to try to 'tough out,' any adverse public reaction if the Minister is too valuable.
- The trend by Ministers to avoid accountability by blaming the public service/top public servant for mistakes – departmental officials can be deemed at fault and thus absolve the Minister of blame; personal staff of Ministers can be deemed as not having passed on information and thus absolve the Minister of blame.
- Almost impossible to pass a censure motion in the HoR against a Minister because of party discipline - Even though IMR is a means of parliamentary scrutiny of the executive, due to the control of the executive over much of the machinery of parliament, parliament cannot effectively scrutinise Ministers and Ministers rarely resign for policy failures.
- Censure motions passed in the Senate have no status in terms of requiring resignation.

- THE IDEA is that when mistakes occur Ministers must account for their mistakes and answer TO PARLIAMENT. So if Ministers breach standards, while IMR does not demand that Ministers resign AUTOMATICALLY whenever mistakes are made, it does mean that they account for mistakes and answer to Parliament. Even when Ministers do not have anything directly to do with particular incidents they are still expected to explain what went wrong.
- Under the convention of IMR, Ministers individually answer to Parliament for their own executive decisions as Ministers and for the conduct of the departments and agencies under their control. Theoretically holds ministers accountable for the decisions and actions of the public servants they oversee.
- the chain of accountability runs from public service to minister, to parliament, then to the people with ministers being traditionally held responsible for the honesty and efficiency with which their departments execute their tasks. How reasonable, in practice, it is to hold a minister responsible for administrative errors in a large bureaucracy with huge budgets is a matter for conjecture.
- Changes in the structure of the Public Service in recent decades which have eliminated the requirement to provide 'frank and fearless advice' and have resulted in a greater 'politicisation' of the public service where they are more loyal to the Government of the day, have also weakened the chain of accountability.
- Public servants are now less willing to provide Ministers with unpopular advice. Another issue has been the growth in the use of political advisors who can interfere with the flow of information between Ministers and the Public Service.
- Another difficulty for the operation of the convention is the increasing influence of the PM and Cabinet over the actions of other ministers. The principle of cabinet solidarity means that ministers are sometimes in the position of implementing policy that they did not agree with. Oversight by the PM and interference in the running off departments also confuses chains of responsibility. This was demonstrated by the failure of the Home Insulation Scheme where four deaths and huge financial mismanagement did not lead to the sacking of the Minister, Peter

Garrett, only his demotion. It was suggested that any such move would implicate PM Rudd who has been heavily involved in the policy.

- The opposition and media regularly call for a ministerial resignation but are motivated by political/ratings aspirations rather than a sense of accountability. The PM now has the ultimate decision-making power in relation to ministerial accountability and these decisions will be applied subjectively depending on the situation. The willingness of PM Turnbull, Rudd and Howard to re-interpret the meaning of their ministerial codes of conduct as it suits them is reflective of where the convention sits today.
- Parliament effectively has no means of enforcing accountability. If a Minister does accept responsibility for actions in his or her Department and offers to resign it is up to the PM to accept or reject that resignation. Public and media pressure can often be more successful in forcing a Minister to resign. As the PM, rather than the Parliament, enforces IMR it is a subjectively imposed convention. An example of the convention not being upheld is the **Home Insulation Scheme and the demotion of Peter Garrett.**
- Parliament in itself is almost powerless to enforce CMR or IMR due to party discipline. No confidence and censure motions will be defeated. However, it is not irrelevant as Parliament can use parliamentary procedures to pressure government action. An effective Opposition can utilise procedures, e.g. Question Time to put issues to the media and to embarrass the Government/ Minister.
- Ministers are now more likely to be considered responsible to party leaders especially the PM, in whose decision of support a minister's career will depend. These decisions are usually made on political concerns rather than the principles of Westminster conventions. Factors that may influence these decisions are things such as:
    - Media attention
    - Party leadership and their perception of the nature of the ministerial misbehaviour
    - Proximity to elections (potential for electoral damage)
    - Public opinion polls
    - Relationship/proximity to PM
    - Factional support base within party
- Even under the convention, all the Minister has to do is be accountable and he can do that merely by answering questions. Under the convention they are only accountable to Parliament. They are not directly accountable to the people, it is Parliament that is accountable to the people and in practical terms, the only person who can impose a sanction other than the personal decision to resign is the PM. Too often, personal or factional interests and the sheer desire to win, whatever it takes, undermine good and clean government, and therefore the capacity to promote the common good and serve the public interest, which should be at the heart of democratic government,

EXAMPLES

- Barnaby Joyce (2018) - Personal behaviour. Nationals leader, Deputy PM and Minister for Infrastructure resigned following allegations of sexual harassment, revelations about his affair with a staff member and an investigation into his travel expenses.

SENATE

- David Johnston (2014) Minister for Defence was censured by the Senate after Johnston remarked he would not trust the government's shipbuilder ASC to "build a canoe"

Ministerial codes of conduct

- Ministerial Codes of Conduct are those written standards covering the behaviour of Ministers which are usually determined and enforced by the Prime Minister. The set of standards that Ministers should emulate.
- Codes were intended to reinforce the accountability of ministers and therefore minimise potential damage to the government from breaches of ministerial responsibility (PM focused codes = standards set by PM and executive team accountable to PM)

TURNBULL'S CODE: -

- Malcolm Turnbull has banned his ministers from having sex with their staff, sent Barnaby Joyce on leave and suggested he "consider his position", as the Prime Minister tried to end the embarrassment crippling his government. Hours after telling Parliament on Thursday Mr Joyce would be taking leave next week and therefore to serve as Acting Prime Minister while the Prime Minister was in the United States, Mr Turnbull announced the ministerial code of conduct had been rewritten to forbid a minister engaging in sexual relations with staff, regardless of their marital status.
- "I do not care whether they are married or single, I do not care. They must not have sexual relations with their staff, that's it," he said.

The accountability of the Executive and public servants. Through Senate Estimates

hearings open tp public and press therefore can be reported which further enhances motion of accountability - weakness most govt in HOR so they cant question all of it, can send a delegated representative hence they will say its a question of the minister and therefore can't answer it

In more recent times, the estimates committees have evolved much broader powers. Their scrutiny now includes virtually all government activity. The justification for this expansion is that all government acridity involves the spending of money and so it is legitimate for estimate committees to scrutinise all government activity. also able to look at policy **intention**

Senate Estimates Committee is used by non-Government Senators to probe into issues of Government policy and expenditure (budget statements). These hearings are held in public and ministers and public servants are expected to attend and answer questions. Can lead to effective scrutiny of the Government policy direction and associated expenditure

What is its purpose?

- The Senate Estimates Committee is the Estimates of government expenditure, which are referred to Senate Committees as part of the annual budget cycle. This opportunity to examine the operations of government plays a key role in the parliamentary scrutiny of the executive and government accountability. **It meets three times year – has 6 members each – open to the public and press**. The committee is able to directly question public servants from the relevant agency, as well as the responsible Minister. The committee is used by non-government Senators to probe into issues of government policy; not just expenditure plans.

- Whilst Senate Estimates hearings are held in public session, they are in some ways restricted or closed inquiries. This is because they do not take written submissions from the general public. Witnesses giving oral evidence are drawn only from the ranks of personnel employed in the Federal Public Service and its agencies.

- Senator John Faulkner has called estimates hearings "**the most effective mechanism for parliamentary accountability that we have in our system of government,"** while former Inspector-General of Intelligence and Security, Bill Blick, has said the hearings are "an important symbolic expression of the role of Parliament in holding the executive accountable."

Accountability Role:

- Estimates are arguably the most critical and systemic element of the accountability mechanism of parliament.

- They provide individual Senators, especially non-government Senators, with an unparalleled opportunity to gather information on the operations of government. They have the power to send for persons or papers hence they can demand that individual officials and documents are made available.

- While Senators may seek information from the government at Question time in the Senate chamber they can ask their questions only of the Minister concerned and are not able to question the relevant officials directly and extensively as they can at a committee hearing. Questions are normally answered at the hearings, but can be supplied later.

- Estimates might appear the closest to clear, apolitical accountability that Parliament achieves. It is, after all, focussed on the activities and record of the individual minister and their officials rather than the whole of the government and has a clear evidence base in estimates of expenditure, department reports and other official publications. Although the modern process is still nominally a financial accountability measure, Senate Estimates rarely confine themselves to budget questions and this has been allowed to include anything related to government's operations and financial position. Although public servants do not advocate or defend policy issues, they can be expected to explain how policies are being implemented or the factual issues related to policy advice.

- Even so, either in spite of this political contestation or because of it, or due to the apparent inadequacies of other parliamentary means for holding ministers to account, the public prominence of Senate Estimates has seemingly continued to rise, as has the priority given to it by the Senators themselves. The amount of parliamentary times spent on estimates has grown steadily and the number of column inches in Hansard it generates has grown as well (Mulgan 2008,62)

Weaknesses

- SEC is often seen as a piece of political theatre, with Opposition members of the Committee attempting to score political advantage at the expense of a rigorous impartial investigation of the issue at hand.
- As Members of the SEC have a wide range of scope when asking questions to witnesses, these witnesses can be questioned for several hours, often by torrid Opposition questioning.
- Furthermore, many Senators lack the experience/expertise to analyse and evaluate complex financial information.
- Hearings are often combative and aggressive
- Ministers hide behind rhetoric/public servants take questions 'on notice' or 'bureaucratise'.
- Estimates is frequently combative and aggressive; answers are not forthcoming and ministers hide behind rhetoric or filibuster with inanely long-winded orations. Government senators try to run "interference" and prevent forensic questioning of expenditure in case waste and mismanagement is exposed. - ABC NEWS

- During estimates hearings in October 2018, Michaelia Cash misled the Senate five times about whether her own staff had tipped off the media ahead of a raid by the federal police on the offices of the AWU.

- govt announced that govt build 12 new subs - stated will costs $50 billion - April 2018 defence department was questioned at senate estimates about how project was going and the cost - DD gave correct figure for how much it will cost and that the cost didn't take into account inflation - SEC wanted to know true cost and found out it was closer to $100 billion - Marise Payne minister for defence was questioned by Rex Patrick and said that the cost would be closer to 100 billion - hold accountable by Rex Patrick through questioning - September 2018 she clarified her departments answer

Composition of committees

- All parliamentary committees are made up of party MPs in proportion to their composition in a committees host house. Government party members will always dominate HOR committees but this is not so for the Senate. This makes Senate committees more independent of the

government. The usual ratio of parties on a Senate estimates committee is **three government Senators, two Opposition and one cross-bencher**

- Every year the government prepares the budget. As part of this annual process the Senate refers estimates of government expenditure to the eight committees, depending on the areas of spending. When these conduct budget hearings they are referred to as Senate Estimates. E.g the rural and regional affairs and transport estimates will conduct hearings into government expenditure in these portfolio areas
- Inquiries into government spending are an important accountability process in their own right. This narrow focus on expenditure formed the purpose of estimates hearings in the past. Modern hearing can call Minsters and any public servant including any member of the Senior Executive Service, the highest ranking public offical servants. They can be asked almost any question related to the running of their departments government policy, controversial events and scandals and virtually anything else
- Any response is covered by parliamentary privilege

Strengths:
- to question Ministers and officials, questions must relate to the estimates of expenditure but this is interpreted widely to allow anything related to government's operations and financial position.
- only Ministers from the Senate are required to appear in person
- may take advice from Australian National Audit Office (ANAO)
- have power to 'send for persons or papers' hence they can demand that individual officials, and documents are made available
- questions normally answered at hearings, but can be supplied later.

Weaknesses:
- many Senators lack the experience/expertise to analyse and evaluate complex financial information
- hearings are often combative and aggressive
- Ministers hide behind rhetoric/public servants take questions 'on notice' or 'bureaucratise'
- political point scoring tends to dominate.

And at least one other committee of the Commonwealth Parliament
Standing Committees

- A Standing Committee is a long-term parliamentary committee that are set up under Standing Orders and exist for the life of a Parliament.
- They can debate proposed bills and examine delegated legislation and also investigate specific policy issues.
- Committees do not generally have the power to initiate their own inquiries, so they are reliant on references from the parent chamber. With the government by definition holding a majority in the House and party lines largely adhered to, House Committees have tended to focus on prospective policy issues, perhaps in cooperation with the minister. Matters potentially embarrassing to the government are unlikely to be investigated.
- But the government rarely has a majority in the Senate (exception in the Howard majority government), and therefore cannot block references of bills or matters for investigation to committees for inquiry. Consequently, the bulk of the legislative scrutiny and scrutiny of ministers and departments takes place in the Senate.
- A weakness of the Committee system is that it is argued that sometimes-party loyalty impacts upon the work of committees and they can be manipulated or sometimes ignored. There are some significant inquiries that result in dissenting reports from the government who largely reject the criticisms contained in the main report. The government has the freedom to reject

committee conclusions or recommendations, but should be obliged to explain itself and its reasons for doing so in ensuring the accountability of the Australian Parliament.

EXAMPLE

The Human Rights (Parliamentary Scrutiny) Act 2011 established the parliamentary joint committee on Human Rights (PJCHR). The PJCHR is a standing committee with the purpose of scrutinising all legislation and delegated legislation introduced into the Commonwealth Parliament for compatibility with the following seven intonational and conventions to which Australia has agreed to be bound:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on the Elimination of all forms of racial discrimination
- Convention on the Elimination of All forms of discrimination against women
- Convention against Torture and Other cruel, inhuman or degrading treatment or punishment
- Convention on the rights of persons with disabilities

Accountability of the executive and public servants **through the Commonwealth Auditor General:**

- not only looking at financial audits

Auditor General:

- An Auditor General is a public officer appointed by the government who conducts independent audits of government spending to ensure that those responsible for expending government money do so in accordance with legislation.

- To perform the role effectively, an Auditor-General requires independence from the Executive. The AuditorGeneral Act 1997 (Cth) sets out the main functions and powers of the Auditor-General and, in combination with the Public Accounts and Audit Committee Act 1951 (Cth), ensures that the Parliament has a role in the Auditor-General's appointment, funding and work program.

- The Auditor-General's role does not extend to commenting on the merits of government policy, but mainly focuses on financial statement audits, and performance audits that assess the extent to which programs have been implemented efficiently and effectively, and in accordance with legislation and government policy.

- As an Officer of the Parliament, the Auditor-General's primary relationship with the Parliament is with the **Joint Committee of Public Accounts and Audit. The Committee has a statutory duty to examine all reports of the AuditorGeneral that are tabled in Parliament.** - public - goes to AG website and parliament - press can look at it -

- These methods are non-parliamentary forms of executive accountability. They are limited by the separation of powers as they are statutory bodies and can be modified or abolished by a new statute. They are also limited by a lack of judicial powers, as whilst these integrity agencies can investigate issues of accountability and recommend action, including disciplinary action against individuals, only a court can exercise judicial power by making a judgement and imposing lawful penalties.

- Auditor General act 1997 creates the Auditor General of Australia and the Australian National Audit Office (ANAO). ANAO is statutory authority. AG head of ANAO.

