

1. Federalism

- The founding fathers intended coordinate or cooperative federalism but over time it's become coercive.

Federalism:

- A system of government that divides sovereignty through a central govt & two or more regional govts.
- Requires a written constitution and a constitutional court for the settlement of disputes.

Exclusive Powers: powers belonging to the commonwealth e.g. s.52(1) establishment of seat of govt for Canberra.

Concurrent Powers: shared legislative powers between state and commonwealth e.g. s.51(2) taxation.

Residual Powers: powers belonging to the states, unspecified e.g. s.107 protections of health & education.

Financial Powers of the Commonwealth:

Section 51(2) Taxation:

- Changed from a concurrent to exclusive power in WW2.
- Commonwealth had insufficient revenue to cover cost of war so temporarily transferred state powers.
- **Uniform Tax Cases 1942 & 1957** – Commonwealth became the sole keeper of the income tax.
- Leaves states reliant on minor taxes like payroll tax & land tax.

Section 87 Braddon Blot:

- 75% of revenue from customs, excise & bounties to be handed back to states for first 10 years post Federation.
- In 1911 it became a spent section of the constitution.

Section 90 Customs, Excise and Bounties:

- Exclusive power demonstrates financial arrangements in constitution protection states were weak.
- Globalisation is increasing so this section is becoming increasingly relevant.
- **Ha 1997 case reduced the financial base of the states, giving commonwealth exclusive power via High Court s.76.**

Section 96 Tied Grants:

- Commonwealth has power to determine terms & conditions of grants it makes to states, intruding state power.
- **2013, Gillard govt offered Tasmania \$400million boost in education funding if it signed up to Gonski education programme despite education being a residual power of the states.**

Legislative Powers of the Commonwealth:

- **Section 51** – legislative powers of parliament, most are concurrent, but some are exclusive.
- **Section 51(20)** – Corporations power allows commonwealth to legislate on incorporated bodies (companies).
- **Section 51(29)** – External Affairs e.g. **Tasmania Dams 1983; Tasmania loses power on land/river management.**
- **Section 51(37)** – Referral of Powers allows states to give powers to commonwealth, non-reversible.
- **Section 109** – If a law of a state is inconsistent w a law of commonwealth, the commonwealth will prevail.

Constitutional Protections of State Power:

- **Section 92** – trade & commerce between states shall be absolutely free e.g. **Cole v Whitefield settled meaning.**
- **Section 107** – anything unspecified/unwritten belongs to the states e.g. **education.**
- **Section 128** – requires referendum can only be successful if approved by majority of the states (4/6).

Change in the Balance of Power Since Federation:

Vertical Fiscal Imbalance:

- Imbalance between revenue & expenditure (commonwealth raises excess revenue in relation to spending responsibilities vs states receive insufficient revenue in relation to spending responsibilities) e.g. **commonwealth collects 80% tax for 50% spending and states collect 20% tax for 50% spending.**
- Caused by section 87, Uniform Tax Cases, Ha Case (section 96 isn't a cause but does exacerbate it).

Horizontal Fiscal Equalisation:

- Transfer of revenue from commonwealth & rich states to poor states to balance inequality of revenue.
- Rich states like NSW get increased GST and poor states like Tasmania get decreased GST.
- Commonwealth Grants Commission recommends GST distribution between states.

Section 51(37) Referral of Powers:

- Transfer of authority from states to commonwealth, not reversible, e.g. SA & TAS non-metro railways 1975.

Council of Australian Governments:

- Formed 1991, meeting of heads of Aus govt – PM, 6 state premiers, chief ministers from territories & President of local govt association to improve cooperative federalism e.g. **2017 COAG discussions about national uniform parole laws after Melbourne terror attack.**

2. Changing the Constitution

Constitution:

- A paramount legal document expressing limits to power, how power is gained & how power is to be used.
- PM Menzies stated constitutional change required “the labour of Hercules” meaning it was almost impossible.

1. Referendum:

- Section 128 is the only formal means of changing the wording of the constitution e.g. **only 8/44 successful**.
- 1910 States Debts altered section 128 expanding commonwealth power to take over state debts.
- 1967 Aborigines altered section 51(26) & 127 including in the census (highest yes vote 90.8%).
- 1977 Retirement of Judges altered section 72 setting age of retirement to 70.

Requirements:

- Proposal must be passed by bicameral parliament as a normal bill would be.
- Proposal must be put to the people between 2-6 months after the bill passes.
- Proposal must receive a double majority – majority of electors & majority of states.

Characteristics for Success:

- Must receive support from government and opposition e.g. **1967 Aborigines**.
- Must be obviously good e.g. **1967 Aborigines, inclusion in census after years of segregation**.
- Limited change should be proposed e.g. **1977 Retirement of Judges, altered s.72**.

Why Section 128 is Unsuccessful:

- Double majority is too high a hurdle, caused the failure of 4 referendums.
- Requires a yes or no answer, so complex issues more likely to attract a no, such as the 1999 Referendum.
- Almost all sides of the political divide, govt, opposition & states, must agree which is unlikely.

2. High Court Interpretation:

- Most important method of constitutional change due to difficulty of passing a referendum.
- Only if two parties are in a dispute can the High Court determine the meaning (can't change wording).
- **Uniform Tax Cases 1942 & 1957 and Tasmania Dams Case 1983**.

3. Referral of Powers:

- Section 51(37) allows states to hand over their powers to the commonwealth, only one way & non-reversible.
- Often difficult as the states are reluctant to surrender their sovereignty.
- **SA and TAS non-metro railways 1975**.

4. Unchallenged Legislation:

- Commonwealth may pass laws outside its constitutional powers.
- Often will be challenged in High Court & the law will be struck down as commonwealth acted “ultra vires.”
- But in some cases, the states may not challenge, so the law stands as a valid law e.g. **Uniform Gun Laws 1996**.

5. Use of Financial Power:

- VFI exists in all federations w Australia having the highest one – puts commonwealth in a favourable position.
- **Sections 86 and 90 give commonwealth exclusive power over customs, excise and bounties**.
- **Section 87 Braddon Blot**.

6. Constitutional Conventions & Commissions:

- “Meetings” formed to study & recommend changes to the constitution.
- **1890's debates about federation & the convention on becoming a Republic**.
- Most unsuccessful and limited form of change.

7. Other Methods:

- A territory becomes a state.

3. Functions of Parliament

1. The Representative Function – represents the people of the nation.

In Theory:

- Delegate Representation – parliamentarians represent majority views rather than act on own judgement.
- Trustee Representation – parliamentarians chosen because of electorates trust in their judgement.

In Practice:

- HOR Partisan Representation – elections as contests between social groups, people vote for leader not ideology.
- Senate Mirror Representation – Single Transferrable Vote allows election of diverse candidates.

2. The Legislative Function – makes statute law.

In Theory:

- Laws are scrutinised, have diverse input, reflect Australian electorates & can be initiated by any MP.
- Deliberative statutory process – statutes are well crafted, have diverse opinions & protect rights.

In Practice:

- Major executive dominance where executive uses tactics to force through its legislation.
- **Gagging 2nd Reading Debate** – govt moves motion to put bill to vote, govt will win due to majority.
- **Guillotining the Debate** – govt sets time limit for debate, govt controls this as they have the controlling vote.
- **Floodgating Bills** – govt introduces many bills at once in HOR, overwhelming statutory process.
- However, Senate provides checks & balances and there is minimal executive dominance.

3. The Responsibility Function – holding executive, legislative & judicial arms accountable.

In Theory:

- Govt exists only if it maintains the support of the HOR, a vote of no confidence will dismiss govt.
- Individual ministers may be dismissed by censure motions.
- Ministers must answer questions asked in Question Time.

In Practice:

- Party with majority will never lose HOR support as it controls votes of its members.
- Motions of no confidence & censure motions often defeated on party lines due to executive dominance.

4. The Debate Function – the nation's premier forum for discussion of issues.

In Theory:

- Helps keep the govt accountable & is critical when MP's present their constituents.
- Parliamentary privilege protects debate.

In Practice:

- Govt can limit debate by allocating time for a sitting day.
- Gags & guillotines limit debate.
- HOR system is adversarial – contest between govt & opposition for political advantage.

