

# UNIT 4

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# The Accountability of Parliament

## PARLIAMENT AND ACCOUNTABILITY

### Parliament & Accountability Through Elections

An election is a procedure allowing eligible citizens to hold elected officials to account for their previous term in office, and to delegate popular sovereignty to elected officials for the next term of office. Elections are the most important of all accountability mechanisms for parliament because they are the only way citizens can express their will in a way that affects the composition of parliament.

Australia is a representative democracy which means that Australians vote to elect members of Parliament to make laws and decisions on their behalf. It is compulsory for Australian Citizens of 18 years and over to enrol and vote. It is also compulsory to attend a voting place on election day, or vote by mail.

### Electoral Laws and Procedures

1. Elections must be **free** from intimidation or influence by those seeking office
2. Electoral systems must follow a **fair** expression, the will of the majority and protect the rights of minorities
3. Elections must be **regular** and reasonably frequent

Australian electoral laws and procedures meet the above criteria in the following ways;

- An independent **statutory authority**, the Australian Electoral Commission, administers the *Commonwealth Electoral Act*, as well as others, and coordinates the running of elections. The AEC is an independent third party and means that elected officials cannot/do not run elections
- The *Commonwealth Electoral Act* specifies **preferential voting** for the House of Representatives, as it expresses the will of the majority (50% + 1). Hence resulting in a stable government reflecting the majority of the nation/citizens. The act also outlines that **proportional voting** must be used in the Senate (the States House). Proportional voting gives voice to the diversity of interests in Australia and allows for a more accurate representation of a wider social group.
  - **March 2016, the Senate electoral reform was debated to introduce optional preferential voting for Senate elections and to remove Group Voting Tickets (which allowed for preference deals). The new reform makes it harder for micro parties to be elected and minor parties will not be able to swap preferences in order to get elected. The proposal will see voters number 1-6 preferences only above the line rather than placing a '1'**
- The *Commonwealth Electoral Act* mandates **compulsory voting**. This ensures that the will of the majority can be truly expressed by those of age to vote.
- Section 28 outlines a maximum **3-year term** for members of the House of Representatives
- Section 7 outlines the maximum term for a senator being **6 years**, with half the Senate being re-elected every 3 years

### Electoral Accountability of the Commonwealth Parliament

Australian Parliament is bi-cameral, with two houses chosen by the people and held accountable through elections. The House of Representatives (the peoples house) set up in section 24 and the Senate (the states house) in section 7. However, each house is elected using a different electoral system, affecting the nature of each house's accountability.

## ***Electoral Accountability (IN THEORY)***

### Accountability for Parliament's Functions

The parliament is accountable for how well it performs its functions, therefore being accountable for;

- The statute laws it passes
- How well it deals with issues in debate and deliberation
- For forming and holding the government to account
- For how well it represents the people

### Accountability for the Roles of Each House

Both houses of Parliament have different roles. The House of Representatives is the house of the people and is where government is formed. The Senate is the States' house and acts as a house of review. Both houses are accountable for how well they perform these roles.

### **Parliament is held accountable through elections.**

### Electoral Accountability in the House of Representatives

The House of Representatives is created in section 24 of the constitution as the lower house of the Commonwealth Parliament. It is known as the people's house and forms government. This section states that House of Representatives elections must be held at least every 3 years, and it is the Prime Minister's decision to call for an election.

Each member of the House of Representatives is elected through the preferential voting system (PV). A system that;

- An order preference is given to each candidate
- Based on single member electorates. There are 150 seats in the House of Representatives and 150 constituencies. From each constituency one member is elected
- Favours a majoritarian system
- The party that receives an absolute majority forms government

### ***Single Member Electorates***

From each constituency (electoral division) a single member is elected into the House of Representatives, with there being 150 constituencies in Australia.

Single member voting systems such as that used in the House of Representatives (preferential) offer a very high standard of accountability as voters can easily identify their local MHR (as can the media). Because there is only one representative, it is easily identifiable who to hold to account if a voter is dissatisfied with legislation, debate or representation. Each member's position on issues, how they vote on bills and their record of speeches in the house are available to the public through the media. The media provides a constant stream of information about members and continually holds them to account for their actions.