- Independent officers of the parliament

- Recommended by the Joint Committee of Public Accounts and Audit (a joint standing committee of the Parliament) and the PM

- **Appointment by the GG using the formal exec powers of the constitution for 10 years**

- As an independent officer of the Parliament can be seen as part of the Architecture of accountability
- AG new innovation designed to enhance the ability of the Parliament to keep the government accountable
- Have broad bipartisan support - important requirement for an officer whose job is to ensure the government administration and finance are accountable.
- After the committee recommends a candidate for the position, PM advises GG to make appointment
- An audit is an offical inspection of an organisation's operations and finances. The ANAO conducts two types of audits
  - Performance audits
  - Financial audits
  - And assurance reviews
- Statutory protection and scope and power

Performance audits

- Performance audit is an inspection of the way a government department or agency carries out its day to day business.
- Use **key performance indicators** to measure effectiveness, economy and efficiency. A KPI is measuring standard that is used to make judgements - check list used to compare different govt departments - same criteria
- Auditor general advises Parliament about how public money is being spent and whether or not outcomes are being achieved. This helps Parliament hold the government accountable

Financial audits

- Check the finial statements and records of a government department or agency. Every year in the annual budget departments and agencies are allocated funds to carry out their responsibility. Financial audits ensure that their spending is accountable. Inefficiency and corruption may be dented when an auditor 'goes through books' - looks to where all the money has been spending - tax payers money - has to determine whether the money has been spent effectively, for the right reasons and if you could of spent less money

Assurance reviews

- Australian public service is governed by
  - Public service act
  - Public service standards
  - Code of conduct
- AG ensures that these laws, standards and guidelines are adhered to within all government entities
- Check to ensure that a government dept or agency is carrying out its responsibilities using the correct information. They are designed to manage 'information risk' by making sure that organisation are complying with the relevant law, regulation and policies that may apply. The laws and policies the public service administers change all the time. Assurance reviews simply aim to make sure dept and agencies are up to date with what is required of them

- **Defence department July 2019 - AG found misgiving with how the ADF and PS officials were claiming travel allowance - as result creation of travel board - prompts response - minister has been held accountable - ADF and PSO have been**

- The department spent roughly $93 million in 2017-18 and $90 million in 2016-17 on allowances paid to Australian Defence Force personnel and APS employees travelling on official business. Of these amounts, approximately 20% is claimed by APS employees.
- Their travel-allowance arrangements for employees "exhibit shortcomings", the audit found, citing "failure to consistently reflect policy requirements in guidance and supporting tools", "division of policy and administrative responsibility" and ineffective detective controls for credit cards as the main issues.

ADMINISTRATIVE APPEALS TRIBUNAL

Role:
- established under the Administrative Appeals Act (1975) implemented by the Federal Government.
- Role of the Administrative Appeals Tribunal re-executive accountability is its ability to review a broad range of government decisions made by (amongst others) Ministers and public servants with delegated authority which have been outlined in the appropriate Act. What can be reviewed is limited by the Act. The tribunal has no power to consider the constitutional validity of particular laws or the legality of government decision-making.
- The AAT's reviews are of the merit of decisions and whether a decision was correctly based on law and government procedures. Any party affected by a decision of the executive may appeal to the AAT- it is relatively straightforward and cheap and most applications are concerned with Taxation and Social Security decisions.
- Appeals are possible from the AAT to the Federal Court.
- The AAT is NOT a court but its decisions can be subject to review through the court system.
- can also investigate dealings of the public servants

How does the AAT promote accountability of the executive and contribute to open government?
- It provides an avenue for the review of administrative decisions of the government and the public service, where that review is provided for by the Act or regulation. This review is based on the merits of the administrative decisions.
- It is an important aspect of accountability of the executive and the public service as it formalises the citizen's right of appeal against an executive decision and aims to ensure that all complaints are treated in a consistent and just manner.
- Accessible for all Australians. It is less costly, more informal, efficient, open and transparent and quicker to reach a decision than a court proceeding.
- The establishment of the AAT reflected the understanding of the intrusion of administrative decisions into everyday life of Australian citizens. It reflected the determination that administrative decisions were made with fairness.

- don't have general jurisdiction over administrative decisions - only look at anything covered by a Statute - if appeal is not covered by a statute - exec is only held accountable by only legislation areas
- can't consider constitutionality

- Has to be brought before them

Many decisions made by the Department of Human Services (Child Support) can now be appealed to the Administrative Appeals Tribunal

An example of the AAT in action being the **Kashkooli** and Minister for Immigration and Border Protection Citizenship 2016. Armin Kashkooli was an Iranian citizen who was granted a refugee visa. After arriving in Australia he committed two minor criminal offences. He was ordered to go to a police station for photograph and fingerprinting but failed to attend. He was convicted of shoplifting in August 2014. In November 2014 he applied for an Australian Citizenship but predated his application to May 2014, before his convictions and answered 'no' to a question on the form asking if he had any criminal convictions. An official of the Department of Immigration and Border Protection made the administrative decision to refuse his citizenship application based on the grounds of bad character. Mr Kashkooli applied to the AAT to review the administrative decision. The AAT upheld the original decision to refuse him Australian Citizenship. The fact that the officials decision was reviewed by the AAT shows they were held to account. In considering the decision, The AAT looked at the facts and the law, making reference t the Australian Citizenship Act.
- AAT reviewed decision and agreed - was looked and found that they made the correct decision and that they were still held accountable

---

Public Servants

- **Definition**: structure of government departments and appointed officials that administer government policy and legislation

What do they do?
- Core of the 'administrative executive' (can include political advisors)
- Ensure the efficient administration of policy and legislation passed by parliament
- Developing and administering delegated legislation
- employees of the government who work either directly for Ministers or within government departments.
- required to develop policy, advise Ministers, implement government policies and/or decisions. Public servants are required to account for decisions taken by government departments. Public servants also known as the administrative executive.

Why they should be held accountable?
- Public servants are representative agents of parliamentarians and hence are accountable
- The policy decisions of public servants are central to the implementation of government policy
- Given the size of the contemporary public service/bureaucracy, it is not realistic for Ministers to be aware of all policy actions and decisions of a Department, and for that reason public servants should be directly accountable
- Senior public servants cannot avoid responsibility for actions on the basis that the Minister must take account for all actions of a Department, especially given that the Heads of Departments/ senior public servants have express contracts.

Why they should not be directly held accountable for their actions?
- The responsibility of Ministers will decline to the extent that the convention of responsibility will be entirely diluted.
- Public servants are not directly chosen by the public but Ministers are and hence should be held ultimately responsible for all actions of a Department
- Ministers will be less inclined to supervise the activities of a Department if the Head of a Department will always be held responsible

- Public servants will always be accountable under the civil and criminal law for their actions. Therefore, sufficient levels of accountability exist.

Accountability of the Executive and public servants through judicial review.

The role of the High Court in relation to executive accountability is its ability to review decisions/ actions of the executive through judicial review, which could include:

- Decisions/actions by the executive in terms of the High Court's original jurisdiction s.75 (3) and (5);

Examples:

- **S99 v Minister for Immigration and Border Protection (2016)**

- High court issued an injunction against the Dept of Immigration and Border Control. S99 was an African refugee who was raped while she was suffering an epileptic seizure on Nauru. She became pregnant as a result of the assault. S99 wished to have an abortion but the law on Nauru prohibits termination of pregnancies. The Australian Government transferred her to Papua New Guinea for a medical abortion. S99 felt that her epilepsy made her vulnerable because PNG lacked the level of medical care needed for her particular case. Called Australia refugee lawyer, George Newhouse, saying that she wanted to access a safe and legal abortion procedure in Aus. AUS Govt denied responsibility, arguing that she was Nauru's responsibility. Aus would either arrange the abortion in PNG or transfer her back to Nauru. Went to High Court seeking an injection preventing an abortion in PNG and her transfer back to Nauru until court found outcome. Referred to Federal court which decided in May 2016 that the Minister for Immigration had exposed S99 to serious risk of medical harm and that the Minister also had a duty of care to enable s99 access to a safe and legal abortion.
- S99 remained in PNG during the entire legal process because the HC injunction restrained the executive govt action, She received treatment in Australia.
- **Peter Dutton had to answer questions and explain his decision - didn't try to appeal**

In Plaintiff S297/2013 v Minister for Immigration and Border Protection [2015] HCA 3 (S297 2015)

- This is the rule of law in action – holding the powers of the executive (the Minister and Department staff) accountable to the law as made by the Parliament and interpreted by judges and the court.
- On 20 June 2014, the High Court found that the Minister's decision to limit the number of protection visas to be granted in a particular year was unlawful in two cases brought by asylum seekers. This was because of the way in which the High Court interpreted the Minister's power in the Migration Act to cap the number of visas of certain kinds. The High Court said that the way the power was expressed in the Act meant it could not have been intended to apply to protection visas. The effect of that decision was that the two asylum seekers on whose behalf the cases were brought could not have their applications refused just because the Minister had decided to limit the number of protection visas in that year. The case demonstrates how the Court will look carefully at the totality of the Migration Act and its purposes to decide what exactly certain provisions of the Act mean. In rule of law terms, the case shows how the Court, not the Minister or the Executive, decide the final meaning of legislation and its implications for the power of the executive.

M70/2011 Case – High Court decision in Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) HCA 32.

> Judicial review is the appraisal of administrative decisions made by the executive under powers set out in statutes by courts and tribunals.

- Whilst the M70/2011 Case centered on the Government's refugee swap deal with Malaysia, the High Court's decision in M70/2011 and MI06/2011 is a good example to demonstrate the accountability of the executive and the doctrine of the separation of powers in action.

- Under the terms of the Malaysian Solution, Australia would have accepted 4000 refugees from Malaysia in return for the Asian country taking 800 asylum seekers who had arrived on Australian shores.
- In this case, the Plaintiffs challenged the power of the Minister for Immigration to make the decision determining that Malaysia could be a specified country for the offshore processing of illegal entrants claiming refugee status.
- The section 198a Migration Act provisions mean that a country has to be legally bound to provide access for asylum seekers to effective procedures and to provide protection for asylum seekers. A country like Malaysia has to be legally bound either under International law or its own domestic law to do those things (for the Malaysia Solution to be lawful).
- A majority of the High Court found that the Minister did not have the power to make the declaration that asylum seekers could be sent to Malaysia.
- An impact of the decision was that after the High Court overturned the Gillard Government's 'Malaysia Solution,' Julia Gillard criticized the decision and in particular Chief Justice French, saying, among other things:
  - 'The High Court's decision, basically, turns on its head the understanding of the law in this country prior to yesterday's decision... a missed opportunity to send a message to asylum seekers not to risk their lives at sea and get into boats. And we tragically saw at Christmas Island around Christmas time what that can lead to, with the loss of life of men and women and children.' Basically she criticized the Chief Justice for making the policy invalid.
  - Also, the government was forced to pass new legislation to overcome the High Court's ruling Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012. This second impact illustrates the sovereign power of parliament.

- The decision in M70 was not based on Constitutional law principles, but on administrative law (which governs how the executive can make decisions and what their powers are under statute), as well as principles of statutory interpretation.
- This decision seems to boil down to a fairly straightforward imposition of Administrative Law, where decision makers are restricted by legislated constraints, which they must adhere to. Decisions purported to be made where the decision maker (the Minister for Immigration in this case) does not comply with the requirements imposed on a decision maker by the Act are amenable (open) to review for jurisdictional error.
- However, because of the political implications, the High Court decision was accused of being interventionist, and even single judges have been singled out by the Prime Minister for criticism. This disagreement should be seen as a positive indication that the Separation of powers is still working in this country, but also seen as a warning against complacency.
- Fundamentally, the High Court decision is significant for demonstrating the importance of judicial review in a democratic society.
- In particular, it illustrates the importance of one of the most fundamental principles in democratic societies – the rule of law. This principle provides that decisions of governments should be controlled by laws.
- This is particularly important in relation to government ministers, who have considerable powers under statute and need to be made accountable for their actions by an independent judiciary.

Governor General

Through Appointment

The extent of the accountability of the GG and the Office of the GG
- GG has vice regal power (half monarch)
- Express powers express the will of the parliament
- With accountability - not dealing with accountability of their express powers, its only when the GG uses the reserve powers when it is questioned
- Reserve power when legislative deadlock however they can just scrap the bill
- Extent of accountability for appointment is limited

- The newest GG was sworn in on 1 July 2019
- Initially appointments to the position were made by the king or queen on the recommendation of the Colonial Office in London. Resulted in appointment of GG who were born in the UK and were at times ill suited to the position. e.g Aus first GG Lord Hopetoun was a controversial figure who asked to be recalled to UK in 1903 after dispute about funding for his position. All GG of Aus born in Britain up until 1965 except for Sir Isaac Isaacs (1931 - 36) and Sir William McKeel (1947-53)
- The right of other PM in the CW to advise the monarch directly and to expect their advice to be taken was ratified in the *Statute of Westminster 1931*
- By convention Queen Elizabeth II is bound to accept the advice of the Aus PM as the appointment of a GG
- The ability of the PM to select the GG implies they have the power to appoint people to this position who uphold the values that the Government of the day would like to see reflected in the Office of the GG. Can be seen through selection of Sir Peter Cosgrove by PM Abbott in 2014
- Power to choose the GG also implies that the PM has the ability to dismiss someone from the position.

Constitutional Monarchy
- A constitutional monarchy is a (hereditary) head of state. He or she is a monarch, or sovereign, who is governed and bound by the Commonwealth Constitution.

Executive Power
- S61 : the executive power of the Cw is vested in the Queen and is exercisable by the GG as the Queen's representative, and extends to the execution and maintenance of this Constitution, and the laws of the Commonwealth

Office of the GG
- The office of GG was established by the Constitution of the CW of Aus in 1901
- The GG is appointed by the Queen on the advice of the PM
- After receiving the commission, the GG takes an Oath of Allegiance and an Oath of Office to the Queen and issues a Proclamation assuming office
- The GG appointment is at the Queens pleasure, this is, without a term being specified. In practice, however, there is an expectation that appointments will be for around 5 years, subject on occasion, to some extension
- The GG salary is set by an Act of Parliament at the beginning of each term of office, and cannot be changed during the appointment
- The GG's powers and role derive from the Constitution. Letters Patent from the Queen, dated 21 August 2008 also

Constitutional executive
- The GG in council - the only body directly given executive authority by the Australia Constitution

Conventions
- The anomaly of s61 is that the GG powers are largely formal and ceremonial and the real power, under convention, is with the PM. The GG by convention exercises Exec power on the advice of the PM
- The exec powers of the GG in the constitution were not intended to be taken literally, but to be interpreted in the light of the constitutional conventions of Australia's inherited Westminister system of government. The GG is expected under normal circumstances to act on the advice of the PM. The PM is not even mentioned in the Constitution

How is the GG appointed?

Commonwealth Constitution:

- Section 2 of the Commonwealth Constitution stipulates that the Governor-General is appointed by the Queen.
- The appointment is at the Queen's pleasure, i.e. without a term being specified.
- Grounded in the constitution

In practice:

- The Governor-General is selected by the Prime Minister who informs the Queen of the selection. After receiving the commission, the Governor-General takes an oath of Allegiance and an Oath of Office to the Queen and issues a Proclamation assuming office.
- It is an expectation that the appointment of the Governor-General will be for around five years.

Through Removal

- Commonwealth Constitution is largely silent on the method of removal of the Governor-General as the Governor-General holds office 'during the Queen's pleasure.'
- The Governor-General can be recalled or dismissed by the Monarch before their term is complete.
- By convention, removal may only be on the advice of the Prime Minister, who retains responsibility for selecting an immediate replacement or letting the vacancy provisions take effect.
- Extent for accountability of removal is limited.

- Removal - no formal methods apart from queen - we need the people

GG

- **Convention** holds GG to account - e.g by convention they don't declare war on another country
- **PM** in consultation with the Queen holds GG to account - PM contact to Queen to resign GG
- The **People -** In reference to the Hollingworth Affair Hollingworth was forced to resign because he lost the support of the people
- The **constitution** - Isn't given total power from the constitution

Accountability of the Office of the GG:

- Informal methods of accountability for the Governor General are more effective in the operation of open government. The Office Secretary to the GG as part of the public service gives transparency to the Office of GG through producing annual reports tabled in both houses of parliament. For example, in the Annual Report of 2014/15, the Secretary gave information on the outcome and program of the Office along with details on budgeting and reporting requirements. This upholds open government as it makes the business of the GG open to public scrutiny through annual reports, giving free flow of information about the outcome and program of the Office.

office of gg is held accountable via freedom of info requests as seen in Kline official secretary to the GG which held the office to account in HC when it denied freedom of info request. Whilst this denial supported the position the position of the GG it demonstrates that the office itself is subjected to the same laws and scrutiny found within other parts of the exec.