The Senate:

- Developed into a powerful & effective house of review as it scrutinises the executive.
- Mirror representation w Senate directly chosen by the people via proportional voting allowing diversity.
- Proposes amendments and refines bills.
- Has developed systems of responsibility such as Senate Estimates Committees to scrutinise govt spending e.g. [2014 Senate rejected tranches of govt bills in the case of the Abbott govt.](#)

The Decline of Parliament Thesis:

- The belief that parliament no longer fulfils its functions & rather, acts as a "rubber stamp."
- Led to growth of executive dominance in the HOR.
- Can be viewed as "invalid" as it is based on a golden age Westminster parliament which may arguably have never existed seeing Australia as its own unique system.

Reforms:

- Section 50 allows each house to make own rules (standing orders) so parliament can reform itself without s.128.
- **Longer sitting times** – federal parliament sits only 66 days a year compared to UK parliament which sits 160 days a year; this would reduce workload and allow parliament to carry out debate/legislative functions better.

4. Lawmaking in Parliament and the Courts

Law: a legal action that applies to everyone.

Statute Law: laws passed through all stages of parliament, given royal assent & been proclaimed (“in futuro law”).

Common Law: laws passed over time by the judgements of courts – precedent/stare decisis (“ex post facto law”).

1. Individuals – Basic unit of society and its political system.

Parliament:

Independents:

- Member of Parliament that has no affiliation with any party & represents a single electorate.
- Influential in hung parliaments where their vote is necessary for minority govt to maintain office.
- 2010 Gillard needed Windsor, Oakshott & Wilkies support to pass plain packaging as both parties had 72 seats.

Private Members Bills:

- A non-executive bill, a proposed law introduced by an MP who isn't in Cabinet, succeed w bi-partisan support.
- 29 successful since federation e.g. Marriage Amendment Bill 2017.

Voting:

- All Australians over 18 can vote every 3 years & voting is compulsory, main way individuals influence lawmaking.

Courts:

Invalidation of Statute Law:

- **Williams 2012** – Williams successfully challenged constitutionality of National Schools Chaplaincy Program. High Court found that s.61 didn't permit executive to fund Program without legislation so Gillard passed new laws.
- **Williams 2014** – Williams challenged constitutionality of using s.51(23A) to pay as it didn't directly benefit students. High Court ruled Gillard govt acting ultra vires. Abbott & Turnbull govts forced to use s.96 tied grants.

Overturning of Common Law:

- **Mabo 1992** – Mabo challenged Terra Nullius meaning land regarded as “unoccupied”. High Court ruled in favour recognising land rights under common law by abolishing Terra Nullius. Parliament codified 1993.

2. Political Parties – Major (achieve majority), Minor (win few seats) and Micro (promote single issue).

Parliament:

Major Party Winning Govt:

- Have most influence, major executive dominance, have a political mandate to ensure opposition support.
- 2013 election LNC won 90 seats & ALP won 55 seats – LNC given a very strong political mandate.

Major Party in Opposition:

- Forms ally with balance of power parties in the Senate & can block/amend govt bills.
- 2014 ALP opposition crushed Carbon Tax & Mining Repeal Bills.

Minor Party Forming Coalition:

- Most notably adopted by LNC e.g. 2014 Nationals blocked sale of Grain Corp despite Liberals wanting sale.

Minor Party in Hung Parliament:

- Maintains a govt majority meaning govt relies on minor party support.
- Adam Brandt from Greens helped Gillard form govt in return for introduction of a Carbon Tax.

Micro Parties Preference Deals:

- Make deals w major parties e.g. 2019 NSW Labor & Greens made deal w Shooters & Fishers in case of hung parl.

Courts:

Legal Challenge:

- Legal challenge against govt statute/policy e.g. Bob Day (FFP) challenged constitutionality of the Electoral Act 2016 saying reforms only a choice between voting methods not candidates, but HC disagreed.

3. PG's – Sectional (selective benefits for members via lobbying) & Promotional (cause for community via protests).

Parliament:

Direct Lobbying:

- Directly meeting w lawmakers e.g. 2012 Clubs Australia lobbied Gillard govt to stop anti-gambling laws.

Direct Action:

- 2014 protestors occupied Julie Bishop offices as opposed detention of children, didn't change laws.

Courts:

Online Campaigns:

- GetUp.Org has 1million subscribers, successfully challenged Electoral Act in Rowe 2010.

Court Action:

- Mackay Conservation Group stopped development of Adani Coal Mine worth \$16billion.

5. Mandates

Mandate:

- An “instruction” or authority to implement policies & govern, given by voters to party w majority in HOR.
- Central to the idea of democracy & creates a govt by consent.

Types of Mandates:

Will of the Majority Mandate (Govt Mandate):

- Executive govt may claim legitimacy to exercise power as its been chosen & endorsed by the people.
- It has been chosen by “majority will” so its claim to exercise power is justified.

Right to Oppose Mandate/Claiming lack of Mandate (Opposition):

- Second largest party in HOR forms the Opposition.
- Westminster theory is that Opposition is loyal to the system but opposes actual govt in power.
- This provides Opposition w a mandate to oppose govt, especially if it has a “large minority” of seats.
- 2016 Bill Shortens ALP Opposition almost won power & reduced Turnbull govt to a 1 seat majority.
- If a govt is a “minority govt” Opposition will feel govt lacks mandate & will exercise right to oppose.

Balance of Power Mandate (Senate):

- Parliament has “strong bicameralism” where there is a powerful upper house for checks & balances and there is a “hung house” where compromises must be made.
- LNC and ALP seldom control this chamber & must negotiate w cross-benches to pass their legislation.
- If Opposition exercises “right to oppose” cross-benchers, minor/micro parties & independents have the power of refusal (may vote with govt to pass bills or with Opposition to defeat govt bills).
- This power is justified with the claim that the people have voted to create a “hung senate.”

Theory:

- Govt makes “core” and “non-core” promises & all promises should be fulfilled.

Practice:

- Often only the “core” policies get implemented.

6. Roles & Powers of the Governor General

The Governor General:

- Queen’s representative at Commonwealth level in Australia, carries out the Queen’s functions on her behalf.
- Section 2 – GG appointed by the Queen and shall be Her Majesty’s representative in Commonwealth.

Express Powers: GG constitutional powers, to “express the will” of parliament e.g. s.58 Royal Assent.

Reserve Powers: GG constitutional role, exercised on GG’s own initiative e.g. s.64 Appoint/Dismiss Ministers.

Constitutional Role: exercising powers vested in constitution e.g. s.28 dissolving the House of Representatives.

Ceremonial Role: opening of Federal Parliament (Cosgrove opens 45th Parl), attending ceremonies & swearing in PM.

Non-Ceremonial Role: to “represent Australia itself” reflecting what it is to be Australian e.g. attending functions.

Section 28: GG may dissolve HOR & Senate.

Section 57: Double Dissolution.

Section 61: GG exercises executive power.

Section 62: Formation of the Federal Executive Council.

Section 63: GG in council w FEC. Theory – acts on PMs advice & meets w FEC after decisions have been made.

Section 64: GG may appoint or dismiss ministers.

Section 68: GG in command of naval and military forces.

11 November 1975 – The Crisis:

- 1970s Gough Whitlam introducing domestic reforms such as abolishing uni fees & introduce medibank which required large funding during a time of economic struggle.
- Hostile Senate blocked appropriation bills, breaking Westminster convention that Senate to always pass supply (s.53 says Senate may not amend money bills).
- Whitlam allowed Kerr to interview Fraser, GG broke Westminster convention by failing to act on advice of PM.
- Kerr concluded if Whitlam couldn’t secure supply or call election he would be dismissed.
- Kerr met w Chief Justice Barwick (former Liberal) without permission who advised Whitlam should be dismissed.
- 11 November 1975 Kerr dismissed Whitlam under s.64 & asked Fraser to form caretaker govt until election – broke Westminster convention as Fraser had minority but formed govt in HOR.

7. Roles & Powers of the PM and Ministry

Executive: day to day running of govt, executes laws passed by legislative & supports judiciary in enforcing law.

Constitutional Executive: The Queen and Governor General as her representative.

Political Executive: Prime Minister and Cabinet.

Administrative Executive: Public Service & Political Advisors.

Ministry: the collective term for all govt ministers, divided into inner (Cabinet) and outer ministry.

Ministerial Responsibility: role of each minister is dependent on the department they're responsible for.

Roles of a Minister:

- Manage portfolios.
- Attend Cabinet meetings.
- Publicly support Cabinet decisions (Cabinet Solidarity).

Cabinet (Inner Ministry): the "engine room of govt", executive decision making, consists of PM & Senior Ministers.