- **Craig Thomson** was a former head of the Health Services Union before entering Parliament. Following his departure from the HSU and audit of the union's records found evidence of misuse of union funds by Thomson to pay for services of prostitutes.
- **Clive Palmer** who won the seat of Fairfax (QLD), was, in 2016 questioned in regards to how he was managing his company, Queensland Nickle, and its donations to his Palmer United Party. Polling leading up to 2016 election indicated a significant fall in voter support.
- **Sophie Mirabella** lost her seat in the 2013 election due to not sufficiently representing the interests of her electorate.

## Electoral Accountability in the Senate

Section 7 in the constitution creates the Senate as the upper house of Australian Parliament, as the upper house, the role of the Senate is to act as a house of review as well as being a house of the States.

Voters in States rarely consider their Senators as State representatives, instead think of them as partisans. Occasionally Senators such as the Nick Xenophon Team from South Australia, have strong State-based support as they are advocates for their state rather than acting as partisans.

Senators are elected for 6-year terms with half of the Senate being elected on a 3-yearly basis through the proportional voting system (PR). A system;

- Based on multi-member electorates whereby one's representation in Senate is a reflection of the votes they received/electoral
- All states have equal representation regardless of size (territories have less representation than States)
- Allows for minor party representation due to the nature of the system (easier to reach quota)

### **Multi-Member Electorates**

Proportional systems have multi-members per electorate. From the States, 12 members are elected and 2 from each of the territories totalling to 76 senators.

Elections of multi-member electorates are weak in accountability as there is more than one members to be held to account in each electorate. If there is to be a problem in one electorate, there is no way of knowing which senator the issues are due to as there are 12 elected per state. The frequency in which senators' face re-election can also reduce the likelihood that voters will be able to react to the (mis)conduct of a particular senator.

Accountability is further weakened by the complexity of the proportional voting system (due to the number of members on the ballot paper). There are two ways to vote for the Senate, either above or below the line, both of which are limited in terms of accountability.

By voting above the line, voters number the boxes above the line from 1-6 in order of preference. Through doing this the vote does not actually get to choose the actual person they are voting for, only the party. The candidate the party chooses to put at the top of the list is most likely to get elected.

Voting below the line requires filling in at least 12 of the boxes in order of preference, and hence deemed the more accountable of the two methods as it allows voters to know who they voted for and understand the allocation of their votes.

- **Bill Heffernan** NSW senator, appointed in 1998 and retired in 2016, served 20 years yet only faced the electorate twice. His personal and professional conduct throughout his time in parliament was not held to account due to the length of the electoral cycle
- **Lisa Singh**, a sitting member of the ALP from Tasmania, was demoted down the ALP's group ticket to an unwinnable 6<sup>th</sup> position in the 2016 election. She mounted a below the line campaign and succeeded in getting a quota of votes and hence a seat in the Senate.

## Parliament & Accountability Through Privileges Committees

### Privileges and Interest Committees

Parliamentary committees are an important part in the work of Parliament. There are three special standing committees whose particular focus is the accountability of the Members of Parliament themselves. They are;

- The House Standing Committee of Privileges and Members' Interests
- The Senate Standing Committee for Privileges
- The Senate Standing Committee of Senators' Interests.

### Accountability for Privileges

All Members of Parliament have special exemption from criminal prosecution or civil liability for anything they say in Parliament when Parliament is in session. Parliamentary Privilege is an enhanced form of freedom of speech, and its essential purpose is for Parliament to perform its functions properly.

To prevent the abuse of this privilege and to stop it from becoming a license to say anything, there must be some accountability for what is said under privilege. Parliament itself needs its own internal mechanisms to hold its members accountable because law and courts cannot exert or impose sanctions for a breach.

Privilege Committees act as 'courts within Parliament' and may sanction a member found to have breached privilege, and can, as a result, discipline Members of Parliament. Privilege Committees are composed of Members of Parliament judging other Members of Parliament. Hence meaning they lack the true impartiality of an independent body. Furthermore, their effectiveness can be compromised by bias.