Accountability and the Courts

- The informal method of judicial review can also reflect open government. As seen in Kline v Official Secretary to GG (2013), open government was upheld through giving people the right to challenge the transparency of GG decisions, providing scrutiny to their actions and ensuring the GG respects the rule of law in that their actions can be reviewed in the court system.

1975 / Hollingworth

The '1975 Crisis' of Conventions

- The events of 1975 are best termed 'a crisis of the conventions of the Constitution.'
- In dismissing Whitlam and installing Fraser, as PM, the GG acted within his formal powers as specified in **s.64** of the constitution, but contrary to the longstanding and fundamental convention that he should only appoint a person supported by a majority in the HoR.
- In refusing to follow specific advice from PM Whitlam that he should undertake a different course of action, the GG broke with the convention that the monarch or monarch's representative, whatever his or her formal powers, should use those powers only in accordance with such advice.
- The Senate's action in refusing to pass the Whitlam government's supply bills was arguably contrary to the conventions of responsible government, as those conventions rely only on the government commanding support in the HoR and thus depend on the Senate passing Supply, even if the Senate is not controlled by the governing party.
- In refusing to resign despite the inability of his government to get its supply bills through parliament, Mr. Whitlam- according to his critics – broke with the longstanding convention that a government must have parliamentary support for supply in order to remain in office.
- Two State governments broke with the convention concerning the filling of casual Senate vacancies.
- Supply Bill - Was an issue because anyone who works under the government won't be paid
- Whitlam government has majority in lower house and at start of 1975 majority in upper house - pass legislation pretty easily
- As time goes on they loose their majority in the senate - not by losing seats
- **FIRST CONVENTION BROKENn**
- Queensland and NSW replace labour senators with **non labour senators**. following the death of a Labor Senator, the Queensland Parliament chose a replacement who was known to oppose the Whitlam Government. NSW senator resigned
- Senate now in deadlock
- Government now has minority government - Senate becomes liberal
- **CONVENTION TWO BROKEN -** Senate blocks supply
- Govt tries to pass again, blocked again by senate -
- **CONVENTION THREE BROKEN** - Govt should of resigned (can't pass money bill you should resign)
- **CONVENTION FOUR BROKEN -** GG sought council from somebody other than the PM (not allowed to get advice from anyone other than PM)
- GG has meeting with Sir Garfield Barwick, who then was the Chief Justice
- Garfield was involved in the liberal party - therefore biased and tells GG to dismiss Whitlam
- **CONVENTION FIVE BROKEN** - consults in secret with Fraser - not meant to meet with Opposition without presence of the Government. - Fraser says he is willing to form a care taker government - GG says he has to call election straight away
- **CONVENTION SIX BROKEN** - Whitlam is dismissed

The 1975 Crisis generated debate regarding the role of the Governor-General because of:

- The use of the reserve powers within a democracy.
- The use of the reserve powers to dismiss a PM who retained the confidence of the House.
- Acting contrary to convention especially in terms of the advice of the PM.

- GG resigned 2 years after event

Use of reserve powers? Arguments for and against using the 1975 as a case study:

For	Against
Although the GG used a reserve power available to him, he was also required by convention to advise his PM of the possibility of him doing so.	GG acted in accordance with the reserve powers granted to him
The GG failed to advise the PM that he had sought the opinions of the then Chief Justice of the HC, Sir Garfield Barwick and of another High Court Justice, Sir Anthony Mason, about his ability to dismiss the government through the use of reserve powers.	The existence of the reserve powers of the GG were a recognised and established feature of the CW Constitution, thus the decision was not based on a constitution fiction.
The GG did not provide the PM with a deadline for resolution of the dispute.	The nature of the constitutional crisis required the GG to act as he did without giving advice to his PM of his intention to exercise his reserve powers.

- The Governor General is the Queen's representative at Commonwealth or federal level in Australia. The GG carries out the Queen's functions as Head of State on her behalf, although typically acts on the advice of the PM. Reserve powers are the Governor General's constitutional powers that they can exercise independently or contrary to the advice of the government, PM or FEC.
- **One argument for** the Governor General freely exercising their reserve powers is that they must act as a constitutional caretaker when a constitutional crisis is encountered. This was seen in the 1975 Constitutional Crisis in which GG Kerr exercised his reserve powers under section 64 to dismiss PM Whitlam and appoint PM Fraser after the Whitlam government failed to pass their supply bills through parliament.
- **One argument against** the Governor General freely exercising their reserve powers is that the Governor General by convention acts on the advice of the Prime Minister and the Cabinet and should not act unilaterally. This was particularly seen in the 1975 'crisis of conventions' in which GG Kerr exercised his reserve powers to dismiss Whitlam and appoint PM Fraser under section 64, but this was contrary to longstanding convention that he should have only appointed a person that was supported by a majority of the lower house. Furthermore, in refusing to follow the advice of PM Whitlam that he should take different action, GG Kerr broke convention that the monarch's representative, whatever their formal powers, should use them only in accordance with PM advice.
- Therefore, while the Governor General is within their limits to exercise reserve powers without the advice of the Prime Minister, Westminster conventions rely on the Governor General not exercising this authority.

1975 Crisis and accountability of the GG:
- Letter conferring constitutional authority on the GG under s.64 and his statement of reasons.
- Consulted with Chief Justice Barwick and referred to this advice in reinforcing his desire to be seen as accountable for his actions.
- While the Official Secretary, David Smith, proclaimed the dissolution of the Parliament, GG Kerr did not explain his actions to the Australian people.
- The Queen's Private Secretary wrote a letter that stated that the Constitution 'places the prerogative powers of the Crown in the hands of the GG.' 'The only person competent to commission an Australian Prime Minister is the GG' and 'that it would not be proper for her (the Queen) to intervene in person or matters which are so clearly placed within the jurisdiction of the GG by the Constitution Act.' Hence, this shows the lack of any formal mechanism for holding the GG accountable.

- Kerr was forced to resign as it was untenable for him to continue in his role as GG without the support of the Australian public.

Hollingworth Affair:
- Peter Hollingworth brought the office of GG into disrepute and in doing so damaged the office to some extent, but more important, embarrassed the government of the day.
- He appeared on 'Australian Story' and suggested that a 14-year-old girl, rather than a married clergyman, was responsible for the sexual relationship that had developed between them. Hollingworth was also plagued by arguments about whether he acted appropriately before his appointment as GG in decisions he had taken as Anglican Archbishop of Brisbane in relation to allegations of sexual abuse at an Anglican private school. Claims were aired that Hollingworth had acted with insufficient resolution when employees of his diocese had been accused of predatory sexual misconduct.
- Hollingworth disappointed many in his responses, which demonstrated an apparent lack of appreciation of the serious danger paedophilia posed within church and society. A public opinion poll found that 63% thought that Dr Hollingworth should resign, while 66% thought he was not a suitable person to hold the position of GG.
- Continuing to defend the GG was detrimental to the PM's reputation, and eventually he was quietly advised that it would be better that he should resign office. Senior Cabinet Ministers suggested that Hollingworth should reconsider his position.
- On the 25 Hollingworth resigned, just 2 years into his 5-year tenure. The PM Howard asked Hollingworth to resign thus demonstrating where real power lies in Australian politics.
- It was said that a 'GG cannot survive in office without the confidence of the people.' The office is regarded as socially important and receives increasing media scrutiny, which helps make it accountable to the people. The GG cannot fulfil the office's role of national unifier and conscience without public support. The principal reason is that since the GG's tenure lies in the PM's hands, public opposition to the GG's continuance in office will eventually rebound on the PM, who will ultimately be forced to urge the GG to resign.
- Professor Craven has noted now that since the 1980s all PMs 'seem to have been equally guilty of elbowing the GG from centre stage' and undertaking great ceremonial functions of state that previously had been discharged by the GG. He gives two examples - PM Howard presiding over the Bali remembrance ceremonies and over the opening ceremony of the Rugby Union World Cup.
  - PMs have continued to make recommendations for the appointment of GG without taking the matter to a full Cabinet. John Howard was responsible for two appointments: Hollingworth and Michael Jeffery.

<u>1975 gg escapes accountability - knows the Queen isn't going dismiss him</u>
<u>However Hollingworth is held accountable by the people</u>

<u>Hollingworth affair and accountability of GG:</u>
- The principal lesson in the Hollingworth affair is that the GG cannot survive in office without the confidence of the people, as Hollingworth had lost the trust of the Australian public.
- The office is regarded as socially important and receives increasing media scrutiny, which helps make it accountable to the people. The GG cannot fulfil the office's role of national unifier and conscience without public support. The principal reason is that since the GG's tenure lies in the PM's hands, public opposition to the GG's continuance in office will eventually rebound on the PM, who will ultimately be forced to urge the GG to resign.
- The Hollingworth affair demonstrates that the constitution is largely silent on the method of appointment and removal of the GG.
- Nevertheless, it can be seen that the GG was held to account to a certain degree as witnessed by the resignation of Hollingworth in 2003.
- Hence, there are no formal means of holding the GG to account. It does show though the importance of media and public opinion/ confidence as informal methods in holding the Governor-General accountable.

Accountability of the Courts

Appeals
- Most obvious way in which the decisions made in courts are checked.
- Superior appellate courts have judges with a higher level of expertise and experience and the power to reverse a lower courts original decision.
- Whenever a judge makes a decision they must give a fully detailed explanation of their reasons. The reasons are then published on that particular courts website and in law reports. Public availability of judicial decisions may result in either public and/or media scrutiny. Public confidence in the justice system is enhanced if justice 'is not just done but is also seen to be done'
- Judges reasons are available for examination by appellate courts. Powerful check on the quality of the original decision and the capacity of the judge who made it
- Individual judges whose decisions are regularly reversed by appellate courts will differ damage to their reputation and may lose promotional opportunities to higher courts. This is a strong incentive for them to make good decisions
- There are many grounds for appeal. The law, with evidence and the way the judge managed the trial. Judges who misapply statute law or precedent, who give incorrect weight to evidence or whose management of a trial was improper will be quickly found out on appeal
- Likewise, lower courts whose decisions are frequently reversed on appeal may be subject to greater scrutiny by the Attorney General.

Attorney General
- Is a Minister in Cabinet with responsibility for the judicial and court systems
- The Cw and each state govt has an Attorney General. Whilst an AG can not directly interfere with the court's processes, they do make recommendations for judicial appointments and promotions. They are also responsible for the funding and support of the judicial system within their jurisdiction. They may respond to problems within a court by directing more resources to it or to the Chief Justice to address any problems
- AG main job is to defend the judiciary, meaning supporting it so that it can function properly. This may mean helping the court system overcome problems caused by a lack of resources and assist judges make good decisions

High Court
- Granted ultimate appellate jurisdiction by section 73. In exercising this jurisdiction, the HC has discovered miscarriages of justice and reversed decisions that have led to significant reforms within other Australian court hierarchy
- **CASE**
  - Rafael Cesan and Ruben Mas Rivadavia, both found originally guilty of drug trafficking in 2004. In their original trial in the NSW District Court the judge fell asleep frequently and snored loudly. Justice Ian Dodd suffered from sleep apnoea (permanently tired)
  - Rivadavia appealed to HC on grounds that they had not received a fair trial and therefore miscarriage of justice
  - Argued that the jury was distracted and snoring interfered with cross examination evidence. Chief Justice Robert French of the HC agreed. Declared trial was flawed and that a miscarriage of justice had occurred. Ordered a re-trail. Justice Dodd had been held to account and so had the original court.
  - Judge did not misapply law but had missed vital parts of the trail - judge himself was held accountable - trial itself was not flawed but the judge had caused a mistrial of justice - not an error of fact but an error of law
  - Judges are also held accountable - not only court itself by the same appeal

Grounds for appeal
- Error of law - e.g misapplied statute,
- Error of fact - e.g DNA doesn't match the convicted, tampered evidence
- Appeal severity of the judgment - use precedent to argue that other similar cases have had lesser punishment

Trial processes and public confidence

- Internal check and balance is the courts use of traditional and publicly trusted processes.
- Offer transparency and authority in the exercise of judicial power and hence build public confidence in the courts
- Public confidence is done through natural justice and appeals and the judge being qualified

Due process and natural justice

- Court processes are designed to ensure a fair trial. Fair trial must meet
    1. The adjudicator (judges and juries) must be impartial
    2. Each side must be able to present their case
    3. Decisions must be based on evidence
    4. Hearings must be open and transparent except in exceptional circumstances
- Above are referred to as due process

1. Impartial adjudicators

- Judges must remove themselves from a trial if there is a conflict of interest. e.g if a judge is related to one of the parties to a case they must declare the relationship and recuse themselves.
- Jurors are required to declare any reason that they should not be empaneled such as knowing the defendant. Failure to declare relationships and interests can result in a mistrial
- A biased judge or jury can be grounds for appeal. If proven, an appellate court will reverse the original decision, quash it or order a retrial
- We know that they are a highly qualified individual who has a law degree and has been working in the industry for a long time
- Judges are not elected - in a way can be more accountable however can be more politicised or populism
- Tenure - they do not loose their job unless they are held by section 72

2. Hear both sides

- Pre-trial and trial processes are designed to give equal opportunities to both parties to present their case
- Each may call witnesses, submit evidence, interrogate the other sides witnesses and test their evidence under cross examination and so on
- In civil pre-trial, plaintiffs make statements of claim and defendants address these accusations in statements of defence. Each side has identical opportunities to gather and present evidence
- In criminal pre-trial, the accused has a right to know what they are being charged with and the evidence against them. The right to silence ensures the accused does not have to contribute to the case of the prosecution
- Adversarial trial procedures employed in the Aus legal system for both civil and criminal trials are very similar.
- Primary responsibility of the judge is to uphold these processes and to ensure procedural fairness
- If a judge fails in their duty to ensure a fair trial, then there may be grounds for appeal. An appellate court may reverse the original decision, declaring it unsafe, or order a retrial

3. Evidence based trials

- rules of evidence are designed to ensure that only evidence of the highest quality is admissible and used in the search for the truth.
- Examples of inadmissible evidence may include hearsay evidence, opinion evidence, irrelevant evidence and circumstantial evidence
- Each party may present evidence and the other party is free to test that evidence. They may object to evidence if it falls outside the rules of evidence. They do this by making an objection and having the judge rule whether the evidence is admissible or not
- Only evidence that has survived being tested in court and is found to be admissible may be used by a judge or jury in making their final decision
- Before sending a jury away to consider its verdict in an indictable criminal case, a WA judge must charge the jury. Charging the jury requires the judge to instruct the jury what evidence they are allowed to take into account, what evidence they must disregard, what law must be

applied and so on. Critical phase of a criminal trial in both the District and Supreme Courts and one in which any error by the judge may result in an appeal
- Failure to apply the rules of evidence or to charge the jury incorrectly may lead to a appeal

4. Public hearings
- All court proceedings are open to the public and media with few exceptions. Judges may decide to hold a trial or part of a trial in camera (out of view) to protect sensitive witnesses such as children, or to protect sensitive information such as secret national intelligence. In almost all other cases the proceedings of courts are open to the public
- Media reports trials. Court reports are published in newspapers and online. Most courts have a public viewing gallery at the rear of the court. Members of the public may enter and view a trial
- Such openness ensures that the public can have confidence in the administration of justice and the courts and judges who administer it