Roles of Cabinet:

- Creates government legislation.
- Sets policy agenda.
- Arbiter (peacemaker or judge).
- Crisis Management e.g. Flood Levy 2010-2011.

Kitchen Cabinet:

- When a PM makes a major decision alone (acts presidentially) or after consulting few Cabinet supporters and presents the decision to Cabinet as a "fait accompli."

Outer Ministry: Ministers w less major responsibilities (portfolios are subsidiary to Cabinet Ministers).

Prime Minister:

- Leader of executive body who determines govt policy.
- Not in the constitution – power & role evolved by a means of convention.
- Must command majority in HOR & act "first among equals" or "primary inter pares" within Cabinet.

Roles and Powers of the Prime Minister:

- Patronage – ability to select & dismiss ministers allows PM to "handpick" loyal team e.g. Howard Cabinet unified.
- Controls policy and administration of government.
- Power to choose election dates, gives PM leverage over Opposition.
- Public face of government.

Limits to Prime Ministerial Power:

- Choosing ministers doesn't guarantee obedient team e.g. 2015 Abbott disposed of as PM as lacked support.
- Lack of majority in the Senate may act as a barrier against PM power e.g. failure of the supply bills in 1975.
- GG reserve powers may be used against PM e.g. section 64 GG may appoint/dismiss ministers.
- Courts act as a constitutional interpreter & may be a barrier to PM objectives.

8. Roles & Powers of the Opposition

Opposition:

- 2nd largest party in HOR following a federal election, alternative govt, established by conventions to oppose govt.

Roles and Powers of the Opposition:

- Provides alternative govt.
- Keeps executive govt accountable through checks & balances.
- Uses media to criticise and undermine govt.
- Call for Quorum – delay govt business & frustrate govt.

Roles of the Opposition Leader:

- Alternative PM.
- Chairs weekly meetings.
- Selects Opposition MHRs & Senators to be shadow ministers.

Shadow Minister: member of Opposition w a portfolio that corresponds to a govt minister.

Strengths: censure motions/motions of no confidence, blocks govt legislation, controls the Senate.

Weaknesses: govt can gag, guillotine or floodgate bills, Question Time avoided by Dorothy Dixers, lack of funding.

9. Roles & Powers of the High Court:

The High Court:

- Highest court of Australia with original jurisdiction over interpreting the constitution.
- Resolves conflicts “ex post facto.”
- Is a Chapter 3 Court meaning it has the power to amend the constitution & make legally binding decisions, proven in **Brandy’s Case** which ruled only CH3 courts under s.71 could make legally binding decisions.
- Currently Chief Justice Kiefel.

Appointment of Judges:

- Consultation w state or territory attorney general.
- Law societies & universities also approached.
- Different to USA where President nominates & Senate approves.

Appellate Jurisdiction: the power to review & reverse decisions of lower courts under section 73.

Original Jurisdiction: the power of a court to hear cases in the “court of first instance” under section 75/76.

Common Law Decision:

- **Mabo 1992** – Mabo challenged Terra Nullius meaning land regarded as “unoccupied”. High Court ruled in favour recognising land rights under common law by abolishing Terra Nullius. Parliament codified 1993.
- **Norrie 2014** – Sought to be registered under Births, Deaths & Marriages Act 1995 (NSW) as non-specific sex but Act did not allow, so appealed to NSW Court of Appeal declaring assignation to non-specific. NSW Registrar of Births, Deaths & Marriages applied for special leave to High Court to appeal (s.73) against decision. High Court created new common law recognising male, female & non-specific gender.

Constitutional Decision:

- **Tasmanian Dams 1983** – High Court prevented Tasmania from damming the Gordon-Below-Franklin River as it was unconstitutional per the external affairs power section 51(29). Tasmania lost its powers over land and rivers as the High Court created constitutional law – the World Heritage Conservation Act 1987 (thus impacting BOP).
- **Uniform Tax Cases 1942 & 1957** – During WW2 the commonwealth didn’t have enough revenue to cover the cost of war so temporarily transferred concurrent powers of income tax to an exclusive power. This became non-reversible and commonwealth became the sole keeper of the income tax.

Section 71: Establishes the High Court and other Chapter 3 Courts.

Section 72: Appointment, tenure & remuneration of judges; dismissed at 70 or if proven misbehaviour/incapacity.

Section 73: High Court has appellate jurisdiction over past High Court decisions & Federal/State Supreme Courts.

Section 75: High Court has original jurisdiction over foreign treaties.

Section 76: High Court has additional original jurisdiction over interpreting the constitution.

10. Australia vs USA Comparative Study

Similarities:

- Both are Federal systems containing a federal and state government.
- Both have written constitutions.
- Senators in both countries have a 6 year term.
- Both Cabinets meet secretly and aren’t subject to public scrutiny.

Differences:

Australia:

- Constitutional Monarchy.
- PM chosen by elected party members in HOR.
- HOR members serve 3 years.
- Compulsory voting.
- Minimalist Constitution
- Legislation requires approval by GG Royal Assent.

USA:

- Republic
- President elected directly by people.
- HOR members serve 2 years.
- Voluntary voting.
- Maximalist Constitution.
- Legislation requires approval by president.

11. Reform Proposal to Change the Constitution

- A proposal recognising Aboriginal Australian's in the constitution.
- Requires the success of a referendum under section 128 of the constitution.

Elements of Change:

- A statement acknowledging Aboriginal & Torres Strait Islanders as the first Australians.
- Abolish the race power under section 51(25).
- Amend section 116A to remove implications of racial discrimination.
- Remove section 25 which contemplates exclusions from voting based on race.

Likelihood:

Likely?

- History of progress w Aus aiming to reconcile & apologise for the 19th century massacres caused by the convicts.
- Native Title recognised under Mabo 1992 which was codified by Parliament in the Native Title Act 1993.
- 1967 Aborigines Referendum received the highest "yes" vote in history (90.8%).
- 2008 Kevin Rudd's Sorry Speech.
- 2019 Indigenous Affairs Minister Ken Wyatt said referendum within 3 years "Morrison govt is committed".

Unlikely?

- Lack of political support with the Uluru Statement making ex-PM Turnbull reluctant.
- Difficulty of passing a referendum – often double majority too high a hurdle w only 8/44 successful ever.

12. Contemporary Issue Relating to Political Power

Senate Voting Reforms 2016:

- Reforms would allow voters to cast at least 6 preferences above black line on Senate ballot, rather than requiring voters to full in all boxes below the line.
- Reforms would prevent Senators from making backroom deals in regard to allocation of votes, and as a result, as a voter you could know where your vote was going.
- Greens supported, arguing current system is "like a lottery" & preference deals are "distorting democracy".

Arguments for Reform:

- Peoples votes go directly to the party they vote for, removing re-allocation of votes.
- Beneficial because elected parties in Senate will actually represent will of the people & no more biased results such as Greens having 24% of primary vote but only receiving one seat.

Arguments against Reform:

- Reforms would make it difficult for micro parties/independents to gain seats, acting as evidence for the Decline of Parliament Thesis (parliament fails to uphold functions & acts as a rubber stamp).
- With less representation of minority groups, there is less scrutiny of govt action & more executive dominance.

13. Contemporary Issue Relating to Legal Power

S.44 Eligibility:

- S.44 prohibits MPs from having an allegiance to a foreign power.
- High Court ruled that this implied if MP held dual citizenship must take "reasonable steps" to renounce.
- Citizenship Seven – group of high-profile figures like Deputy PM Barnaby Joyce breached section 44.

Ambiguity:

- High Court forced to interpret using additional original jurisdiction under section 76.
- Took a literalist approach as made decision without acknowledging issues it would cause parliament.
- However, could've taken activist approach & saw section implemented w fears of defending Australia's empire.
- As a result, November 2017 saw several resignations as parliamentarians recognised dual citizenship e.g. Liberal MP Alexander cost LNC its majority and a new election had to be called.
- In total, 15 sitting politicians were ruled ineligible.

1. Accountability of Commonwealth Parliament

- The requirement that all public officials should be directly and indirectly answerable to the people.
- Westminster type democracies like Australia have an accountability process called the chain of responsibility.
- Mechanisms of accountability aren't perfect but do ultimately work as in non-democratic places they don't exist.

(1) Elections:

- Highest method of accountability as citizens can directly express their will to effect composition of parliament.
- Elections are procedures allowing eligible citizens to hold elected officials to account for previous term in office.