- **Craig Thomson** was referred to the *House Standing Committee of Privileges and Members Interests* after his breach of parliamentary privilege

## Parliament & Accountability Through Parliamentary Procedures and Processes

There are no written constitutional rules for how each house is to conduct its business. Instead s.50 gives each house of Parliament the power to make its own 'rules and orders'- their own procedures and processes known as standing orders, enforced by the President/Speaker.

### Standing Orders (S.50)

The Standing Orders are the rules governing the conduct, order of business, how motions are made and voted on, the passage of bills and how to address the Speaker (in the House of Representatives) or the President (in the Senate). Standing Orders outline the procedures and processes for both of the chambers and guide the way they operate each day.

### The Speaker and the President

The Speaker is presiding officer in the House of Representatives (Tony Smith) and the President in the Senate (Scott Ryan) and have the role of enforcing Standing Orders in their chamber. Parliamentarians are bound by the Standing Orders and are subject to interpretations and rules of the Speaker/President during a session of Parliament.

Any parliamentarian may refer a matter to the Speaker/President. These 'points of order' require the presiding officer to interpret the Standing Orders and make a ruling. Each week or fortnight the House of Representatives publishes a Procedural Digest which contains all the rulings from the Speaker and any precedents set.



## Conduct of the Speaker and President

The Speaker in Australia is a political appointment. The House of Representatives appoints the Speaker by a vote, which the government of the day will always win. In practice, the appointment of the Speaker is right of the Prime Minister (as they are the head of government). Due to this, Australia Speakers are open to partisan influence and bias on how they do their job, including how they apply and interpret the Standing Orders when disciplining Members of Parliament.

- The individual character of the Speaker is a major factor in how they do their job in presiding over the House. Many argue that partisan bias was a feature of the Speakership of Bronwyn Bishop (2013-2015) when she ejected 400 MHR's from the house under Standing Order 94A; of these, only three were from government

The Senate is a more independent chamber, usually free of dominance by the executive. The Senate appoints the President by a vote, in which there is need for consensus (agreement) as to who is chosen. Consequently, Presidents of the Senate tend to be more impartial and less open to partisanship.

## Order of Business

Each house has its own agenda governing each sitting day. These are the procedures and timing of events during a sitting day and ensures business gets done in an orderly fashion.

The Senate runs its daily routine by the Order of Business ('the Red') and the Notice Paper that is published every day: it is the agenda for the Senate for a particular day. Senators wishing to participate in debate, move motions or take part in other formal proceedings must have their name entered on the Notice Paper. The President runs the Senate in accordance to the Notice Paper and Order of Business.

The House of Representatives has its own equivalent of the Notice Paper and Order of Business which the Speaker uses to run the house.

## Assessing Accountability by Procedures and Processes

### ***Standing Orders***

Standing Orders are the rules used to manage the work of the House of Representatives and the Senate. Along with the Australia Constitution (s.50) and customs that have developed over many years, Standing Orders guide the way the chambers operate each day and ensure that Parliament can function.

Standing Orders guide proceedings and define processes such as the way a bill passes through the House of Representatives or how amendments are voted upon or when a decision must be called. The President and Speaker act as referees in their respective chambers. Enforcing Standing Orders, making decisions when asked to make a judgement about the rules and delivers sanctions when Standing Orders have been broken.

### ***Hansard***

All debates in both chambers of Parliament and in committee proceedings are recorded and the edited transcripts of these debates are published after proceedings are concluded. Hansard provides accurate records of the debate that has taken place, which are published online and made available for anyone to see. In this way, Hansard provides accountability in Parliament.

### ***Matters of Public Importance (MPI)***

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

### Parliamentary Committees other than Privileges Committee

#### ***The Work of Parliament***

Parliament is composed of two house containing 150 elected representatives from divisions around Australia and 76 elected Senators from the States and Territories, totalling to 226 Members of Parliament who must legislate to create new statutes, amend old ones, debate issues and represent the people and hold government responsible.

Parliament works through the principle of 'division of labour' and 'specialisation' allowing Parliament to function efficiently.

A Parliamentary Committee is a specialised subset of the Members of Parliament. A committee has defined membership and a specific area of work to focus on.