Public confidence in the courts
- The adversarial system of trial has its critics. It is expensive. It is shrouded in complex jargon, Latin terminology and obscure processes. It is time consuming and there is a server backlog in cases coming before the courts causing delays.
- Courts are the most trusted of the three arms of government
- Public generally have faith that courts and judges can be relied upon to make authoritative decisions based on law and evidence. People trust that courts are apolitical; they have no 'policy' and no party loyalty. Court decisions follow strict doctines, principles, rules and maxims that have developed over hundreds of years
- Other reasons for high public confidence include the fact that judges never have to appeal to populist to keep their jobs. They have security of tenure guaranteed in section 72 of the constituiton. Politicians sometimes have to appeal to populism. They are partisan and may be perceived to spin issues to favour their political side. Judges should never favour a side
- Politicians are always in a contest for votes with other politicians. Judges never have to compete with other judges to keep their jobs
- Court procedures are centuries old and based on traditions that have stood the test of time. They are not the inventions of parties seeking political advantage. History and tradition gain public respect
- In short judges and courts are trusted because they are impartial and independent - they have integrity. Parliament and governments are partisan and dependent on popular will to retain their positions. Judicial integrity is fundamental to public confidence

Parliamentary legislation and scrutiny

- External
- Strong accountability requires independent institutions. Seen in Auditor general and judicial review by the courts, both of which are independent of government and therefore provide strong accountability for the executive arm
- If the rule of law is to be upheld courts must be independent of all other bodies. This makes it difficult for external agencies to hold them to account in a meaningful way. Despite this challenge attempts have been made to enhance the accountability of the judiciary using agencies that are at arms length from the courts whole at the same time trying not to infringe on their independence. These methods may be categorised as traditional, constitutional and modern
  - Traditional accountability includes the separation of powers and rule of law
  - Constitutional accountability is the formal process of removal of a judge contained in Section 72
  - Modern accountability includes new institutions such as the NSW judicial commission

Traditional accountability

Separation of powers : courts and parliament
- Common law is developed incrementally by judges in courts making decisions on specific cases. They may create new common law in a number of ways - by distinguishing cases from any prior case, by overruling old precedents or by reversing the ratio decidendi of a case on

appeal. This is actual law making by the courts and may be criticised for breaching the separation of powers - it is the Parliament that should make laws
- Statute law is superior to common law. Parliamentary sovereignty ensures that parliament may override judge-made common law simply by passing a statute. Parliament may limit judicial discretion with laws requiring judges to make certain decisions, such as mandatory sentencing. Some argue that Parliament is interfering with the judiciary when its dictates reduce a judges discretion

Parliamentary legislation overruling and clarifying court made law
- Parliament may step in at any time and abrogate a common law if it feels that the common law is developing in ways it wishes to check. It may also pass statute laws that clarify common law
- An example is native title. The High Court decision of Mabo v Queensland No2 (**1992**) recognised a new common law form of land title and called it native title. In doing so the HC abolished the legal principle of terra nullius. The entire foundation of Australian land law was thrown into doubt by this single decision. There was immediate concern about the status of freehold property and even fears that peoples' homes, backyards and farms would be at risk of claims by potential native title holders. To clarify the newly created common law of native title the CW parliament passed the **Native Title Act 1993**. The act recognised the existence of native title in certain circumstances. It extinguished native title where freehold title existed, and created certainty once again. It also established a **separate native title tribunal** to hear claims for native title and set a strict test on how native title must be proven to exist. In this case Parliament acting in concert with the judiciary and clarified the new law of native title rather than simply abolish it
- Native title amendment act 1996 - NTA and common law went to far - to many cases where it was unclear - Stated that HC needed to be held accountable and made native title amendment act - made it more difficult for indigenous groups to apply for native title.
- Parliament held court accountable as the court feels that the original decision of the court went too far or was inconsistent with values of the people of Australia

Mabo - native title act - native title amendment act

Limiting judicial discretion - best to use
Mandatory sentencing : legislation restricting judicial discretion
- Mandatory sentencing laws in WA and NT force Judes to jail offenders regardless of the seriousness of the crime and the circumstances of the offender. It is usual practice to allow judges wide latitude, called judicial discretion, so that they may pass sentences that fit the crime and the convicted offender, taking into account the unique circumstances of each case
- Rehabilitation, retribution, deterrence and community protection are four of the aims of sentencing. Judges seek to balance these four aims when sentencing a convicted criminal. In doing so they consider the nature of the offence (how serious it was) and the nature of the offender (background, previous criminal history, mitigation factors and so on).
- Every case is unique so judges tailor sanctions carefully. However, mandatory sentencing laws severely restrict a judges capacity to perform this function by forcing them to sentence even vulnerable petty offenders to custodial sentences.
- These laws were a reaction by parliaments to community perceptions that courts were not sentencing harshly enough. Judges may wish to sentence for the purpose of rehabilitation when the Parliament and the community want retribution, deterrence and protection. Mandatory sentencing laws provide a good example of courts being held to account by parliament for not sentencing criminals according to community expectations.
- CASE
- 11 year old Aboriginal boy - minor role in three home burglaries - learning impairment - spent 108 days on remand at Banksia Hill Detention Centre under harsh conditions developing a fungal infection from an untreated burn and contracting head lice and scabies. He was then sentenced in the Bunbury Children's Court in April 2018 to a 12-month intensive supervision order with detention as he fell under the 'three strikes' mandatory sentencing laws, which required a minimum 12-month detention term. An appeal for his convictions to be quashed and for no further penalties to be applied to the boy was granted in the Supreme Court of WA on Friday by acting Justice Larissa Strk.
- Shows how the govt policy can interfere with judicial discretion

Separation of powers: courts and government

- The executive has a role in carrying out the legislation that establishes and regulates the structures and jurisdictions of the courts. However, no official of the government can interfere with the processes of a court
- The attorney general is a member of cabinet whose portfolio responsibility is for the courts. The AG almost always has a legal background, either as a trained barrister or solicitor, and is involved in judicial appointments
- The govt cannot remove a judge. This is an absolute limit on executive power over the judiciary. The govt cannot even reduce judges pay. Further, the AG has a duty to defend the judiciary; they must, by law, defend its ability to act independently
- The CW and state attorneys general departments are responsible for the maintenance of the court infrastructure, such as buildings. They are also responsible for the payment of judicial officers and court personnel

Rule of Law

- Cw and state parliament create laws that bind the courts in federal and state court hierarchies respectively. For example legislation such as the judiciary act 1903 (cth) and the crimes act 1914 bind chapter 3 (federal) courts. State parliaments have similar legislation governing state courts. For example state criminal codes and sentencing acts determine minimum and maximum sentences and the factors judges are allowed to take into account when sentencing. WA and NT mandatory sentencing laws are an example
- The superiority of statute over common law and the principles of the rule of law require judges to apply statutes even if they conflict with common law precedents. In this way, democratically elected parliaments maintain oversight of judicial power, which is not democratically accountable.

Censure and removal judges

Can say its the most effective or the least - ultimate

Constitutional accountability : section 72

- Judges may be sacked by parliament under section 72. Copied from Britain and adopted at the state and CW levels.
- Sacking a judge is the ultimate sanction and one that could threaten the independence of the courts. It is codified in the constitution and strictly limited. It is also codified in superior law at the state level
- Section 72 contains a number of provisions concerning judicial appointments, pay and removal. Taken together they form the basis for the independence of the judiciary. Section 72 contains
  - Exec appoints judges
  - Judges pay cannot be reduced
  - Both houses of parliament must approve of the removal of a judge, but only on the grounds of ‘proved misbehaviour or incapacity.
- Section 72 provides for both judicial independence and accountability of chapter 3 federal courts
  - Independence is guaranteed by protecting judges pay and by balancing the appointment and removal processes between the other two arms of government
  - Accountability is achieved by granting parliament the ultimate power to remove a judge
  - Independence is further guaranteed by limiting the removal only to ‘proved misbehaviour or incapacity’. Parliament cannot remove a judge for any other reason
- Proved misbehaviour or incapacity is not very specific. The constitution does not specify what misbehaviour warrants a judge’s dismissal. Nor does it specify what medical conditions or extent of physical or mental impairment qualify as incapacity. This lack of clarity is deliberate; it creates space for reflection and doubt in the minds of those who wish a judge to be removed. It makes it essential that debate about the meaning of the words should occur in parliament. The constitutional uncertainty also creates the possibility that the removal of a judge could be challenged in the High Court. If a constitutional case concerning the parliamentary removal of a

judge was to occur the HC would have to interpret the words ‘proven’, ‘misbehaviour’ and ‘incapacity’. Makes it difficult for Parliament to remove a judge
- When an arm of government can sack a judge there is a potential threat to the independence of the judiciary. That makes the power a potential threat to the rule of law
- The power in section 72 has never been used at the federal level.

Justice Angelo Vasta
- Queensland supreme court
- Removed by the Queensland Parliament following the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry) in Queensland
- Set up commission of inquiry led by former High Court Chief Justice, Sir Harry Gibbs to investigate the allegations made in the Fitzgerald inquiry
- Vasta was accused of wrongdoing in relation to a company with which his family was associated. His wrongdoing, which did not affect his court decisions, was found to be misconduct and he was removed from office in June 1989 by a vote of the Queensland Parliament, Australia’s only unicameral State Parliament
- He is the only Australian superior court judge to be removed from office in the 20th century. None have been removed in the 21st century
- Demonstrates judges can be removed by parliament

Justice Sandy Street
- data shows his decisions were far quicker than his peers and his decisions were often against the appellant.
- Has heard 2000 cases. 842 were refugee cases 97% he handed down judgement on same day as the case
- Found in favour of appellant 1.66% of the time in refugee cases
- His decisions are often overturned on appeal
- Held accountable through appeal

Modern Accountability

Parliamentary and judicial commissions

A commonwealth Parliamentary commission
- 2012 the CW Parliament passed the Judicial Misbehaviour and Incapacity (parliamentary commissions) act. This act enables the Parliament to establish a formal parliamentary commission to investigate specific allegations of misbehaviour or incapacity amongst the federal judiciary
- A federal parliamentary commission set up under the Act would investigate an allegation of misbehaviour or incapacity against a CW judicial court (HC judge, judge of federal court or Family Court of Australia or a federal magistrate)
- The act requires the appointment of the three must be either a former judge of a State or Territory Supreme Court. The Parliamentary commission is required by law to report to the Parliament. A commission created under the Act would therefore resemble the three judge Parliamentary Commission of Inquiry set up to investigate Lionel Murphy
- The procedures outlined in the Act described above put the investigation of a judge at arm’s length from the parliamentarians who, according to Section 72, would have to vote for their removal. The investigation would be conducted by an apolitical body (the three commissioners) and Parliament would have to act on its recommendations

NSW permanent commission
- The judicial officers act 1985 established a permanent judicial commission to investigate complaints made against judicial officers. It is unique in Australia as the only permanent judicial commission. Some judicial officials have resigned after complaints were referred to the judicial commission of NSW; none have yet been removed from office as a result of a complaint
- Further developed the judicial commission with the Judicial Commissions Act 1994. Since it was passed only one judge, Justice Vince Bruce, has been the subject of a debate in the NSW

Parliament about his possible removal. Justice Bruce made a statement to the Parliament outlining his mental depression. The Parliament voted against the motion to remove him. He resigned from the Supreme Court shortly after
- Not all states have followed Queensland and NSW. Some regard judicial commissions as a potential threat to . Others regard them as a useful addition to enhance the accountability of the courts and deal with cases such as those of Justice Murphy, Vasta and Bruce.

Public servant loses free speech High Court case
- Michaela Banerji argued she had been unlawfully fired in 2013, from what was then the Department of Immigration and Border Protection.
- She had operated the Twitter profile LaLegale, which frequently posted opinions critical of the Australian Government, its immigration policies, and its treatment of immigration detainees.
- Ms Banerji was sacked from her role for breaching the Australian Public Service (APS) Code of Conduct, after an internal investigation linked her to the Twitter account.
- She took her case to the Administrative Appeals Tribunal, which found her sacking had impeded her implied right to freedom of political communication.
- But on Wednesday the High Court unanimously ruled that was not the case, and that the APS code was proportionate to its purpose of maintaining an apolitical public service
- The court needed to decide whether Ms Banerji's sacking was illegal because it breached the implied freedom of political communication guaranteed in the Constitution.
- But the court's reasons explained that the APS guidelines explicitly warned that staff should not expect to be protected by anonymity when posting online.
- Media holding court to account

Human Rights

Definition
Rights that belong to all people simply because they are human beings. A basic principle of a free society if that people have inalienable rights that cannot be 'given away' or legitimately reduced by the actions of government.
A person's fundamental human rights include legal rights such as the right to a fair trial.

Features of Human Rights
Universal - Apply to all humans regardless of gender, nationality or status
Inherent - Means they're birth right of all humans
Inalienable - they can't be bought, sold or traded or taken away by government
Indivisible - people are entitled to all rights - civil and political and economic, social and cultural. All equally important

- **Negative** rights (or first generation rights) . The rights fundamental to political and legal freedom. They include political freedoms such as free political decision making and legal/civil rights. Together these rights guarantee open democratic participation and protect individuals from the excessive power of the state or other larger groups.
- These rights are different from positive rights as they provide a narrower definition of rights.

- **Positive** rights also known as 'second generation rights'.
- The claim that individuals have fundamental economic, cultural and social rights. They include freedom from poverty and disease, the right to education and the right to practice one's traditional religion or culture.
- They are an extension from negative rights and they require government action to make them possible.

Types of Rights

Civil rights
- The rights of citizens to equality and liberty. Sometimes referred to as 'first generation' rights. Civil rights ensure peoples' physical integrity and safety.
- This includes protection from discrimination on grounds such as physical or mental disability, gender, religion, race, national origin, age, or sexual orientation; and individual rights such as

freedoms of thought and conscience, speech and expression, religion, the press, and movement.

Political rights
- A political right is a right/power to participate directly or indirectly in the establishment or administration of government. An example of a political right includes freedom of assembly and the right to vote.

Economic rights
- Second generation or positive rights.
- Rights that concern the production, development, and management of material for the necessities of life. E.g. the right to work, the right to a minimum wage, the right to form a trade union, the right to strike or the right to own property.

Social rights
- A second generation or positive right.
- Rights that give people security as they live and learn together, such as in families, schools and other institutions.

Cultural rights
- Second generation or positive rights.
- The right to preserve and enjoy one's own cultural identity and development which may include language or religion.
- They deal with groups of people, rather than with individuals.

Rights protection is seen through
- constitutional
- Implied
- Common law
- Statutuory
- Charter of rights
- Charter of Human Rights and Responsibilities Act 2006 (Victoria)
- and the Human Rights Act 2004 (Australian Capital Territory)

Constitutional and Implied Rights in Australia

Constitutional Rights – a right that may be found in the Constitution and is expressly stated. The processes for changing an entrenched right is laid down in the relevant constitution and this process must be followed by present and future governments.

Included Rights
- The acquisition of property on just terms – s51xxxvi
- Trial on indictment for any offence against a law of the CW shall be on jury – s80
- Right to the free exercise of religion and not to impose religious observance on an individual nor establish a state religion – s116
- Protection against discrimination on the basis of state residence – s117

Examples
- *Street v QLD Bar Association (1989):* Mr Street is a barrister resident in NSW and admitted to practice as a barrister in the Supreme Courts of NSW, Vic, SA and the ACT. He was refused admission as a barrister of the Supreme Court of QLD based upon his failure to comply with two requirements of Rules Relating to the Admission of Barristers of the Supreme Court of QLD, such as having to be a resident of QLD, and not ceasing practice in NSW. This case raises questions concerning s117 of the Constitution, which states citizens shall have protection against discrimination on the basis of state residence.

Implied Rights – an implied constitutional right is a freedom or entitlement that is not expressed specifically but can be inferred from the broader meaning of the Constitution.