Electoral Laws:

1. The Australian Electoral Commission acts as an independent statutory authority & coordinates the election.
2. Preferential system in the House of Representatives and Proportional system in the Senate.
3. Voting is compulsory.
4. Section 28 mandates a maximum 3 year term for the House of Representatives.
5. Section 7 mandates a fixed 6 year term for the Senate.

Elections in the House of Representatives (The Peoples House):

- Preferential voting system (50%+1) adopted in 1919, "majoritarian", based on single member electorates.
- Generally, creates a two-party preferred system with strong, stable government.
- **Craig Thomson 2013 Election** – Former head of Health Services Union found to be misusing union funds to pay for prostitutes, suspended from ALP, sat as cross-bencher, but lost his seat in the 2013 election.
- **Tony Abbott 2015** – Former PM lost position in 2015 but he gained position of Warringah. However, 2019 he was voted out due to constant comments on SSM & climate change.
- **Strong Accountability** – direct link between voters & representatives, shorter term, decisions transparent.

Elections in the Senate (The States House):

- Proportional representation voting system adopted in 1949, gives voice to diversity, multi-member electorates.
- Creates a hostile Senate (only 4 friendly Senates since 1949).
- **Lisa Singh 2016 Election** – ALP Senator from Tasmania demoted to ALPs group ticket unwinnable position. She mounted a "below the line campaign" & succeeded in getting a quota & winning a seat. She was the first Senator elected from below the line since "above the line" option was introduced in 1984.
- **Malapportionment:**
 - The uneven weighting of voting power occurs when seats contain different numbers of electors.
 - **The number of voters required for a Senator in NSW is 345,000 but in Tasmania it is 26,000.**
 - Voters in large states can't hold powerful small-state Senators to account as can't express vote outside state.
- **Group Ticket Voting:**
 - Voting above the line gives parties power to decide which candidates get their preferences e.g. **2013 election Ricky Muir gained a seat for the Australian Motoring Enthusiasts but only had 0.15% of the vote.**
- **Weak Accountability** – 95% vote above the line allowing parties to decide their preferences, malapportionment, 6 year term too long.

(2) Privileges Committees:

- Formed in each house to hold MHRs & Senators accountable for conduct & use of parliamentary privilege.
- Act like "courts within parliament" as can sanction a member found to have breached privilege.
- Consists of members who judge other members – lacks impartiality from an independent body.
- Effectiveness breached by partisanship as any breach of privilege will be newsworthy.
- **Craig Thomson ALP Backbencher** – breached privilege as made statement naming members of Health Services Union claiming they set him up, he was reprimanded, but only in 2016 when he was already out of parliament.
- **Types of Standing Committees:**
 - House Standing Committee of Privileges & Member's Interests.
 - Senate Standing Committee for Privileges.
 - Senate Standing Committee for Senator's Interests.

Parliamentary Privilege:

- Protection against defamation – protects MPs from civil/criminal liability for comments they make in parliament.
- Is an "enhanced form" of freedom of speech.
- Privilege needs to be held accountable so that it doesn't become a license to say anything.

- Courts/law can't impose sanctions for abuse of privilege, only privileges committees can.
- Sanctions don't consist of prosecution/banning but do consist of Hansard (public scrutiny holding accountable).
- **Bill Heffernan 2002** – Made speech about Justice Kirby having used Commonwealth vehicle to collect prostitutes, Privileges Committee checked & found documents had been fabricated, Heffernan censured for abuse of privilege.
- **Derryn Hinch 2016** – Named paedophiles in maiden speech, Privileges Committee received complaint from school claiming damaging effects on teacher who was named, committee suggested response incorporated w Hansard.

Registrar of Interests:

- List of all properties, financial resources & gifts owned and given to MPs.
- Maintains transparency & openness about financial interests.
- Investigates any conflicts of interest – no bribes or corruption.
- HOR combines interest committee w privileges but Senate maintains two separate committees.

Evaluation:

- Can raise media attention to poor conduct of a minister, adding pressure.
- Those who breach privilege cannot be prosecuted or removed from parliament.
- MPs are unwilling to hold peers & colleagues accountable.

(3) Procedures & Processes of Parliament:

- Section 50 gives power to make “rules and orders” in both houses.
- Commonwealth follows Westminster tradition.

Standing Orders:

- Rules governing the conduct of all business in the HOR and Senate, binding on Parliamentarians.
- Govern conduct, orders of business, how motions are made & voted on and passage of bills.
- Outline due process – the proper way to conduct procedures.
- Enforced by presiding officers in each house – Speaker in HOR and President in Senate.
- **Limited Accountability:** can be suspended by majority vote, govt can manipulate due to executive dominance.

The Speaker:

- Presiding officer in the HOR who enforces Standing Orders.
- All MHRs are subject to the Speakers interpretations of Standing Orders.
- **Limited Accountability:** speaker appointed by vote in HOR where govt always wins vote, so speaker is open to partisan influence e.g. **2013-2015 Bronwyn Bishop ejected 400 MHRs under Order 94A (only 3 were from govt).**

The President:

- Presiding officer in the Senate who enforces Standing Orders.
- All Senators are subject to the Presidents interpretations of Standing Orders.
- **Strong Accountability:** president often more impartial than speaker due to limited executive dominance in Senate & presidents consequentially less open to partisanship.

Hansard:

- All debates in both chambers recorded & published online, available for all to see.
- **Fraser Anning maiden speech comments referring to “final solution” for immigration recorded in Hansard.**
- **Strong Accountability:** public can see what happening & everyone can access debate.

Matters of Public Importance (MPI):

- Parliamentary procedure that allows members to speak in parliament about current issues if they have not been raised in another discussion or bill, requires the support of 8 MPs.
- MPIs can highlight mismanagement of a matter, putting pressure on govt to address the issue.
- **2018 Senator McKim raises discussion of refugee offshore detention.**
- **Strong Accountability:** speaking on an issue in parliament can put it on public agenda & may lead to govt action.

Parliamentary Committees:

- Subset of parliamentarians formed into a group, covering a particular specialisation.
- Committees are essential for parliament to carry out its functions effectively.
- Purpose to debate legislation, represent public interests, investigate issues & scrutinise govt.

- Less partisanship & provides community with greater access to parliament.
- May be standing committees (formed when parliament is first established post-election to last duration of parliament) or select committees (formed for a particular purpose & dissolved after purpose is achieved).
- **Types of Committees:**
 - House Committees (consist of MHRs) e.g. **Health Committee**.
 - Senate Committees (consist of Senators) e.g. **Foreign Affairs Committee**.
 - Joint Committees (consist of members from both houses) e.g. **Joint Committee on Human Rights**.
- **Joint Committee on Human Rights:**
 - Established by the Human Rights Act 2011.
 - Scrutinises legislation for compliance with international human rights agreements.
- **Strong Accountability:** keeps parliament accountable & ensures parliamentarians carry out actions properly.

(4) Judicial Review:

- The power of the judiciary to check & balance the power of the legislature, courts holding parliament to account.
- Involves the High Court's original jurisdiction under sections 75 and 76.

Reviewing the Constitutionality of Legislation:

- High Court has the power to declare parliament statutes as "ultra vires" (beyond constitutional powers).
- Statute to be brought before High Court for review, otherwise is unchallenged legislation & stand as a valid law.
- Parliament may abrogate court decisions e.g. **Wik Peoples v Queensland 1996 decision abrogated**.

Williams v Commonwealth of Australia 2014 (2):

- Williams challenged constitutionality of using s.51(23A) to pay as it didn't directly benefit students.
- High Court ruled Gillard govt acting ultra vires. Abbott & Turnbull govts forced to use s.96 tied grants.

JTI & BATA v Commonwealth 2012:

- Govt passed manifestly good legislation banning plain packaging, challenged by international tobacco companies based on intellectual property rights. High Court upheld legislation as commonwealth had no personal monetary gain and section 51(31) could not be applied.

Statutory Interpretation:

- CH3 courts apply rules of interpretation to adapt/change Acts so they remain current & deliver just outcomes.
- Statutes need to be interpreted as may be out of date, poorly drafted & inconsistent with other Acts.
- Parliament may intend this when creating acts by using broad language.

Strong Accountability: courts strike down ultra vires law, frequent interpretation of statutes shows parliament isn't doing job effectively, however, parliament may abrogate and to be reviewed, statute must be challenged in HC.

2. Accountability of the Commonwealth Executive

Executive: arm of govt that carries out the law & makes policy on how the law is implemented.

Constitutional Executive: The Queen and Governor General as her representative.

Political Executive: Prime Minister and Cabinet.