#### ***Types of Parliamentary Committees***

There are different types of Parliamentary Committees based on;

- Membership
- How long they exist
- Purpose

#### **Membership**

Committees are composed of members of the current Parliament. They are formed by and within Parliament and must be dissolved when the Parliament is dissolved under S.28 or 57 of the constitution. They are formed by Parliament NOT the executive.

- Members of the House of Representatives from House committees
- Senators form Senate Committees
- Joint Committees have members from both houses

#### **Duration**

**Standing Committees** are formed when a Parliament is first established after an election. They endure the life of Parliament, being dissolved at the following election (when Parliament is dissolved)

**Select Committees** are formed for a particular purpose and dissolve when the purpose is achieved.

There can be both select and standing committees from both houses as well as joint.

#### ***Purpose***

All committees have a purpose. Their particular area of focus may be to inquire into legislation generally or to specialise in particular areas of legislation, to investigate a particular issue or to scrutinise the activities of government departments or agencies.

Committees also have a role in making sure that the Parliament is doing its job properly – committees hold Parliament and its members to account for their actions.

## **Accountability Value of Committees**

Parliament has four main functions. Committees enable Parliament to carry out these functions far more effectively than either of the two chambers (the House of Representatives and the Senate). Committees can focus on the job they have to perform and do so without worrying about partisanship like they would have to in the houses.

Committees take detailed submissions from the public and re-present them in recommendations to the Parliament. They seek out expert technical and legal advice when considering amendments to legislation, and even travel to regions in Australia to take into account local concerns. Ensuring that Parliament is being held to account and the people of Australia are being represented.

**Joint Committee on Human Rights** is an example of a committee with an accountability role. Its role is to scrutinise all legislation for compliance with seven key international human rights agreements by which Australia is bound to. Hence holds the legislative function of the Commonwealth Parliament to account for compliance with human rights.

**Scrutiny of Bills Committee** has assessed legislation for its effect on rights, the rule of law and Parliamentary propriety. It publishes reports to alert the Parliament of Bills it thinks are of concern.

## **Parliament & Accountability Through Judicial Review**

The Separation of Power is a key principle of democracy in Australia. In Australia, the Judicial Branch (the courts) have a strong separation from the legislative and executive branch. Due to the clear separation of the judiciary from the other two branches;

- The High Court can freely act as an accountability mechanism
- The High Court has the power to adjudicate the constitutional validity of parliaments statutes and declare them unconstitutional (ultra vires)
- The High Court can interpret Commonwealth statutes (s.76)

## **Reviewing Constitutionality of Legislation**

The High Court has the power to declare legislation unconstitutional (ultra vires). In order for legislation/stature to be reviewed it must be challenged by a party with standing and brought before the High Court. The High Court cannot judge if it is not brought to them – unchallenged legislation.

If a statute is challenged and the High Court judges that it is that it is beyond the constitutional powers of the Commonwealth Parliament then the High Court will strike it down. The law ceases to be valid in part or full in the Commonwealth.

Striking down statute is the ultimate accountability mechanism for the Parliament's legislative function. The High Court is the most powerful check on the legislative power of the Parliament.

- **Williams (no.2) 2014.** High Court struck down amendments to the Financial Management and Accountability act 1997 which authorised the payment of national school's chaplaincy program funds to the Scripture Union of Queensland as a 'benefit to students' under S.51xxiii. The High Court found that the constitution only allows such benefits to be made directly to the students themselves, not the Scripture Union.
- **Communist Case 1951.** The decision of the High Court to strike down the Communist Party Dissolution Act, which made communism punishable in Australia.

## Statutory Interpretation

Federal courts interpret statutes passed by the Commonwealth Parliament if they come before the court. Disputes about the meaning of statutes are resolved by courts through the process of statutory interpretations. Statutes often need interpretation as they contain many broad terms that require clarification, as the rule of law states that all statutes must be clear and consistent.

### **Maxims of Interpretation**

Maxims of interpretation are used to ensure there is consistency when trying to interpret statutes. Courts may apply maxims and rules of interpretations to adapt and change to meaning of acts.

- **Noscitur a Sociis.** Translates to 'by the company it keeps'. Meaning that courts interpret/read the words of a particular act in to context of the surrounding words and meaning.