Included Rights

- Implied right to freedom of communication on political matters.
  - This is drawn from the democratic nature of the Constitution. If people are to choose their representatives as required by Sections 7 and 24, it follows that communication and debate of the arguments concerning the policies of the parties contesting the election.
- Right to legal representation.
- The implied right to vote
  - Sections 7 and 24 both expressly state that the Senate and the House of Representatives shall be 'directly chosen by the people.'

Examples

- Freedom of Political Communication
- **Australian Capital Television Pty Ltd v Commonwealth**
  - The Commonwealth legislated that TV and radio stations could not broadcast political content in the last few days of an electoral campaign.
  - The HCA struck this legislation down, as it was incompatible with implied rights found in the Constitution (Section 7 and 24) which stated that Parliament must be directly 'chosen by the people.'
  - This implied that people would be free to vote and therefore politically express ourselves.
- **Theophanous v Herald and Weekly Times**
  - Theophanous, a federal MP, sued the newspaper for defamation for publishing a letter with criticised his performance and capacity as an MP.
  - The HCA held that the freedom of political communication extended into discussing the performance of MPs, not just political issues.
- **Comcare v Banerji Case No. C12 (2018)**
  - Where employee of Department of Immigration and Citizenship used Twitter account to post anonymous 'tweet's critical of Department
  - The High Court decided that in certain circumstances, it is reasonable for an employer to dismiss an employee for posting political content on social media.
  - The High Court did not find that the Constitution provides protection for public servants speaking politically in all circumstances. However they did find that public servants do have the right to make political comment, including on social media.
  - There are limitations on what public servants can do, and this decision has also made those limitations a bit clearer.
  - This is also a limitation on the implied right of political communication.

Right to vote - implied right

- **Roach v Electoral Commissioner (2006)**
  - The Howard Government which had the power in both houses at the time, banned all incarcerated people to vote.
  - Roach, a prisoner at the time, took this legislation to the HCA which overruled that the legislation denied people their implied right to vote.
  - The legislation was modified to people serving more than 3 years.
- Rowe v Electoral Commissioner (2010)

Strengths	Weaknesses

- Fully enforceable by the High Court. This means that if an act of the CW Parliament infringes one of these express or implied rights, HC can declare that the law is unconstitutional, and hence invalid
- If the HC declares legislation invalid, the Parliament's options are;
  - To amend the legislation
  - Try and remove that express right by amending the constitution in accordance with s128
- Rights stated in the Constitution operate as limitations on government power
- Implied rights have reflected the changing values in society
	- Rights are limited in number and are mainly prohibitions on the law-making powers of the CW Parliament.
	- Many basic rights are not stated in the Constitution.
	- Interpretation of express rights has been narrow.
	- The High Court's finding of implied rights has not provided for a comprehensive statement of rights and the development of implied rights has been limited.
	- Enforcement through the High Court is time-consuming and costly.
	- With the implied right to freedom of political communication - this is only limited to parliament members - public servants are not protected with the same rights.

Common Law Rights in Australia

Common Law Rights – a "common law" right is a right emanating from the legal traditions or conventions of the community including the Magna Carta, initially by the courts in England and later in Australia and are recognised by the courts within judgements.

Included Rights
- Freedom from arbitrary arrest
- Right to be assumed innocent until proven guilty
- Right to a fair trial
- Right to a jury trial

Magna Carta - other individual legal rights and traditions that have been developed by the common law include the following:
- The rejection of illegally obtained evidence
- The inadmissibility of confessions obtained through duress and coercion
- The rights of the accused to remain silent
- Common law protections against self-incriminating evidence
- The exclusion of evidence that is not relevant
- The exclusion of hearsay evidence

Examples
- **Coco V the Queen (1994)** 179 CLR 427 at 437 is an example of a High Court common law judgment which has added to common law protection of human rights. In the Coco case, Santo Antonia Coco, was convicted of an offence of offering to bribe Commonwealth officers and much of the evidence for the trial was obtained by the use of listening devices installed on the appellant's premises. It is a fundamental common law right of a person in possession of premises to exclude others from those premises. *The courts should not impute to the legislature an intention to interfere with fundamental rights. The Coco case illustrates the approach that the court will take when interpreting statutes with the potential to abrogate or curtail a 'citizen's common law rights or immunities'.*

Strengths	Weaknesses
- Common law rights are the most flexible of all types of rights. They can evolve on a case by case basis and can be overridden by Parliament if it so chooses. - Courts have a strong tendency to protect rights. - The right to silence was developed to prevent the admission of confessions obtained under torture, thereby making torture useless as a means of convicting the King's enemies. - The deep history of rights protection predisposes common law to protect rights. - It is built into the adversarial trial processes and procedures; the reliance on quality evidence, the high burdens of proof in criminal cases, the impartiality of judges, equal opportunities for parties to present their cases.	- The vulnerability of common law rights to Parliament is a great disadvantage. - Executive dominated parliaments are particularly prone to temptations to override common law rights in times of populist pressure for 'tough on crime' policies. - Crises such as high casualty terrorist attacks may produce temporary circumstances in which the desire to override common law protections for criminal suspects outweighs the liberal desire to protect rights in general. Permanent reductions of legal rights protections may result. - Recent Australian anti-terror laws overrode common law rights to silence and the presumption of innocence.

Statutory Rights in Australia

Statutory Rights – a statutory right is found expressly in legislation such as the *Racial Discrimination Act* 1975.

Included Rights

- A variety of statutory rights have been passed that are specifically designed to protect and enhance human rights at both the Commonwealth and State level:
- Racial Discrimination Act 1975
  - The Bolt Case upheld the Racial Discrimination Act (1975) in 2011
- Sexual Discrimination Act 1984
- Human Rights and Equal Opportunity Act 1986
- Affirmative Action (Equal Opportunity for Women) Act 1986
- Disability Discrimination Act 1992
- Age Discrimination Act 2004

Examples

The Bolt Case (2011)

- Eatock v Bolt, was a 2011 decision of the Federal Court of Australia which held that two articles written by journalist Andrew Bolt and published in The Herald Sun newspaper had contravened section 18C, of the Racial Discrimination Act 1975 (Cth) (RDA).
- On 15 April 2009, The Herald Sun published an article authored by columnist Andrew Bolt in its print edition, entitled "It's so hip to be black", and republished the article on its website with the title "White is the new black."
- Section 18C of the RDA relevantly provided:
- "(1) It is unlawful for a person to do an act, otherwise than in private, if;
  - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
  - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group."
- Justice Bromberg found that it was reasonably likely that an ordinary person within the group of fair-skinned Aboriginal persons would have been offended and insulted by the newspaper

articles, in particular the challenge to the legitimacy of the identity of those individuals and the concentration on skin colour as the defining determinant of racial identity.
- As such, Justice Bromberg held that the publication of the two articles contravened section 18C of the RDA.

Human Rights Commission
- Responsible for the administration of Australia's anti-discrimination laws, including the Migration Act.
- An Act of Parliament establishes the HRC.
- Lies within the portfolio of the Attorney General.
- Not a court.
- It cannot make decisions that bind the executive.
- Acts to mediate disputes between a complainant and the party accused of infringing rights.
- Can only make recommendations to the government.
- Government can refuse to adopt the HRC recommendations or criticise the HRC.

An example: Dr Triggs and Senate Estimates 2018
- Some Senators used the Estimates process to attack her and the Commission on political grounds rather than respect the Commission and it President's legal obligations, thus undermining the rule of law. The Attorney-General is the minister responsible for the HRC. The Senate censured Attorney-General George Brandis for his failure to protect the independence of the HRC and defend its President against political attacks by partisan senators during Estimates hearings.
- After the censure motion, the government tried to offer Dr Triggs another job. The opposition referred this matter to the Australian Federal Police alleging the government had compromised the independence of the HRC by offering inducements to its President. Dr Triggs did not pursue the matter believing the Senate censure of Brandis had adequately dealt with the matter.

Human Rights Act 2011
- The Parliamentary Joint Committee on Human Rights (the committee) is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act).
- The committee's main function is to examine all bills and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament on its findings.

Strengths	Weaknesses
- Whilst Statutory protection of rights are easier to change than constitutional protections, one could argue that these are a more important source of protections as they express international covenants into domestic law and they offer wider protections than those found within the constitution - i.e. Sexual, Human Rights and Equal opportunity, Equal opportunity for Women. - To prohibit discrimination on a number of grounds the Federal parliament fulfilled this obligation by passing various pieces of legislation. Statutory protections are at a federal level which include, The Age Discrimination Act 2004, which helps to ensure that people are not treated less favourably on the grounds of age in various areas of public life. - States and territories also have a variety of other laws that protect individual rights in specific contexts. In addition, since 2006, the ACT and Victoria have both introduced statutory human rights legislation.	- Enforcement lies with the Australia Human Rights Commission. - Non-judicial body so cannot award damages or sanctions. - Due to parliamentary sovereignty, Parliament can easily amend or dissolve these and so endanger rights without legal consequences. Although some can argue that the ability to amend legislation is a positive one as it can update rights to suit the changing values of contemporary society. - Statutory rights have no higher status than any their law. The Parliament can amend it if it thinks fit. In the relatively short period since it was enacted in 1975, for example, the Racial Discrimination Act has been modified three times. - There is not one statute protecting all rights, but a collection of anti-discrimination acts

Charter v Bill of Rights

- A Bill of rights is a law stating the fundamental human rights accepted by a country. A bill of rights can be constitutional, (such as in the US) or legislative (such as in New Zealand or the UK).
- Legislative bills of rights are also known as Charters of Rights. These are statutory laws which list fundamental human rights protections.

Differences

- The main difference between a BoR and a Charter of Rights is that a 'Bill of Rights' would be incorporated in the Constitution as a permanent document (although, Canada has a Charter in the Constitution). But, in order to establish a Constitutional Bill of Rights a referendum would need to be held to approve the move.
- Another difference is that a BoR allows courts to declare legislation invalid that are found to contravene some aspect of the bill, whereas a Charter of Rights would allow courts only to declare legislation inconsistent with the rights set out in the Charter.

***The Charter of Human Rights and Responsibilities Act 2006* (Victoria)**

Overview of the Act – the Charter requires the Victorian Parliament and all agencies of the Victorian Executive government to consider human rights when developing laws and policies. All laws passed by the Victorian Parliament must be checked against the Charter and a 'statement of compatibility,' which informs how the law complies with human rights, must be issued. The Victorian Parliament can still override the Charter, but it must explain why it is passing a law that does not meet the standards of the Charter. In cases that come before the Supreme Court, the Court may issue a "declaration of inconsistent interpretation".

The Supreme Court of Victoria does not have the power to strike down a law which conflicts with the Charter. Hence, Parliament retains sovereignty. There have been some positive outcomes of

the Charter, such as that many disputes have been settled out of court using the Charter as a guide.

Included Rights
- Article 8 – Right to recognition and equality before the law
- Article 9 – Right to life
- Article 11 – Right to freedom from forced work
- Article 12 – Freedom of movement
- Article 13 – Right to privacy and reputation

Examples
Goddard Elliott (A Firm) v Fritsch [2012] (14 March 2012)
- Charter provisions: ss 8 (1), 24
  - Goddard Elliot, the plaintiff, a mentally ill client, in a property settlement which was to be heard in the Family Court of Australia. A last-minute settlement was agreed on. The plaintiff brought an action against the defendant seeking the payment of outstanding legal fees. The defendant counter-sued on the grounds that, *inter alia*, the plaintiff had acted negligently in settling on the agreed terms. An issue was whether the plaintiff was mentally capable of issuing orders to his firm to settle on the terms agreed. Bell J dismissed the plaintiff's claim and granted the defendant's counterclaim.
- Judgement - Bell J determined that the defendant was insufficiently mentally capable to instruct on the settlement. In particular, ss 8 and 24 of the Charter were relevant to the decision, as they consolidated the common law presumption of legal personality and autonomy.

Strengths	Weaknesses
- Many disputes have been settled out of court using The Charter of Rights as a guide. - The Charter of Rights allow courts only to declare legislation inconsistent with the rights set out in the Charter. - Audits by the Victorian Equal Opportunity and Human Rights Commission have led to improvements in the treatment of female prisoners.	- Gives too much power to judges. They are not elected officials and cannot be held to account by the public for their decision. - Preserves the parliament's sovereignty by only requiring that the Parliament explains why any particular law does not meet the standards set by the Charter. The courts cannot strike down the law. - Some argue that these arrangements seriously weaken the Charter by limiting the power of the judiciary, to stand up for human rights, and provide real remedies for those whose rights have been infringed. - The Charter does not provide any remedies; it is focussed on prevention. - Another limitation is that no person can bring an action to court using the Charter alone. - An example is *Castles v Secretary to the Department of Justice 2010 VSC 310 9 July 201*

The Human Rights Act 2004 (Australian Capital Territory)

Overview of the Act – This was Australia's first legislative Charter of Rights; "The Human Rights Act 2004 is an act of the Australian Capital Territory Legislative Assembly that recognises the fundamental human rights of individuals. It was the first of its kind in Australia." The Act established an Australian Capital Territory Human Rights Commissioner. It also empowers the ACT Supreme Court to declare on compliance of legislation.
- The Act was amended in 2005 by the Human Rights Commission Legislation Amendment Act 2005, showing the use of s41 in practice.
- Under the Human Rights Act 2004, section 31 international law and the judgments of foreign and international courts and tribunals, relevant to a human right, may be considered in

interpreting a human right. The accessibility of this material to the public is one of the criteria for deciding whether to consider the material and the weighting to be given to it. This helps to guide judicial interpretation in the realm of human rights

Included Rights

- S5 divides the rights enumerated within the act into:
- Civil and political (part 3) which come from the ICCPR.
- Legal
  - Fair trials (s21)
  - Right to appearance and trial before an impartial court. Trial should be public; unless it contravenes the provisions of subsection 2 i.e. protection of privacy, avoidance of prejudice
  - Judgements must be made public, unless in the case of a trial involving a child, in which the interests of the child should prevail
- Political
  - Freedom of thought, conscience, religious belief (s14)
- Civil
  - Protection of civil/social expression of Indigenous and other minority cultures (s27)
  - Allows the free expression of minority and indigenous cultures; including expression of language and religion
  - Encourages valuation/consideration of Indigenous ties to land and water
- Economic, social and cultural (part 3A)
- Right to education (s27A)
- Every child has the right to access free school-level education, and should be provided access to vocational or post-secondary education
- Subsection 3b allows for the freedom of choice of parents to choose education outside of a government institution i.e. moral, religious reasons

Examples

Capitol Property Projects ACT VS the ACT Planning and Land Authority – the right to the interpretation to the right to have a free trial, benefitted the corporate plaintiff due to the bearing on the court to consider human rights implications.

Judiciary and the Act

- So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights. (s30)
- This provision is exerting control over the judiciary by maintaining that the statutory interpretation of judges within Territory courts must prioritise compatibility with rights when examining statute/cases.
- Provides guidelines as to the guiding documents judges may consider when interpreting, in regard to human rights, i.e. international law, judgements of foreign and international courts and tribunals.

Strengths	Weaknesses
- Draws the attention of the parliament and the public to human rights violations, through human rights statements of compatibility etc. - New bills are scrutinised to determine if they are compatible with human rights. - The Human Rights Commission can report the effect of the human rights laws and report to the Attorney General about it. - The values of the majority should include protecting minorities from discrimination. An important function of human rights legislation is to act as a guarantee that everyone will indeed enjoy fair and equal treatment. - While the views of Australia's human rights record have generally been fairly positive, there has been some sharp criticism in recent years from the United Nations Human Rights Treaty Committees for breaching rights Australia has agreed to uphold. The ACT Bill of rights would prevent this to a higher degree. - Material on the ACT legislation register is taken to be accessible to the public. Various human rights conventions and covenants are published on the legislation register. Various declarations of compatibility are also published on the legislation register. - Achieved many of the same positive effects as the Charter of Human Rights Responsibilities in Victoria.	- The Act does not give the judiciary any power to invalidate laws. They only allow the courts to declare other laws to be incompatible with human rights. - New bills are still able to pass, even if they are not consistent with human rights, if there is proper reasoning - Any clash with federal legislation will likely be overridden by the Commonwealth.