Administrative Executive: Public Service & Political Advisors.

(1) Public Servants:

- Appointed, unelected officials who provide administrative services to the executive arm of government.
- Employed under Public Service Act 1999 and each department is led by a minister
- In theory meant to be absolved from public scrutiny but in reality, are scapegoats as take blame for ministers.
- **Roles:** administer government policy & legislation, give "frank and fearless" advice to Ministers, are subordinate to elected government and are politically neutral.
- **Jack Walker 2016** – Apart of the "budgie nine" who would travel to places & strip in public. As a result of their arrest in Malaysia, Walker quit his job in Christopher Pyne's office.
- **Weak Accountability:** too powerful as are unelected, hard to be held accountable by the people.

(2) Ministerial Responsibility:

Individual Ministerial Responsibility:

- Specific to individual behaviour, minister is held accountable for probity/propriety & conduct of their portfolio.
- Ministers resign when become political liability – PM decides if cost of keeping minister (negative media publicity) exceeds cost of forcing their resignation (conceding points to opposition).

- Media, parliament & public can pressure resignation but only PM can accept.
- Ministers may blame public servants, making them a scapegoat to avoid IMR.
- 2017 Susan Ley resigned after investigation into her travel expenses.
- **Conventions:**
 - Ministers are accountable to parliament for their department's actions – propriety (Bronwyn Bishop 2000).
 - Ministers are accountable to parliament for their own actions – probity (Joel Fitzgibbon 2009).
 - Ministers who are censured by a majority vote in the HOR should resign.
- **Censure Motions:**
 - No legal power display of disciplining a minister for incompetence, corruption or portfolio problems.
 - Successful censure motion requires the minister to resign.
 - HOR censures often defeated on party lines due to executive dominance.
- **Weak Accountability:** if PM doesn't act minister doesn't have to resign, media/opposition don't have power to force resignation, censure motions defeated due to executive dominance, public servants used as scapegoats.

Collective Ministerial Responsibility:

- Affects the entire executive team, achieved by a motion of no confidence.
- However, in practice, govts dismissed via elections.
- Last govt to fall via vote of no confidence was Fadden's United Australia Party 1941.
- Motions of no confidence used by opposition in HOR to highlight problems and scrutinise govt, takes precedence over all other business, but govt will usually win due to executive dominance in the HOR.
- **Conventions:**
 - Govt is selected, can be dismissed & will be scrutinised by parliament.
 - Ministers must publicly agree & support Cabinet decisions, or otherwise resign.
 - The executive stands and falls together (Cabinet Solidarity) & presents a "united front" to parliament.
 - Stuart West (1983) Immigration Minister resigned from Hawke Cabinet as he couldn't support Uranium mining (although, reappointed to Cabinet in 1984).
- **Weak Accountability:** motions of no confidence unsuccessful despite opposition being able to scrutinise.

(3) Executive Committees:

Senate Estimates Committee (SEC):

- 8 legislative and reference committees that investigate the budget cycle & scrutinise the executives spending.
- Held 3 times a year and recorded in Hansard.
- Has the power to call witnesses, give evidence and require production of documents.
- Ministers do not have to attend, but if they don't it appears they have something to hide.
- In theory intended to scrutinise executive spending but in practice scrutinises all govt operation.
- 2016 Larry Marshal from CSIRO held to account for cutting 350 jobs including climate change scientists (media).
- **Strongest Executive Accountability Mechanism:** can scrutinise all govt activity without executive dominance, can make recommendations across party lines, conducts transparent hearings but cannot reverse govt decisions & MHRs aren't directly questioned.

Parliamentary Joint Committee on Human Rights:

- Standing committee that scrutinises all legislation introduced in parliament with regards to its compatibility with international covenants and conventions which Australia is bound to, established by Human Rights Act 2011.
- Publishes a scrutiny report alerting parliament to any human rights concerns that are discovered.
- Consists of 5 MHRs and 5 Senators & ministers are ineligible to prevent executive dominance.
- **Strong Accountability:** scrutiny report allows for bills to be assessed against human rights standards & prohibition on ministers being members makes committee independent from executive agenda.

(4) The Commonwealth Auditor General and Administrative Appeals Tribunal:

Auditor General:

- Independent officer who gives parliament assessment of select areas of public administration (AG Act 1997).
- Currently Grant Hehir supported by Australian National Audit Office (ANAO).
- Conducts performance audits (everyday business of govt), financial audits (financial records of govt) and assurance reviews (ensures govt complies with relevant law, regulations and policies).
- Australia spends \$700million on domestic violence campaigns to curb domestic violence, granted by Hehir.
- **Strong Accountability:** scrutinise govt as can access documents/info, invites govt to assess where they went wrong, however, has no scope to punish anyone and has no legal power.

Administrative Appeals Tribunal:

- Provides independent merit reviews of administrative decisions made by govt.
- Created by the Administrative Appeals Tribunal Act 1975.
- Cheap, quicker and less formal than courts.
- Hold govt departments – public servants & minister who manages – to account.
- Can only review administrative decisions, deals w misuse/abuse of administrative power & deals with failure to provide fair processes.
- **Penis Case 2014** – 2012 Centrelink decided not severe enough for pension, AAT ruled in Centrelink's favour.
- **Kashkooli 2016** – Iranian citizen answered "no" to criminal convictions in Aus citizenship application despite being convicted so citizenship denied, AAT held original decision.
- **Strong Accountability:** powerful check & balance on govt, has broad jurisdiction, provides independent judicial review, less formal than courts so easy to access however, can only review decision if party is in dispute w them.

(5) Judicial Review:

- The power of the judiciary to check & balance the power of the executive, courts holding govt to account.
- **Writs of Mandamus:** court order requiring govt official to carry out specific action under section 75(5).
- **Injunctions:** court order preventing govt department from carrying out a specific action.
- **Williams v Commonwealth 2012 (1):** Williams successfully challenged constitutionality of National Schools Chaplaincy Program. High Court found that s.61 didn't permit executive to fund Program without legislation so Gillard passed new laws. Gillard accountable for misconduct.
- **M70 Case 2011** – High Court saw Migration Act said executive couldn't send refugees to country that didn't protect rights as Malaysia hadn't signed human rights agreements. Gillard criticised the decision (SOP).
- **Strong Accountability:** powerful check on govt, independent judiciary so impartiality, however can only review decisions if party is in dispute with them.

3. Accountability of the Governor General

- GG is Queen's representative at commonwealth & carries out Queen's functions on her behalf.
- Section 2 says GG is appointed by Queen & subject to Queen's pleasure (5 years by convention).
- Section 61 establishes executive power of the GG.

Mechanisms of Accountability:

- By convention, PM makes recommendation to Queen which she will accept by convention.
- Ability to of PM to select GG allows them to appoint values similar to that of government.
- **Peter Cosgrove 2014 military service reflected importance of conservative values to the Liberals.**
- Constitutional mechanisms limited as gives significant powers as shown in 1975 dismissal.
- Westminster Conventions e.g. **Cosgrove completes term after 5 years, cannot maintain role indefinitely.**
- Public expectations & scrutiny e.g. **Hollingsworth Affair 2003.**

1975 Whitlam Dismissal:

- "1975 exposed contradictions inherent in Westminster combination of a codified constitution that says one thing and a set of conventions that say something quite different" – Fenna.
- 1970s Gough Whitlam introducing domestic reforms such as abolishing uni fees & introduce medibank which required large funding during a time of economic struggle.
- Hostile Senate blocked appropriation bills, breaking Westminster convention that Senate to always pass supply (s.53 says Senate may not amend money bills).
- Whitlam allowed Kerr to interview Fraser, GG broke Westminster convention by failing to act on advice of PM.
- Kerr concluded if Whitlam couldn't secure supply or call election he would be dismissed.
- Kerr met w Chief Justice Barwick (former Liberal) without permission who advised Whitlam should be dismissed.
- 11 November 1975 Kerr dismissed Whitlam under s.64 & asked Fraser to form caretaker govt until election – broke Westminster convention as Fraser had minority but formed govt in HOR.

Aftermath:

- Gordon Scholes Speaker of HOR wrote letter to Queen expressing concern over GGs use of reserve powers, Queen replied saying GGs actions appropriate & that it wouldn't be appropriate if she intervened.
- Neither state nor federal Labor politicians accepted legitimacy of Kerr in office of GG.
- Kerr and family attacked by Whitlam supporters, due to attacks Kerr forced to resign in 1977.

2003 Peter Hollingworth Affair:

- Closest GG to be removed from parliament.
- Forced to resign after public/media scrutiny as didn't properly deal with 2003 child sex abuse allegations against a priest during his time as Archbishop in Brisbane and after allegations that he raped a woman in the 1960s.
- PM Howard supported Hollingworth but other senior ministers like Peter Costello didn't.
- GG accountable for personal propriety & needs to be a figure of national unity which Hollingworth wasn't.
- Resigned 25 May 2003 after apologising to victims and condemning actions of paedophile priest.
- Arguments still remain that he should lose his \$600,000 pension.

Office of the Governor General:

- GG established in 1901 under Governor General Act 1974, leading to statutory Office established in 1984.
- Official secretary should be transparent & politically neutral.
- Must supply reports annually to parliament about programmes and budgets.
- [Kline \(2013\) freedom of information documents requested from GG & High Court disallowed documents, showing office of GG is being held to account.](#)

4. Accountability of the Courts

Common Law: laws passed over time by the judgements of courts, "ex post facto law".

Precedent: Judges look back to past similar cases made by higher courts to determine the law & consequences.

Ratio Decidendi: the courts judgement, the final decision of a case, the common law.

Court Hierarchy: ranked order of courts, w High Court at the apex (s.73, s.75, s.76).

Mechanisms of Accountability:

- Based on "self-accountability" meaning the judiciary holds itself to account.
- Main mechanisms are internal to the judiciary – appeals, transparent processes & public confidence.
- May be external but due to judicial independence its difficult – parliamentary scrutiny & censure of judges.
- Clear, high expectations of judges – independent, competent and impartial.

(1) Appeals:

- A review of a case by a higher court, allow checks & balances and hold lower courts accountable for decisions.
- Judges reputations damaged for making decisions that are often reversed by appellate courts.
- Appeals may only occur on a basis of lack of evidence, misapplication of law/precedent or judge management.
- Expensive, time consuming & requires special leave to be granted (only 5%).
- High Court has ultimate appellate jurisdiction under section 73.

[Andrew Mallard 2005:](#)

- 1994 convicted by Supreme Court of murder, lost appeal & spent 12 years in jail.
- 2005 High Court holding ultimate appellate jurisdiction under section 73 reversed the decision.
- Appeals process holding court's decisions accountable and discovering a miscarriage of justice.
- Led to Criminal Appeals Amendment Bill 2019 giving automatic right to second appeal if new evidence emerges.

[Eddie Mabo 1992:](#)

- Appealed Queensland Supreme Court decision that didn't recognise Native Title.
- High Court found claims to land that pre-dated colonisers, overturning previous decision & set new precedent.

Evaluation: Powerful check on quality of court decisions & judges whose decisions regularly reversed face consequences. However, expensive and time consuming (only 5% get granted special leave).

(2) Transparent Processes & Public Confidence:

Natural Justice:

- Court processes are designed to ensure fair trial and due process.
- Impartial adjudicator, each side must present case, decisions to be based on evidence, hearings open and transparent except in exceptional circumstances (children).

nemo iudex in causa sua: no one should judge their own case:

- Impartial adjudicators – judges and jurors must be independent and impartial.
- Judges are bound to follow precedent.

- Judges must remove themselves if there is a conflict of interest.
- Jurors must declare any reason why they shouldn't be chosen e.g. if related to party of the case.
- Failure of judge to recuse themselves or juror to declare relations results in grounds for appeal.

audi alteram partem: hear both sides of a case:

- Ensures procedural fairness.
- Adversarial trial processes are designed to give equal opportunities to both sides in a dispute.
- Failure of a judge to ensure a fair trial results in grounds for appeal – court may order retrial or reverse decision.

strict evidence based decisions:

- Inadmissible evidence includes hearsay, opinion evidence & irrelevant evidence.
- Judge must “charge the jury” by instructing which evidence they may consider and which they must disregard.
- Failure of a judge to apply rules of evidence or “charge the jury” correctly results in grounds of appeal.

Public Hearings:

- All court proceedings are open to the public and media.
- Anything withheld is for the safety of a witness particularly young people or national security intelligence.
- Ensures the public have confidence in administering justice as courts apolitical & judges impartial to populism.
- **Public confidence in High Court is about 61% compared to 28% in federal parliament.**

Evaluation: Failure to maintain processes results in appeal, so strong check on judicial power, and public confidence allows the judiciary to be directly accountable to the people.

(3) Accountability of Judges by Censure and Removal:

- Section 72 is the only constitutional means of accountability for federal judges.
- Section 72 forms the basis of judicial independence – executive appoints judges, judges pay can't be reduced, GG in joint sitting (s.57) must approve the removal of a judge on grounds of misbehaviour/incapacity.

Censure and Removal:

- Removing a judge threatens judicial independence so happens rarely – **1989 Justice Angelo Vasta only superior court judge to be removed (easier than other states as Queensland is unicameral).**
- By convention, parliamentarians shouldn't criticise judges but in instances that they do, reduces public confidence that the decision is being made on actual case rather than on pressure from parliamentarians.
- Some cases result in sanctions e.g. **Neville Wran 25,000 for commenting on live trial that friend was innocent.**
- Some cases result in no legal consequence - **Turnbull (s.44) says he's sure Barnaby Joyce will meet requirements.**
- **Evaluation:** most powerful check & only constitutional way of judge accountability, but threatens independence.

(4) Parliamentary Scrutiny and Legislation:

- Due to independence of the judiciary, it is difficult for external agencies to hold it accountable.

Traditional Accountability:

- Parliamentary sovereignty means any statute passed by parliament has precedence over common law, except in constitutional cases.
- Parliament may abrogate common law decisions e.g. **Wik 1996 (pastoral leases may exist under native title).**
- Judges decisions are bound to statute law making them accountable to the democratic will of parliament.

Mandatory Sentencing:

- Limits judicial discretion, goes against judicial independence, but reflects community opinions.
- Courts held accountable for not sentencing criminals according to community sentencing.
- Judicial discretion is the freedom of a judge to decide appropriate outcome for a case within bounds of law.
- Laws in WA & NT force judges to jail offenders regardless of severity & circumstance of crime.
- **Staskos 2016** – sentenced to 12 months in jail after biting police officer due to mandatory sentencing laws.

Attorney General:

- Highest legal officer in federal government.
- Cannot directly interfere w court process but scrutinises lower courts whose decisions are frequently reversed.

Evaluation: Ensures democratic parliament holds judiciary accountable however threatens independence & SOP.

5. Human Rights

- Fundamental, universal rights & freedoms entitled to every individual because they are human.
- Also known as rights of the individual against the state.
- Aus Human Rights Commission states human rights must be “shared across cultures, religions & philosophies”.
- Universal (everyone), Interdependent (all enjoyed), Indivisible (not ranked) & inalienable (not separated).

First Generation or Negative Rights: Require no action from govt to exist e.g. basic political/civil rights & freedoms.

Civil Rights: Protection from discrimination e.g. freedom of speech.

Political Rights: Enable participation in democratic govt e.g. right to vote.

Second Generation or Positive Rights: Require action from the govt to exist e.g. education.

Economic Rights: Minimum standard of living available to all e.g. minimum wage.

Social Rights: Ability to live life the way of personal choice e.g. freedom to choose marriage a partner.

Cultural Rights: Apply to specific cultural groups to protect tradition & preserve identity e.g. right to wear a hijab.

Third Generation Rights: Focus on self-determination such as native title e.g. Aboriginal ownership to the land.

An Overview of the Protection of Rights:

Superior Law (Constitutional Law):

- Constitutional rights are very secure as the constitution is very difficult to alter (section 128 via referendum).
- Protected by judiciary who abolish laws that breach constitutional rights under section 76.
- Binds all institutions – parliaments, governments and the courts (govt cannot violate constitutional rights).
- However, adding new rights/removing outdated ones is difficult & too much power given to unelected judges.

Ordinary Law (Statute and Common Law):

Statute Law:

- Laws made by elected parliamentarians, represents will of the people, parliament is sovereign.
- Flexible & easy to pass or amend statutes (worrying in instances of executive dominance).
- Reflects changing attitudes as is responsive to democratic influence.
- Independent judiciary helps protect.
- However, rights are less protected as can be easily changed, less likely to restrain govt as govt controls them.

Common Law:

- Judge made law, binds govts if they are a party in the case.
- Flexible & evolve on a case to case basis.
- Rights protection built into adversarial process – quality evidence, burden of proof, impartiality & equal opp.
- However, inferior to statute law & parliament may override, making them vulnerable.