'Australia uses many ways of protecting human rights'. Discuss one strength and one weakness of this approach.

Strengths	Weaknesses
- Using a combination of ways allows the country to protect those rights of most importance/least change in the constitution, whilst other rights that may evolve/change over time can be protected in other ways (that are more responsive to change); - Less express and implied rights in the Constitution places less limits on parliament (and government) and protects sovereignty of the parliament; - Reflects our heritage as this approach is especially prevalent in Westminster systems of government like Australia, Canada and UK.	- Rights are more susceptible to breach/ removal by parliament and government as they have less protection compared to constitutional rights (as offered by U.S. Constitution and Supreme Court); - Reliance on a single mechanism, particularly one that is difficult to change like constitutional protection, may lead to rights becoming outdated and not reflecting the values/attitudes of the community.

Constitutional Rights in the United States

- The USA's Constitution is the fundamental law of America:
  - Explicitly codifies the rights of citizens

Constitutional Bill of Rights – A bill of rights codified within a nation's constitution. The strongest form of rights protection. Leads to the superiority of the judiciary over rights (judicial supremacism). Proposed in 1791 - America specifies and codifies the fundamental rights of its citizens in the nation's supreme law, thus, creating a Constitutional Bill of Rights. The Bill of Rights is a series of 33(10) amendments to the US Constitution made shortly after it was declared.

Included Rights

1st Amendment	2nd Amendment	5th Amendment
• Freedom of Religion • Freedom of Speech • Freedom of the Press • Right to peaceful assembly • Right to petition government	Right to keep and bear arms	Right to silence for an accused person
The first-generation negative rights. Has been interpreted by the Supreme Court as applying to the entire federal government, even though it is only expressly applicable to Congress. E.g. In 2017, the Supreme Court struck down parts of President Donald Trump's executive order. Known colloquially as the 'Muslim Ban", which prevented individuals from certain countries such as Iran, from entering the US. Citing that the order infringed on the constitutional right to freedom of religion (1st amendment).	The most problematic right. Often argued that it is outdated, however, if it was truly outdated it could be removed via ⅔ majority of both houses of Congress and ¾ of states. The presence of major pressure groups such as the NRA suggest that the right to bear arms is still relevant today, hence the USA's judicial supremacism approach is quite effective. This illustrates the problem of inflexibility caused by constitutional codification of rights.	5 Distinct Constitutional Rights 1. Right to indictment by the grand jury before criminal charges for felonious crimes 2. A prohibition on double jeopardy 3. A right against forced self-incrimination 4. A guarantee that government cannot seize private property without making a due compensation at the market value of the property Originally only applied to Federal Courts. The U.S Supreme Court has partially incorporated the 5th amendment to the states through the due process clause of the 14th amendment.

Examples

1st Amendment

Boy Scouts of America (BSA) v. Dale (2000) was a case heard in the United States Supreme Court decided in 2000 that held that the constitutional right to freedom of association allowed the BSA to exclude a homosexual person from membership in spite of a state law requiring equal treatment of homosexuals in public accommodations.

Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018) was a case heard in the United States Supreme Court that dealt with whether owners of public accommodations can refuse certain services based on the 1st Amendment claims of free speech and free exercise of religion. In particular, by refusing to provide creative services, such as making a custom wedding cake for the marriage of a gay couple on the basis of the owner's religious beliefs. In a 7-2 decision the Court ruled the Commission didn't employ religious neutrality, and thus violated Masterpiece owner Jack Phillips' rights to free exercise and reversed the Commission's decision.

14th Amendment

Obergefell v. Hodges (2015) was a case heard in the United States Supreme Court that ruled that the fundamental right to marry is guaranteed to same-sex couples by the Fourteenth Amendment to the United States Constitution. The 5-4 ruling required all 50 states (the District of Columbia and Insular Areas) to perform and recognise the marriages of same-sex marriage couples on the same terms and conditions as the marriages of opposite-sex couples.

Strengths	Weaknesses
- Having most rights in a list raises awareness, hence US citizens tend to be one of the most vocal about their rights in the world. - The Bill of Rights is entrenched in the constitution; therefore, it is difficult to change and the rights are 'inalienable'. - Congress cannot legislate to override these, and all statutes must comply with the bill of rights. - Expressly provides for a range of individual rights considerably more extensive than the Australian constitution. Rights are fully entrenched and can only be removed by amending the US constitution. Can be amended by a joint resolution of Congress approving an amendment by a 2/3 majority in each house, then gaining approval of 3/4 of all US state legislatures (who can elect to give the vote to the people). Express and implied rights are fully enforceable by the SC. This means that if an act of Congress infringes one of these express or implied rights, the SC can declare that the law is unconstitutional, and hence invalid.	- Contains no clause requiring the courts to balance the rights expressed in any other aspect of public interest. - Last updated in 1870, could be argued to be outdated . - Difficult to change due to the processes of amending the constitution (a proposal can expire). For example, in 1972 it was proposed that the constitution be amended to include an 'equal protection' clause addressing gender equality. By 1982, an insufficient number of states had passed the proposed change and as such, the amendment expired. - Process does not directly involve the people if the states do not refer it to a referendum. - Rights contained in the Bill of Rights can be interpreted very narrowly by the Supreme Court which can cause injustices.

Statutory Rights in the United States

Included Rights

- Civil Rights Act 1964
- Americans with Disabilities Act 1990

Strengths	Weaknesses
- As the cultural and social aspects of the American society adapt and change, rights being incorporated in statutes, allow representatives to update and change legislation to reflect the views of the community, rather than hold a referendum. - It is easier and more efficient to protect rights in a statute than in the constitution as they can quickly be legislated on and therefore quickly protected. - It is more cost efficient to have these incorporated in a statute than the constitution - referendums to add / change legislation is expensive.	- As they are not placed in the constitution they can be abolished without the input of the community. If these rights were placed in the constitution, the USA would need a double majority to modify / abolish and create rights. - Some rights may not be nation-wide but only occur in a particular state. Unless the statute is created at a federal level, some states may have more rights than others. - The US Patriot Act 2001- authorises the court to issue search orders directed at any US citizen who the FBI believes may be involved in terrorist activities. Such activities may involve 1st Amendment protected acts, such as participating in non-violent public protests . - The US Department of Health and Human Services mandate that people who may be religious are to perform abortions and give out abortion inducing drugs against their faith, violating the Religious Freedom Restoration Act, a Federal law, that prohibits the federal government from imposing a substantial burden upon a person's exercise of religion . - As these rights are not explicitly entrenched into the constitution, the legislation could be repealed by congress at any point. - The US Constitution 'Bill of Rights' 14th Amendment 1870 prohibits the federal government and states from using a citizen's race, colour or previous status as a slave as a qualification for voting. Yet, some legislation and practices in various States effectively mean that equal voting rights for citizens have not been promoted.

2018 example from U.S. Elections of discriminatory legislation

- Georgia, plus at least eight other states, has a "use it or lose" law that allows it to cancel voter registrations if the person hasn't voted in recent elections. The state also has an "exact match" law, enacted last year, whereby a voter registration application must be identical to the information on file with Georgia's Department of Driver Services or the Social Security Administration; if they don't match, or no such information is on file, then the registration is put on hold until the applicant can provide additional documents to prove their identity. That's why more than 50,000 applicants are on hold. (They can still vote, with a photo ID, but no doubt their pending status will discourage many.

- First protection of rights is common law, most encompassing rights, covers lots, - common law protects rights because unless there is a statute that states that citizens can not do something, the common law states that u can - downside parliamentary sovereignty - govt can overrule common law
- Second - constitution (can be placed into 2 categories) - rights written in the constitution are **express** rights- 5 rights protected in the constitution - don't cover much - only a few
  - **1st** is right to vote via constitution ***** section 41

- **2nd** is property rights.- if the govt is to take your property they have to compensate you - down side is that just terms is not defined therefore the govt can manipulate it section 51(xxxi)
- **3rd -** right to trial by jury - section 80 - only against the commonwealth - not many are crimes against the cw - limits the amount of cases that can be heard by jury
- **4th (can be split into 4)** right to not have a national religion of Australia, law that imposes a national day of observance, prohibiting the ability to choose a religion, can't post a religious test for working in the commonwealth.
  - No guarantee that at state levels it can't be imposed - there is days where shops and pubs do not open (religion observance - good friday) - 116
- **5th** section 117 - can't have unity - one state can't be favoured over the next - can't have one tax high in one state and low in another - can't
- **IMPLIED RIGHTS -** freedom of communication (ACT V CW), freedom of speech = all been implied by common law (LANG) *** ask for cases

- Final method of rights protection - **statutory protection** - racial discrimination act, PG 283 - sexual discrimination act 1983, disability discrimination act 1992, age discrimination act 2004.
- Racial discrimination act - The Racial Discrimination Act 1975, promotes equality before the law for all people regardless of race, colour or national or ethnic origin. It is unlawful to discrimination against people on the basis of race, colour, descent or national or ethnic origin, - protection for employment, transport, services, property ownership - can take it to commissioner if you are discriminated against based on race - can make a complaint to the relevant commissioner.
- Because employers are aware that there is a racial discrimination commissioner, it prevents discrimination and provides an avenue for complaint
- Flexible - can be changed in time - can be used to pinpoint areas that need further clarification

Influence on statutory protection of rights - 1966 - international covenant of civil and politics rights, and international covenant on economic, social and cultural rights - most of domestic rights come from these covenants

---

The status of international covenants, protocols and treaties in protecting human rights in Australia

Australia is bound by a number of international conventions that protect human rights. These include

- **International covenants -** an agreement under international law entered into by actors in international law, namely sovereign states and international organisations. The major international human rights covenants (both passed in 1966) are the **International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.** These have come into force upon ratification by a certain number of states.
- **International Treaties** - A treaty is a written agreement entered into, by mainly sovereign states and international organisations and made binding upon its parties by international law. A treaty may also be called a 'treaty', 'convention', 'protocol' or 'covenant'
- **International protocols** - usually refers to an agreement, in international law that *amends or supplements an existing treaty.* It can amend the treaty or add additional provisions. Parties to the earlier agreement are not required to adopt the protocol. I.e. *It is not binding for the parties involved.* For example, Australia acceded to the Second Optional Protocol of the International Covenant in Civil and Political Rights, aiming at the abolition of the death penalty ('the Second Optional Protocol') on 2 October 1990.

- Since 1901, Australia has become a party to over 2500 treaties.
- Many of these international treaties are now obsolete or are no longer in force, but the number of treaties Australia has been involved with is an indication of the importance of international treaty law to Australia.
- Australia is a signatory to both the **United Nations Declaration of Human Rights (UNDHR 1948) and the International Covenant on Civil and Political Rights (ICCPR).** It is also a signatory to other international covenants and obligations that affect human rights including the

Convention on the Elimination of Racial Discrimination (CERD), the Convention on Discrimination against Women (CDAW) and the Convention on the Rights of the Child (CRC). Australian governments used their external affairs power under the Constitution to enter into all these international obligations.

How does international law become part of Australian law?

- Australia, as a party of the CRC, the ICCPR and the Refugee Convention, has voluntarily committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law

- Under Australian law a treaty only becomes a 'direct source of individual rights and obligations' when it is directly incorporated by legislation. This is because under Australia's Constitution the making and ratification of treaties is a function of the Commonwealth Executive, whereas the making and alteration of Commonwealth laws is a function of the Commonwealth Parliament. The Executive would be usurping the role of Parliament if the treaties it made and ratified automatically became sources of new rights and obligations

- CRC, ICCPR and the Refugee Convention not been directly incorporated into Australian law in their entirety, certain provisions of those treaties are reflected in domestic legislation.

- For instance, the ***Migration Act 1958*** **(Cth) (Migration Act)** makes reference to the protection obligations under the Refugee Convention in defining the criteria for a 'protection visa' under that Act. Other domestic legislation, much of it State legislation, can be said to mirror the intent of international conventions without referring directly to them. For instance, all States have child protection laws, which reflect the obligation to protect children from abuse in article 19 of the CRC, but do not necessarily refer specifically to the CRC. The provisions of the ***Family Law Act 1975*** **(Cth)** relating to children also mirror rights and principles established by the CRC

- The Commonwealth Parliament has also enacted the ***Human Rights and Equal Opportunity Commission Act 1986*** **(Cth) (HREOC Act)**, which specifically empowers the Commission to examine Commonwealth legislation, and the acts and practices of the Commonwealth in order to determine their consistency with 'human rights'.

- 'Human rights' is defined by the legislation to include the CRC and the ICCPR. However, this legislation falls short of direct incorporation.

Statutes implementing Human treaties
Following lists selection of Australian CW Acts incorporating international human rights law.
Covenants :
- International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)
    - Signed in 1965, but was not ratified until **30 September 1975.**
    - Commits its members to the elimination of racial discrimination and the promotion of understanding among all races.
    - Monitored by the Committee on the Elimination of Racial Discrimination (CERD).
    - Drawing from Article 2, 5 and 6, the Australian Parliament passed the *Racial Discrimination Act 1975* which makes it unlawful to directly or indirectly discriminate against a person on the basis of their race, colour, descent or national or ethnic origin.
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
    - Signed in 1972, but was not ratified until **10 December 1975.**

- International Covenant on Civil and Political Rights (ICCPR)
    - Signed in 1972, but was not ratified until **13 August 1980.**
    - Civil and political rights include the right to freedom of conscience and religion, the right to be free from torture, and the right to a fair trial.
    - The ICCPR is one of the major sources of 'human rights' listed in the *Human Rights (Parliamentary Scrutiny) Act 2011.*
    - The Covenant is not directly enforceable in Australia, but it's provisions support a number of domestic laws. For example:

- ➢ ***Article 17*** (arbitrary or unlawful interference with privacy) introduced through the *Privacy Act 1988*
- ➢ Equality and anti-discrimination provisions support the *Disability Discrimination Act 1992.*

- International Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW)
  - Signed in 1981, but was not ratified until **17 August 1983.**
  - The *Sex Discrimination Act 1984* prohibits sex discrimination and giving effect to many of the obligations under CEDAW.

Similar laws exist at the state level, generally mirroring many of the same international instruments but not necessarily explicitly. The first such law passed in Victoria was the *Equal Opportunity Act 1977* (Vic) (now the *Equal Opportunity Act 1995* (Vic)) which now provides for the protection of human rights particularly in the areas of age, breastfeeding, gender identity, impairment, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity and sexual orientation.

Treaties/Conventions - They do not form part of Australia's domestic law unless the treaties have been specifically incorporated into Australian statute law through legislation.

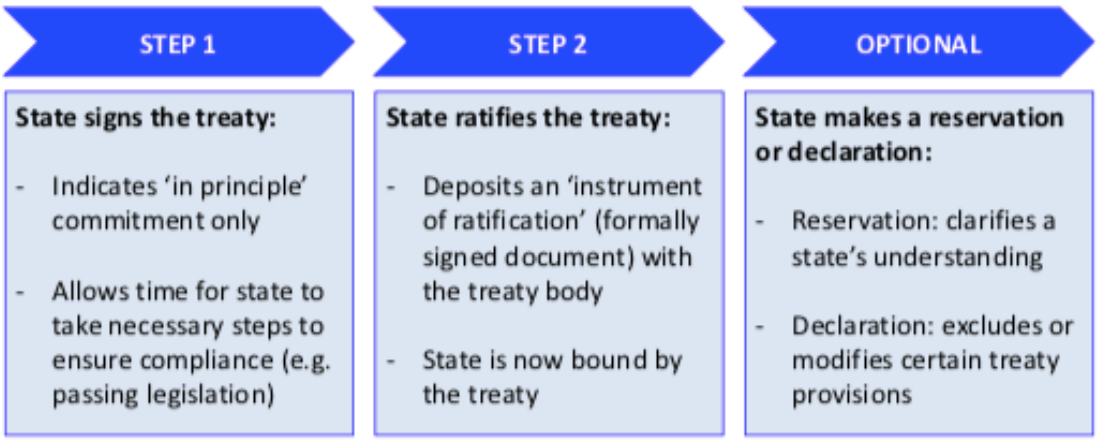
- Some examples include:
  - Convention on the Rights of the Child
  - Convention on the Reduction of Statelessness
  - Convention relating to the Status of Stateless Persons
  - Convention Relating to the Status of Refugees

Protocols - Very often, human rights treaties are followed by "Optional Protocols" which may either provide for procedures with regard to the treaty or address a substantive area related to the treaty. Optional Protocols to human rights treaties are treaties in their own right, and are open to signature, accession or ratification by countries who are party to the main treaty.

- The optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women includes:
- **The Communications Procedure**
  Gives individuals and groups of women the right to complain to the Committee on the Elimination of Discrimination against Women about violations of the Convention. This procedure is known as "the communications procedure". United Nations communications procedures provide the right to petition or the right to complain about violations of rights. Under all procedures, the complaint must be in writing.
- **The Inquiry Procedure**
  It enables the Committee to conduct inquiries into grave or systematic abuse of a party to the Optional Protocol. Known as an inquiry procedure, this capacity is found in article 8 of the Optional Protocol. It is modelled on an existing HR's inquiry procedure, article 20 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

How does a treaty become law in Australia?

The general process by which a state becomes a party to a treaty:



(Source: Charlesworth, H, Chiam, M, Hovell, D & Williams, G 2006, *No Country is an Island: Australia and International Law*, UNSW Press, Sydney, p. 27–8.)

-

In Australia

- Treaty obligations must be enacted into domestic law before they are legally binding
- This means that, after a treaty is signed by Australia, the government must consider whether
  - It will pass new legislation to specifically implement the treaty obligations into domestic (Australian) law OR
  - It will rely on existing legislation (as already effectively implementing the treaty obligations)

External affairs power

- The HC's decision in the Koowarta (1982) and Tasmania Dams (1983) cases dramatically increased the political scope of such international agreements. The decisions enabled the Federal government to enact legislation to override State legislation that conflicted with Australia's international obligations, which the Federal government had ratified.
- In the *Koowarta* case the HC upheld the right of the Federal government to use its Racial Discrimination Act, which was enacted in 1975 to ratify the International Convention on the Elimination of Racial Discrimination, to overturn Queensland legislation in relation to Aboriginal reserves that was seen as discriminatory.
- In the *Tasmania Dams* case, the Federal government passed legislation to protect the wilderness areas of southwest Tasmania that had been nominated by the Federal government as a World Heritage area to the UNESCO agency of the UN. Despite its listing by UNESCO as a World Heritage area, the Tasmanian government proceeded with its plans to construct a hydro-electric power station within the designated area. Again, the HC upheld the right of the Federal legislation passed pursuant to its external affairs power to prevail over conflicting State legislation.

International law and common law

- International human rights law may influence the development of the common law, for example by filling a gap in it or potentially by leading to its change.
- In *Mabo v Queensland [No 2]*, in which the High Court first recognised indigenous peoples' native title to traditional lands, Brennan J noted that Australia's accession to the First *Optional Protocol to the International Covenant on Civil and Political Rights* 'brings to bear on the common law the powerful influence of the [*ICCPR*] and the international standards it imports'. The First Optional Protocol allows a party who claims that their rights under the *ICCPR* have been infringed, and who has exhausted all domestic remedies, to appeal to the United Nations

Human Rights Committee ('HRC') for consideration of their claim. In this context, Brennan J stated that 'the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.

- In the course of his judgment in *Mabo*, which changed the common law through the introduction of the concept of native title, Brennan J made the following comment about the incongruence between the common law as it then stood and 'human rights' represented by indigenous rights to traditional lands:
- It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule, which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

Teoh Case – The exception to the rule

- There are some limited exceptions to the principles that treaties do not have domestic effect unless implemented by domestic legislation. In Mabo v Queensland, Justice Brennan of the High Court, with whom Chief Justice Mason and Justice McHugh agreed, stated that while Australian common law is not necessarily consistent with international law, 'international law is a legitimate and important influence on the common law, especially when international law declares the existence of universal human rights.' In the 1995 case of *Teoh*, the High Court decided that administrative decision-makers in government were required to take Australia's treaty obligations into account (including treaty obligations not implemented in domestic law) when making decisions. This decision gave international treaties a status in domestic law that had not been previously recognized. Two of the judges in *Teoh* justified their decision on the basis that, if the government did not have to make decisions that were consistent with its international treaty obligations, it rendered Australia's ratification of international treaties a 'platitudinous and ineffectual act.' In spite of attempts to pass legislation overruling the *Teoh* doctrine, it remains part of Australian law. However, a 2003 High Court decision in *Lam,* suggests that Teoh's view of international law, is not shared by some members of the current High Court.

Australia and human rights treaties

- Australia has ratified most of the core international human rights treaties.
- But, it has often shown reluctance in implementing human rights treaty obligations into domestic law.
- Slow to implement appropriate domestic legislation (e.g. legal recognition of genocide as a crime).
- Lack of recognition of economic, social and cultural rights (as required by the ICESCR)
- Limited mechanism for investigating complaints of human rights violations (and lack of enforceable remedies).
- Attitude towards implementing recommendations of the UN and treaty bodies.

Why does this matter?

- Without effective domestic implementation, human rights treaties cannot properly protect Australian people from human rights violations

Why the reluctance?

- Human rights treaties often deal with matters relating to how a country orders its internal affairs, which typically fall within the legislative power of the state parliaments (not the Commonwealth Parliament)

- Utilitarian confidence in existing governmental structure
- Issues of sovereignty and a fear of handing over power to unelected international committees
- If international treaty obligations are not implemented into domestic legislation, international law has a very limited effect in Australia. We need to rely on statutory interpretation, development of the common law and constitutional interpretation.

International recognition of breaches of Human Rights in Australia are just a starting point. There

are many examples of international condemnation that has fallen on deaf ears here in Australia E.g.
Immigration detention (particularly the detention of children) .

Strengths and weaknesses of human rights protection under international agreements:

Strengths	Weaknesses
- The strengths of protection of human rights under international agreements can result in domestic law being updated to conform with international treaties – e.g. following Australia ratifying the Convention on the Elimination of All Forms of Discrimination against Women, numerous sex discrimination legislation was passed by Parliament. - Australian Human Rights Commission is able to report on infringements of human rights violations – for example, the Commission can note when Commonwealth departments do not uphold the equality of opportunity and treatment in employment. - Failure to uphold international treaties raises public awareness both domestically and internationally – example, under the Howard, Gillard, Rudd, Abbott, Turnbull government, Australia's human rights came under increasing critical scrutiny by the UN. - International agreements can provide a process by which individuals can raise concerns that their rights are not being protected. For example, in 1992 Nicholas Toonen complained to the UN Human Rights Committee that Tasmanian criminal laws interfered with his right to privacy and non-discrimination. (Article 17 of the ICCPR). Tasmania refused to change the law. The Keating Government responded by passing the Human Rights (Sexual Conduct) Act 1994 to overturn Tasmanian law. The federal law was valid under the external affairs power of the Constitution.	- **However**, there is no enforcement of international treaties being adhered to by Australia and therefore no consequences if these treaties are not upheld. For example, the indefinite detention, coupled with poor conditions in some detention facilities for many asylum seekers, has been cited as Australia refusing to uphold numerous international treaties outlining the rights of asylum seekers that Australia has ratified. Also, since 1996 all findings by UN Committees have been refuted by Australia, and therefore they had no effect on Australian law or the rights of Australian citizens. - Australia also does not have to conform to an international treaty simply because the international law exists. For example, the High Court in Nulyarimma v Thompson 2000 rejected that international law is part of Australian law. - Australia can still ratify a treaty even though it has reservations. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was signed by Australia with the caveat that the Convention may not apply to persons being sent back to their country of origin even though they may face torture by that country's government. - Governments may, when the need arises, introduce legislation that is contrary to international treaties – example, various pieces of legislation following the 2001 terrorist attacks on the World trade Center have reduced civil liberties or the recent restrictive anti-terrorism legislation under the previous Abbott/Turnbull government.

The Manus Island Case 2014 and The Rule of Law

- On 18 June 2014, the High Court handed down its decision concerning the lawfulness of amendments to the Migration Act 1958 (Cth) legislation enabling asylum seekers to be removed to Manus Island, part of Papua New Guinea (PNG), for "processing" to assess whether they meet the definition of refugees and can be granted a protection visa. The High Court held that the legislation is valid, notwithstanding its harshness. In doing so, it reiterated that even though laws may breach international treaties and human rights concerns, they will not be struck down by the courts if they are constitutionally valid. The decision demonstrates one of the tensions in

rule of law theory: whether the rule of law requires not just that laws are validly made but that they satisfy human rights principles.

Case Study – the changing experience of a particular group with respect to their political and legal rights in Australia.

- **Muslim community**

Protection afforded to minority groups in Australian for the above (but not all will apply)

- Statutory and constitutional protections
- The courts
- Human Rights Commission
- S116 of the Commonwealth constitution
    - Indirectly affords some protection to religious minorities
- Primarily through human rights, the Commonwealth has also indirectly provided some minority rights. The Commonwealth parliament has passed legislation implementing a number of major international human rights treaties.
- The relevant acts include: The Racial Discrimination Act 1975, The Human Rights Commission Act 1981, The Human Rights and Equal Opportunity Commission Act 1986, The Privacy Act 1988, The Crimes (Torture) Act 1988, The Disability Discrimination Act 1993 and The Racial Hatred Act 1995. The Racial Hatred Act of 1995 amends the Racial Discrimination Act 1975 by inserting a new section entitled "Offensive Behaviour Because of Race, Colour or National or Ethnic Origin".

Examine the following

- Political rights of the group and their experience over time, which could include: the franchise, right to stand for election; freedom of association; the right to petition
- Legal rights of the group and their experience over time, which could include: procedural fairness; the rights of the accused; right to seek a legal remedy; right to liberty and security; right to freedom from discrimination.
- Particular changes in the law affecting the group.
- Some consideration of legislative changes and case law should be drawn upon.
- Has it improved; stayed relatively unchanged or worsened over time?

Muslims

Introduction

- The Muslim community in Australia has faced many issues, mostly negative, with regards to their involvement in the political and legal system.
- Political Rights: the power to participate directly or indirectly in the establishment or administration of government.
    - Examples - Right of citizenship, the right to vote, and the right to hold public office.

- Legal Rights: a power, privilege, demand, or claim possessed by a particular person by virtue of law.
    - Examples - Right to a fair trial, right to legal representation

In theory Muslims have political and legal rights, however, their changing experience in Australia has meant that they cannot exercise these rights to the fullest extent as they often have seen that the system is against them, particularly where the law has treated Muslims harshly.

History of Discrimination

- Muslims arrived in Australia before the earliest Europeans, as "Afghan" came drivers with the Burke and Wills expedition and have since formed a vital part of Australia's social and cultural life.
- In support of the Immigration Restriction Act (White Australia Policy) of 1901, Attorney-General Alfred Deakin (2nd PM of Australia) said it would be effective in excluding, "the persons who annoy us most. the Syrians and Afghans who seek to make a living by peddling."
- Frederick Vesper, editor of Coolgardie Miner and later member of WA Legislative Assembly said: "We see the shadow of a great evil at our doors at the presence of large numbers of Afghans."
- Has seen increased discrimination and harassment for Muslims since 2001 World Trade Centre attacks in New York and 2005 Bali Bombings.
- In 2004, these tensions between Lebanese Australian Muslims and non-Muslim Australians caused the Cronulla riots.

No Federal Law

- Under international laws such as the ICCPR, Australia has committed to respecting human rights and to ensuring that it adopts measures for the elimination of discrimination against all persons, including those of the Muslim faith.
- Despite this commitment, Muslims in Australia do not yet enjoy human rights on an equal footing with other Australians.
- Under the ICCPR, and Victorian Charter of Human Rights, all people in Australia, including Muslims, are entitled to attain and enjoy a full range of civil and political rights, without discrimination of any kind, including the rights to freedom of thought, conscience and religious belief.
- All people in Australia, including Muslims, are equal before the law and entitled, without any discrimination, to equal protection before the law.
- However, these rights are not comprehensively protected in Australian law, since there is no such protection at a federal level.
- The Constitution only provides for a limited protection of freedom of religion, preventing the CW government from passing a law to establish religion or prohibit free exercise of religion, but providing no further safeguards.

Issues

- Without protection from discrimination based on religion, there are limited avenues for legal redress when a person suffers such discrimination.
- Federal legislation does not prohibit discrimination or vilification on the ground of religion.
- Thus, while majority of states have made religious discrimination unlawful, there are no direct, legally-enforceable rights in NSW or SA.

- For example, the law in New South Wales does not extend to people who have been treated badly solely because they are Muslim.
- This gap is particularly problematic given that approximately half of Australia's Muslim population lives in New South Wales.
- The damaging social and civic effects of racial vilification can also undermine a sense of belonging to the community.
- Such abuse may alienate Muslim people form Australian society and feed a sense of disillusion and disempowerment.

Current Laws and Policies

- Some aspects of Australia's current laws and policies, such as counter-terrorism laws, constitute indirect discrimination by impacting disproportionately and detrimentally on Australia's Islamic communities. See 2018 Citizenship Stripping Laws on grounds of national security.
- An issue of concern are police 'stop and search' powers, which are overly broad and inadequately regulated. These powers have resulted in the alleged victimisation of groups such as Muslim Australians.
- The overly broad definitions of 'terrorist acts' and 'terrorist organisations,' have had particular impacts on Muslim Australians.
    - For example, to date, 19 organisations have been listed as 'terrorist organisations', with all but one of those organisations being self-identified Islamic organisations.
- The raising of the official terror alert in August 2014 has made many Australian Muslims feel a sense of 'us versus them'.
- Operation Pendennis, the largest anti-terrorism operation in Australia to date, led to the arrest of eighteen young men in Melbourne and Sydney and attracted extensive media coverage. In doing so, the media alienated many Muslims and increased the chance of withdrawal from participation in Australian society.

<u>Minister for Immigration & Citizenship v Haneef (2007)</u>

- An appeal by the Minister to set aside the decision of Spender J to cancel Dr Haneef's VISA on character grounds.
- On 2 July 2007, Dr. Haneef was arrested following attempted terrorist bombings in London on 29 June 2007.
- Minister cancelled his VISA pursuant to s. 501(3) of Migration Act 1956 on grounds of a, 'character test.'
- On 27 July 2007, the charges were dismissed and a full federal court unanimously upheld Justice Spender's decision that the minister had fallen into jurisdictional error by misinterpreting the character test and applying a test that was too wide and therefore, incorrect.
- Dismissed appeal with costs, yet still the impact on career as a doctor would have been huge.
- Demonstrates the current gaps in legal protection which mean that Muslim people do not always have the opportunity to enforce their legal rights.

<u>R v Mallah (2005)</u>

- Accused's admissions to have been obtained improperly, but evidence was admitted.
- Despite jury delivering a verdict of, "not guilty," on two terrorist charges, Mr. Mallah was charged for threatening a CW officer to imprisonment for 2 years, 6 months.
- Over charged him due to anti-terrorism laws.