International Law:

- Law made between nations or by international organisations.
- Creates consistency in human rights standards.
- On its own is unenforceable – only has moral force but no legal force.
- To become enforceable, it must be ratified into domestic law.
- **How international law is implemented into Australian law:**
 - 1. UN member states negotiate agreements on human rights.
 - 2. The executive arm of govt signs the agreements under section 61.
 - 3. The agreements are ratified into domestic law using the external affairs power section 51(29).
 - 4. The agreement must be implemented and enforced.

Bill/Charter of Rights:

- Either constitutional (Americas Bill of Rights 1971) or statutory (UK Human Rights Act 1998).
- Lists the most important rights citizens in a community have.
- Australia is the only true liberal democracy in the world that doesn't have a Bill of Rights at national level, although Victoria and ACT have one.
- However, Bill of Rights transfers power from parliament to courts (judicial supremacy) granting judiciary power to strike down laws that are incompatible with it.
- Rights are enshrined, but also difficult to change with changing attitudes.

Protection of Human Rights in Australia

- Australia resisted the codification of rights through a bill of rights.
- Australia has a mixed approach of incorporating constitutional, statutory, common & international law rights.

Constitutional Law:

- Constitution provides limited protection of rights as originated from UK system of parliamentarianism.
- The rights that are in the constitution are mainly to limit government.
- There are two types of rights in the constitution – express and explicit rights.
- There are 5 express rights (clearly stated) e.g. [section 80 right to trial by jury in federal indictable offences](#) and [section 116 freedom of religion, prohibits states from imposing religion on a person](#).
- High Court may find implied rights through drawing implications from the wording, intended by the drafters of the constitution but not made explicit e.g. [sections 7 and 24 right to vote, informed vote & political free speech](#).
- [Roach v Electoral Commissioner 2007](#) – High Court overturned law that removed right of Australian jail prisoners to vote, this was found to be unconstitutional as it breached the implied right to vote.
- [Australian Capital Television 1992](#) – High Court found govt statute banning tv & radio advertising was unconstitutional as it breached implied right to an informed vote.

Statute Law:

Australian Human Rights Commission AHRC:

- Independent organisation that enforces human rights through Human Rights & Equal Opportunity Act 1986.
- Only able to make recommendations to parliament but parliament isn't obliged to listen or take action.
- Created for dispute resolution – to hear complaints about human rights violations but High Court ruled against.
- Originally had judicial powers and could make legally binding decisions until Brandy's Case.
- [Brandy's Case](#) – High Court ruled Australian Human Rights Commission wasn't a chapter 3 court & couldn't exercise judicial power. This diminished power of AHRC & now people must seek resolution via normal courts.
- Despite this, AHRC can still administer laws such as anti-discrimination acts e.g. [Hickie v Hunt & Hunt 1998 found that failing to renew contract following maternity leave amounted to indirect discrimination under the Sex Discrimination Act 1983](#).

Parliamentary Joint Committee on Human Rights PJCHR:

- Established under the Human Rights Act 2011.
- Protects statute law as publishes scrutiny report to parliament alerting parliament to any human rights concerns & provides statement of compatibility that makes sure legislation is compatible w human rights standards.
- [Committee ruled that Australian Border Force Rule 2015 aligned with the right to privacy \(checks & balances\)](#).

State Law:

Human Rights Act 2004 (ACT):

- First Charter of Human Rights enacted in Australia.
- Protects 20 rights e.g. [the right to life in article 9](#).
- Any legislation passed by ACT must pass the statement of accountability.
- [Nona v R 2012](#) – found under s.22 of Human Rights Act Nona had right to trial without reasonable delay (14yrs).

Charter of Human Rights and Responsibilities Act 2006 (Victoria):

- Requires Victoria govt to act compatibly with 20 human rights when developing policies.
- Requires statement of compatibility to show how the law complies with rights.
- Parliament is sovereign over the charter and can issue "override declaration" but are accountable to it as must explain why it doesn't align.
- [Castles v Secretary to Department of Justice 2010](#) – plaintiff wanted to continue IVF while in prison which was rejected by Department of Justice. Victorian Corrections Act 1986 stated prisoners had right to treatment.

Common Law:

- Judge made law and protects rights through precedent (stare decisis).
- Changes on a case to case basis, adapting to new circumstances.
- Adversarial process aims to ensure justice, protecting rights.
- Protects legal rights e.g. right to fair trial, right to presumption of innocence & right to silence.
- [Mabo 1992](#) protected right to native title & [Dietrich 1992](#) protected legal right to counsel in indictable offences.
- Common law can be codified by parliament, protecting it further e.g. [Parliament codified Native Title Act 1993](#).

- However, common law is vulnerable to executive dominance who respond to pressure to be “tough on crime”.
- Also, common law suffers to parliamentary sovereignty e.g. [anti-terror legislation passed in 2001](#).
- New legislation (1) allowed convictions of “suspected” terrorists rather than “convicted” terrorists breaching right to presumption of innocence, (2) disallowed knowledge of evidence against them breaching right to fair trial and (3) allowed charge for not answering questions breaching right to silence.

International Law:

Covenant:

- Written agreement between international organisation & states, w aim of protecting human rights universally.
- In order to become legally binding, countries have to ratify into domestic law under external affairs s.51(29).
- [International Covenant on Civil and Political Rights \(ICCPR\) 1966](#).
- [Toonen v Australia 1992](#) – argued Tasmanian anti-gay laws breached privacy under article 17 of ICCPR. Keating govt passed Human Rights Act 1994 overturning Tasmania law using external affairs s.51(29).

Treaty:

- Written agreement between international organisation & states, w aim of protecting human rights universally.
- In order to become legally binding, countries have to ratify into domestic law under external affairs s.51(29).
- [Convention to Eliminate all forms of Discrimination Against Women \(CEDAW\) 1983](#) – Ratified into domestic law under Sex Discrimination Act 1984, but Australia placed two reservations on it, preventing women from armed combat & paid maternity leave.
- [Convention to Eliminate all Forms of Racial Discrimination \(CERD\)](#) – Ratified into domestic law under Racial Discrimination Act 1975, protecting cultural & religious rights of all citizens regardless of anything. A reservation placed on this treaty was that there is no jurisdiction that criminalises racial discrimination.

Protocol:

- Optional additional agreement attached to covenant/treaty to amend or supplement existing agreement.
- Not legally binding and must be ratified into domestic law to be legally binding.
- [Optional Protocol to Convention on Elimination of All Forms of Discrimination Against Women \(CEDAW\) 2000](#) – allows individuals and groups of women to make complaints, resulted in sex discrimination legislation passed.

Protection of Human Rights in USA

Constitutional Law:

- Has the oldest written constitution currently in effect since 1787.
- Contains a Bill of Rights – set of 10 amendments declared in 1791, additional 17 have been added.
- [Second Amendment 1791: the right to bear arms](#).
- [Nineteenth Amendment 1920: the right to vote for women](#).
- Rights fully entrenched & change very difficult – must pass 2/3 both houses & approved 3/4 state legislatures.

Express Rights:

- Supreme Court has jurisdiction to interpret constitution & can decide if a law is constitutional.
- [District of Columbia v Heller 2008](#) – Supreme Court ruled that a ban on handguns introduced in 1976 was unconstitutional as the ban interfered with the second amendment: right to bear arms.

Implied Rights:

- [Roe v Wade 1973 landmark decision](#) - US Supreme Court struck down Texas statute banning abortion as it was unconstitutional per the implied right to privacy under the fourteenth amendment. However, Alabama recently passed legislation banning abortion and it is yet to be challenged in the Supreme Court.

Statute Law:

- [Civil Rights Act 1964](#) grants equal rights regardless of race following a civil war discriminating African Americans.

Common Law:

- Follows adversarial system, precedent, and has most common law protections for legal rights e.g. [Roe v Wade 1963](#) struck down Texas statute banning abortion as violated right to privacy under 14th amendment.

International Law:

- USA & Somalia only two countries not to ratify [Convention on Rights of the Child](#) (no ratification since 2002).

6. Democratic Principles

- Democracy recognises individual rights & freedoms and limits power of govt through the rule of law.
- Based on popular sovereignty, known as “will of the majority” and “rule by the people”.
- Australia & USA share democratic philosophies due to being Western nations w roots to Athenian democracy and a shared colonial history exposing them to 18th Century Enlightenment ideas.