- One lawyer stated, “I think it was pure politics that drove the laying of the terrorism charge. They didn’t have anyone to charge. He was a candidate. And they used it.”

Legal Assistance

- Unlike many other groups, Muslims have few specialist avenues of legal assistance (compared to Aboriginal Legal Service)
    - Australian Federation of Islamic Councils (AFIC)
    - Muslim Legal Service Victoria (MSLV): 2006- legal consolation (pro-bono) in Melbourne
    - Australian Muslim Civil Rights Advocacy Network (AMCRAN): 2004- law reform + policy work
- Groups like AFIC and LMA have initiated outreach programs, such as inter school sports events, debates, interfaith dialogue, public meetings and open days at the mosque.
- LMA and Hilali took 40 tradesman to QLD to rebuild houses after floods- “These are all ways by which barriers can be broken down. But it is an exhausting and often frustrating task.” (AFIC President Ikebal Patel)
- Muslims encouraged to donate blood- potential recipient said, “I don’t want Muslim blood injected into me.”
- “We understand that from our point of view, we need to engage, but if you engage and the engagement is not reciprocated, it’s like a slap in the face.”
- According to AMCRAN, this leads to self-limiting behaviour, where they overestimate the reach of the laws and are unnecessarily cautious.
    - Example – “We have heard people telling their children not to go to protests,” and, “have seen people not wanting to go to normal Islamic classes, or similar things, because they fear ASIO may be watching.” (2006)

Engagement in the Political and Legal Process

- The majority of Muslims in Australia (79%) have obtained Australian citizenship since 2006.
- There are three Muslim politicians in our federal parliament:
    - The House of Representatives
        - Ed Husic (Chifley, NSW, ALP)
        - Anne Aly (Cowan, WA, ALP)
    - The Senate
        - Mehreen Faruqi (NSW, Greens)
- Muslims better represented in local government, particularly in areas with high Muslim population.
- In court, procedures have now been changed so that a person may, ‘swear in’ on the Koran, rather than the Christian Bible.
- Legislative safeguards, implemented by Howard and Abbott, exist to protect against religious and racial vilification and commit to cultural diversity.
- Have achieved influence through lobby groups, pressure groups, journalism and advocacy organisations.

The Muslim Community Reference Group

- Established in 2005 under COAG to act as an advisory group to government, made up of senior members of Muslim community.

However, significant numbers of Arab and Muslim Australians are feeling isolated and vulnerable.

- i.e. 66% had personally experienced more racism, abuse or violence since 9/11 attacks.
- E.g. Sonia Kruger- she would like to see the immigration of Muslims to Australia, "stopped now… because I would like to feel safe." (2016)
- "We've never been engaged in the political process. We never understood it because our forefathers were literally factory workers." (Sydney Lebanese Muslim Association President - Samier Dandan)
- "The politicians don't care; they literally don't care." (Dandan)
- However, most survey respondents did not formally complain, and of those who did, 20% spoke directly to the person and only 8% formally complained to an institution.

WHY DON'T MUSLIMS ASSERT THEIR RIGHTS?

Prejudice in Political System

- David Barker, dumped by the Liberal party in 2010, made the comment, "I don't know if we want at this stage in Australian politics a Muslim in the Parliament."
- Pauline Hanson (2016) has called for a ban on Muslim immigrants- "The threat has become a reality."

Anti-Muslim Smear Campaigns

- Fall victim to anti-Muslim, "smear campaigns," with several federal politicians portraying Muslims as a threat to Australian values.
- Example – Greenway (2004) - Ed Husic
    - Ed Husic (ALP) defeated for Greenway as a victim of, "a vicious and well-orchestrated attack on his religion and ethnicity," (Eric Roozendaal)
    - A fake ALP brochure, by Louise Markus (Liberal) inflamed anti-Muslim sentiment and led to his defeat.
    - Markus' supporters overheard at booths urging to vote Ms. Markus, "because she's a Christian."
- Example – Lindsay (2007)
    - Unauthorised pamphlets designed to tap into anti-Musli sentiment were distributed by their party.

Counter-Terrorism Legislation

- Legislation, which indirectly discriminates against Muslims
- Example – Bronwyn Bishop (2014)
    - Announced there would be restrictions on visitors who could cover their faces (i.e. Muslims)
    - Led to a gathering of faith groups outside Parliament to protest about discrimination and erosion of democratic principles.
    - This controversial plan was later dumped.

Abbott's Counter-Terrorism Legislation Amendment (Foreign Fighter) Bill (2014)

- Made it illegal for Australians to travel to areas declared terrorist zones, other than on family or humanitarian reasons.
- Under this legislation, ASIO had power to request cancellation of Australian passports.
- Muslim community outraged, and claims they are being targeted.
- The discriminatory impact of laws aimed to counteract terrorism in fact limits the ability of Muslim people to enjoy their rights to freedom of religion, opinion and association.

- Negative public attitudes towards these communities raises concerns about the ability of Muslim Australians to publicly manifest their religion.

Democratic Principles

AUS	Upholds	Cases	Undermines	Cases
Political representation - the extent to which citizens have adequate representation via political institutions. -	- Australian Electoral Commission - independent body that checks elections - Secret ballot - There has been many reforms in voting (1918, 1949, 1984, 2016) - Not many limits on voting - 18, citizen and not in jail for more than 3 years. - Assumed in the constitution that we can vote - section 41 - Parliament - federal parliament / state parliament / local members - 15 people who represents individuals - Virtually no one that is not represented - Compulsory voting (provides a firm expression of the will of the majority achieving majority political representation, prevents well organised or funded minorities from achieving over representation) **The GG is seen as upholding this by:** - Governor General by convention acts only on the advice of Ministers. These are the elected representatives of the people. - In 1975, the GG, Sir John Kerr, dismissed the elected representatives of the people, but ensured that the people would 'decide the issues that the two leaders have failed to settle' through an election. - The Governor General can only appoint as Ministers (for terms longer than three months) Members/Senators who have been elected.	- marriage equality -party loyalty	- voting system reinforces the 2 party system - one of the major parties will win - minor parties do not gain representation in the lower house - Every state must have equal representation - however they all have different populations - states with lower population have more influence in the senate - voter in Tasmania vote has 10x more influence than someone in NSW - MALAPORTIONATE - Party loyalty - vote with the party rather than the state **The Governor General can be seen to undermine the democratic principle of representation:** - The GG can dismiss elected representatives of the people under s.64. - The GG can withhold or refuse to sign bills presented to him under s. 58 that have been passed by the people's representatives in parliament.	-

AUS	Upholds	Cases	Undermines	Cases
Popular participation - the extent to which citizens feel that they are part of the democratic process	- Join pressure groups - no limit on pressure groups - Publicly funded political parties which obtain more than 4% of primary votes. PF helps meet the costs of developing policies and campaigning for elections - Voting - Not many limits on voting - 18, citizen and not in jail for more than 3 years. - Right to protest. - common law right to protest - High court- take the govt to court - Petition parliament - Australia's use of a centralised national electoral system administered by an independent AEC, combined with compulsory voting, results in greater popular participation -	- williams	- cost of taking part - protest - Time that it takes - Misinformation - bias press - Donkey votes - Its a common law right- can create a statue that over rules it	

AUS	Upholds	Cases	Undermines	Cases
the rule of law - A concept that all authority is subject to, and constrained by, law. Government is not arbitrary. All citizens/ persons operate within the law and are controlled by it. Everyone is entitled to have a matter heard by an independent and impartial court or tribunal.	- The law is made by representatives of the people in an open and transparent way - The law and its administration is subject to open and free criticism by the people, who may assemble without fear - Law is capable of being known to everyone, so that everyone can comply - No one is subject to any action by an government agency other than in accordance with the law and the model litigant rules, no one is subject to torture - Judicial independence provides fair and prompt trial - Everyone is innocent until proven guilty, entitled to remain silent, not required to incriminate themselves - No one can be prosecuted, civilly or criminally, for any offence not known to the law when committed. - Written and unwritten constitutional limits to power, a separation of powers and an independent judiciary. - Government processes are open and transparent		- those we are less educated have a high chance of not knowing aspects of the law - Indigenous people are arrested at a higher rate than rest of population -	

AUS	Upholds	Cases	Undermines	Cases
judicial independence	- Section 71 vests judicial power in the High Court and other courts the parliament may create - Section 72 guarantees judicial independence by protecting judges from arbitrary removal or reductions in their pay. Only executive can appoint judges and only parliament can remove them - separating the powers of appointment and dismissal - Court decisions can't be interfered with by governments.		- Exec dominance of Parliament has led to the passing of 'tough on crime' laws and anti-terror laws that are potentially dangerous to civil liberties - Mandatory Sentencing - criticised because they reduce the capacity of a judge to apply an appropriate sanction - Adoption of the CW statutory charter of rights base on the Victorian, ACT and British examples would increase the ability of the judiciary to defend basic freedoms and rights. - Charters / bill of rights would increase the 'dialogue between Parliament and the courts' and result in improved legislation without compromising the sovereignty of parliament or the independence of the judiciary -	
natural justice - refers to the right of a person to procedural fairness and to be given a fair hearing and the opportunity to have a decision made by an unbiased judge. It also incorporates the principle of the right of appeal. ADR = Alternative dispute resolution	- Procedures of the adversarial trial and the mechanisms of ADR are well established by tradition and are supported in legislation - CW evidence Act 1995 legislates the rules of evidence and the Australian Human Rights Commission Act 1986 requires the Human rights commission use conciliation, a form of ADR to resolve disputes. - Family law act 1975 forces parents disputing custody to attempt to settle these very emotional disputes through ADR before going to court - People trust courts - most respected institutions in society. Seen to resolve disputes fairly but are limited to making decisions on the law alone.		- Adversarial trial is expensive and this is a barrier to many. - Trials are time consuming. Timely resolutions of disputes is a feature of justice. Justice delayed is justice denied	

USA	Upholds	Undermines
Political representation - the extent to which citizens have adequate representation via political institutions.	- vote for Executive (President) - Represented by congress - upper house, lower house and state level - Voting age is 18, (**12th amendment has the right to vote)** - USA has short electoral cycles (2 years) and fixed terms for Congress and the President. This higher frequency gives more opportunity for political representation to be exercised. - HOR voting - strong link between representatives and the constituents - Good for political representation of the majority - Good for accountability - Very simple to use and count - SENATE voting - strong link between representatives and the constituents - Good for political representation of the majority - No gerrymandering - Simple and easy to count - PRESIDENT. - fairly direct link between President and people	- Jerry Mandering - states use it to stay in power - completely undermines democratic representation - non compulsory voting - undermines the principle of popular participation - sometimes the majority of the nation has not voted - Malaportionate - Vote is worth 70x Wyoming than what it is in California - Voting system - only pick one person - least representative way - most people will not vote for the government - do not need 50% + 1 - Certain states deny the people the right to vote even once they have left prison - 1/13 african Americans can not vote because they have been to jail - HOR VOTING- minorities don't achieve political representation - Gerrymandering is common - Malapportionment is common - Electoral rules are state based. - there is no national electoral system SENATE - Minorities don't achieve political representation Malaportionment based in State populated sizes Electoral rules are state based - no national electoral system PRESIDNEY - complicated, time consuming, electoral college is an anachronism - an outdated concept from an earlier time, use of voting machines has proven unreliable with highly controversial election in 2000 decided by Supreme Court

USA	Upholds	Undermines
Popular participation - the extent to which citizens feel that they are part of the democratic process	- Join special interest groups / pressure groups = more effective than influencing legislation than here in Australia - Can vote - High court - Higher degree than in Australia - its part of the constitution (bill of rights) Electoral participation - constitutional guaranteed first amendment rights to the freedoms necessary for popular participation. These ensure equal rights to participate for all American citizens - High level of rights awareness Political parties - system of primaries and caucuses provides opportunities for politically active citizens to join a party, campaign for a Presidential candidate and vote within the party to choose the final nominee Pressure groups -	- can't run for office in the US unless u are above 25 and can't run for president until your 35 - Don't have to vote (can be used for upheld) - Cost - Time - Misinformation - Special interest groups have a disproportionate amount of power over the political process. - only those with money / power can influence the political process in America - National Rifle Association - In the USA political candidates need to find their own money to run - find sponsorship through big organisations such as NRA -

USA	Upholds	Undermines
Rule of Law	- Strong checks and balances within the USA's political system which limit the power of any one branch of government - Exec does not dominate the legislative process to the extent that it does in Australia - Strong rights culture which makes citizens acutely aware of their rights and they are prepared to defend themselves against government interference - Litigious culture means that citizens are prepared to use court action to clearly mark out boundaries of power - Article 1, section 9, clause 3 of constitution prohibits the congress from passing 'ex post facto' law. This is a constitutional prohibition on retrospective legislation and a clear distinction between the USA and Australia on this key principle of the rule of law	- USA conduct in the War on Terror illustrates rule of law concerns - Practices of extraordinary rendition and extra judicial assignations of terrorist suspects by drone strikes are other policy concerns. Without formal declaration of war against another sovereign nation, the war on terror is not subject to the usual rules of war. Assassinations by drone strikes are carried out in the territory of other countries with whom the USA is not at war. Such acts can be in breach of international law - A person subject to a National Security Letter (NSL) which authorises an investigation, cannot have access to judicial review. There is no need for the authorities to have any reasonable suspicion to issue an NSL - Allowed the interception of communications without a warrant and the delayed notification of search warrants where a subject is notified of a warrant only after a search is carried out on their property - now expired - Undermines presumption of innocence. Reduce checks on the arbitrary use of power

USA	Upholds	Undermines

Judicial independence	- USA courts are more powerful than Aus because of the countries highly specific constitution, but they are no more independent than their Australian counterparts
	- Achieves judicial independence through
	  - Article 3 of constitution - in which Section 1 vests judicial power in the Supreme Court and other courts the Congress may create
	  - Article 3 also states Judges may hold office 'during good behaviour'
	  - Article 2 Section 2 which states the President shall, with the advice and consent of the Senate, appoint the judges of the supreme court
	  - Articles 1 and 2 which allow judges to be impeached in the same way as any other federal official if their conduct is deemed not of good behaviour
	- two arms of government are involved in appointing officials to the judicial arm.
	- Can be assertive - because judicial supremacy is enabled by the way its constitution is written
	- Emboldened by its rights based constitution
		- judges are elected - exposes them to partisan political processes. Bias is an inherent part of partisanship - undermines impartiality
		- Some states only elect their justices in the first instance. Others elect them to subsequent terms. Elected judges who must face re-election can easily be perceived as lacking independence because they must please a majority of voters, and powerful pressure groups, if they wish to maximise electoral support

USA	Upholds	Undermines
Natural justice	- Bill of rights guarantees some legal rights - The rules Enabling Act 1934 enables the Supreme Court to determine the processes and procedures of the adversarial trial, including the rules of evidence - ADR is also a feature of dispute resolution system - Since the 1960's many reforms have been introduced to help reduce the case burden on the courts and the costs to the community, The Alternative Dispute resolution act was passed by Congress in 1998 to facilitate cheaper, quicker and better merits based dispute resolution - Legal Services Corporation was established by Congress in the 1970's to provide funding to state legal aid services which provide legal assistance to the poor. Therefore improving natural justice	- reliant on litigation to resolve disputes. Litigious culture, creates a climate in which court action can be an ever present threat. A threat which can be enormously costly to defend against and, if one should lose, has the potential to lead to financial ruin - Growing levels of income and wealth inequality mean that more people are increasingly unable to use the courts to achieve justice - Legal aid services such as the legal service corporation are underfunded and don't meet most of the needs for assistance - Access to justice is denied to those who cannot afford legal representation and delays in getting cases to trial prevents the timely resolution of disputes. According to the Wall Street Journal, over 30,000 civil cases were stalled in federal court backlogs for more than 3 years