Political Representation: Principle that views & interests are present in policy making of govt – people are sovereign.

Australia:

Upheld:

- Fair (secret ballot & universal suffrage) and frequent (constitutional safeguards s.28 and s.7).
- Compulsory voting expresses will of majority (91.9% 2019 election vs 91.1% 2016 election).
- 2016 electoral reforms allow voters to preference parties, controlling where their votes go.
- Representation on rise e.g. 2010 Ken Wyatt first Aboriginal elected in HOR and 2019 first Aboriginal in Cabinet.

Undermined:

- Increase in voter disengagement especially in youth – 2016 more than half 18 year old’s not enrolled to vote.
- Malapportionment w smaller states over represented due to s.7 requirement of equal state representation.
- Executive dominance prevents PMBs and reduces representation of the minority.
- Lack of mirror representation e.g. women make up only 29.8% of parliament despite population being 50%.

America:

Upheld:

- Fair (secret ballot & universal suffrage) and frequent elections (President 4 years, HOR 2 years, Senate 6 years).
- First past the post voting where candidate that gets most votes is elected even if don’t get a majority.
- Senate voting reform changed from Senators appointed by state legislatures to elected by the people.

Undermined:

- First past the post voting reduces minority chances from gaining seats.
- Lack of mirror representation e.g. white men make up 35% of population but 60% HOR and 70% Senate.
- Citizens United Case 2010 ruled that no legal limits to donations made to parties or candidates, donations corrupt as money buys influence and limits transparency.

Popular Participation: Activity of making citizens voices, opinions & perspectives directly present in policy making.

Australia:

Upheld:

- 80% of young people signing up to political parties & 2018 Aboriginal Australians had an enrolment rate of 76%.
- Australia has a broad range of political parties (One Nation conservative and Greens progressive).
- Broad range of groups win seats: 2016 minor & micro parties & independents gained 23% of the primary vote.
- Pressure Groups influential e.g. 2015 Mackay Conservation Group blocked Adani Coal Mine.

Undermined:

- 500,000 people not participating in the vote.
- Increase in informal votes e.g. 700,000 informal in 2016 and 800,000 informal in 2019.
- Declining party membership – no party has more than 50,000 members despite Liberals having 200,000 in past.
- People barred from voting if prisoner w sentence of 3 years or more, unsound mind, not pardoned of treason.

America:

Upheld:

- Constitutional protections in first amendment such as right to participate in govt.
- Nineteenth amendment 1920 protects right to vote for women.
- Primaries & Caucuses system allows people to vote for candidates not just “party bosses”.
- Most Americans participate in pressure groups e.g. NRA National Rifle Association has 5.5million members.

Undermined:

- No US election in 20th Century has exceeded a 65% turnout.
- Electoral college distorts votes e.g. 2016 Clinton won popular vote but Trump won more electoral college votes.
- No minor parties gain seats in Congress.
- Citizens United Case 2010 allows sectional pressure groups to buy influence.

Rule of Law: All are subject to & equal under the law, regardless of difference, laws based on consent, involve consistent & accepted procedures & apply to all, called “the rule of laws, not of men” as restrains arbitrary power.

Australia:

Upheld:

- Separation of powers prevents executive having excess control e.g. [Williams \(1\) 2012](#).
- No one is immune to the law e.g. [Turnbull had to pay \\$250 life jacket fine despite being PM](#).
- Senate provides checks and balances and scrutinises executive power.
- Section 76 allows courts to keep a check on legislative & executive power e.g. [Williams 1 and 2](#).

Undermined:

- Parliamentary privilege shows MPs above the law, remedied by Privileges Committee e.g. [Ben Heffernan 2002 made speech about Justice Kirby using commonwealth vehicle to get prostitutes](#).
- Arbitrary detention of asylum seekers under [Migration Act 1958](#) – no legal limit to length of detainment.
- [Anti-terrorism legislation 2001](#) interferes w right to silence, presumption of innocence & right to fair trial.
- [2005 Mohammad Haneef suspected of terrorist association & detained without charge for 12 days](#).
- Access and equity issues with high level of Indigenous in prisons – [1/3 of Aus prisoner population is Indigenous](#).

America:

Upheld:

- USA has a stronger separation of powers as executive doesn't dominate the legislature.
- Bill of Rights very strongly enforces rights e.g. [15th amendment right to vote for African American men](#).
- Prohibits retrospective rights in Article 1 Section 9.

Undermined:

- USA anti-terror legislation limits presumption of innocence & right to know what you're charged against.
- [Guantanamo Bay detained terror suspects without charge and interrogated suspects without restraint](#).

Judicial Independence: the judiciary must be completely free of interference & influence from any person, including parliament and government, ensuring courts base decisions on the law and not on opinion.

Australia:

Upheld:

- Section 71 vests judicial power in the High Court and other Chapter 3 courts.
- Section 72 guarantees judicial independence as protects judges from arbitrary removal & reduction in pay.
- [Boilermakers Case 1956 and Brandys Case 1995](#) define judicial power as the principle that only Chapter 3 courts can make legally binding decisions.
- High Court cases legally binding on parties e.g. [Howards s.61 to fund Chaplains unconstitutional Williams 1 Case](#).

Undermined:

- GG and PM by convention appoint High Court Justices – fusion between executive and judiciary.
- Potential for appointments to be political e.g. [Murphy ALP Senator appointed by Gough Whitlam](#).
- Mandatory sentencing limits judicial discretion e.g. [Danielle Staskos sentenced 12 months despite no previous offences, for assaulting a police officer](#).
- Parliament can abrogate judge made law e.g. [Wik 1996 Case](#).

America:

Upheld:

- Article 3 states judges remain in power “during good behaviour”.

Undermined:

- Article 2 states President with advice of Senate appoints Supreme Court Judges – conflicts separation of powers as Presidents appoint judges w similar political ideology which may dominate legal system e.g. [2019 8 out of 9 Supreme Court Judges conservative](#).

Natural Justice: the right of all individuals to access due process of court proceedings, enabling them to argue their case before an unbiased judge and be judged by their peers in federal indictable cases.

- Right to a fair hearing of both cases audi alteram partem.
- Impartiality or rule against bias nemo iudex in causa sua.
- Basing decisions on evidence.
- Open and transparent courts.

Australia:

Upheld:

- Constitutional protections Section 80 right to trial by jury in federal indictable cases.
- Common law establishes legal rights e.g. **Mabo 1992 native title rights to indigenous**.
- Legal aid created by Dietrich 1992, providing representation for those who can't afford it.
- Adversarial processes ensure justice – impartial judge, rules of evidence, open courts creating transparency.

Undermined:

- Expensive, time consuming & formal process assuming both parties have equal resources but unequal in reality.
- Despite legal aid, wealthier will always have better legal representation.
- Higher proportion of indigenous Australians in prison after going through criminal justice system **1/3 indigenous**.
- Wrongful convictions still occur e.g. **Mallard 1995**.

America:

Upheld:

- Adversarial processes ensure justice – impartial judge, rules of evidence, open courts creating transparency.
- Legal Services Corporation 1970 established to provide legal aid to less wealthy.

Undermined:

- Expensive, time consuming & formal process assuming both parties have equal resources but unequal in reality.
- **Wall Street Journal states 30,000 civil cases delayed in federal court for over 3 years**.
- Wrongful convictions e.g. **2015 study showed 1 in 15 sentenced to death were innocent**.
- Anti-terror legislation e.g. **Guantanamo Bay**.

7. Changing Rights of a Particular Group

- The legal rights of the LGBTQI+ community have improved significantly since Federation.

Discrimination:

- Originally in 1901, Australia adopted UKs anti-homosexual laws.
- Homosexuality was punishable by death in Victoria.
- 1978 police arrested 53 people in the first gay & lesbian Mardi Gras Parade.

A Move Forward:

- By 1990 all 6 states decriminalised male acts of homosexuality.
- Laws overturned & challenged:
 - **Toonen v Australia 1992** – TAS law prohibiting same sex intercourse overturned.
 - **Norrie 2014** – challenged NSW Registrar of Births, Deaths & Marriages in High Court, with HC ruling in her favour creating new common law recognising male, female & non-specific gender.

Contemporary Day:

- 2016 police apologised for actions in 1978 Mardi Gras Parade.
- 2017 Postal Survey legalising same-sex marriage introduced & succeeded, amending Marriage Act.
- Currently 9 openly LGBTQI+ MPs in Federal parliament showing how far Australia has come in acceptance.