## Rules of Interpretation

### **Accountability through Statutory Interpretation**

Courts apply maxims and rules of interpretations to adapt and change the meaning of Acts so that they remain current and deliver just outcomes. Parliament may intend this to be the case when writing statutes in general terms and using broad language. On occasions an Act may be subject to frequent interpretations or the courts may have to report to the purpose/mischief rule more often to make it work justly. In these cases, the courts are signalling to Parliament that the Act in question is in need of attention, and may be encouraged to amend the Act.

## The Relationship Between Parliament and the Courts

Parliament is keen to ensure that the courts develop the meaning of statute in ways consistent with Parliament's intentions. Judicial review creates an incentive for Parliament to write Acts clearly and precisely in the first place. If court decisions indicate a problem with a statute then Parliament may amend the act. This process allows for/creates constant feedback between the two bodies.

# Accountability and the Government

## Accountability and the Government

### The Government

The executive is the most familiar part of the system of government, due to the executive being responsible for running the nations day-to-day affairs, and bears the name of the Prime Minister. Governments are the focus of constant polling, media attention, pressure group activity and opposition tactics.

### Public Service

The executive is far more than just the Prime Minister and Cabinet. It is also made up from the public service. Approximately 155,000 employees working in Commonwealth government departments, agencies and statutory authorities execute the business of governing. The public executive makes up what is known as the administrative executive.

Public Servants are those employed under the *Public Service Act 1999*. Their work is to deliver programs and provide policy advice to their ministers. Public servants;

- Are officers in federal education, health, infrastructure, immigration, agriculture, etc.
- Fulfil various roles including department assistants, analysts, registrars, directors, managers, ministerial liaison, CEO's and importantly the Secretary of the department.
- Work in an ongoing capacity, for a specific term

The public service differs from the public sector. The public sector includes people such as;

- Clerks in Centreline who process local security claims
- Employees of Broad-spectrum and G4A, companies that operate Australia's offshore detentions centres
- Australian federal police of Boarder Force personnel
- Pilots, sailors and soldiers

### Clarification

The executive has **THREE** components

- The **FORMAL** or constitutional executive – the Governor General and the Federal Executive Council, outlined in Section.1 of the constitutional
- The **REAL** executive or political executive – Prime Minister and Cabinet, created through the Westminster Conventions.
- The **ADMINISTRATIVE** executive – the public service.

### Should the Executive Government be Accountable?

The defining feature of any democratic government is a limited and accountable government. The executive government has the power of the states at their hands. Government power must be accountable if good government is to be presented.

### The Executive & Traditional Methods of Accountability

#### Westminster Conventions

Westminster governments are directly accountable to the Parliament and, through it, to the people. Government power is accountable through a range of Westminster Conventions and practices. Individual and Collective Ministerial Accountability are two of the most important of these conventions in imposing discipline and accountability on government by allowing for the dismissal of incompetent, corrupt and/or bad ministers.

#### Individual Ministerial Accountability

Ministers are responsible to Parliament for their personal probity and the conduct of their portfolio responsibilities. Individual Ministerial Responsibility is the convention that makes it theoretically possible for parliament to sack a minister. Parliament can censure a minister by passing a censure motion. These motions are usually initiated by the opposition and criticizes and brings attention to a minister's actions.

#### **Censure Motions**

Individual Ministerial Responsibility is a convention in Australia Parliament with the purpose of holding ministers to account for their actions, decisions and behaviour in Parliament. This convention, in theory, is designed to ensure that is ministers should resign if they cannot uphold their portfolio or partake in activities that do not align with parliamentary standards. However, IMR is not as effective as intended due to the dominance of the executive in the House of Representatives. Due to the dominance of the executive censure motions rarely pass the House of

Representatives due to requirements to pass a censure motion. Censure motions require a majority of votes against the Minister in the house, and due to government holding the majority in the house the votes will rarely pass. In the rare case of a censure motion passing in the house, it is still the decision of the Prime Minister as to whether the Minister resigns or not.

- **Alan Griffiths** what is now known as the Sandwich Shop Affair. Griffiths attracted negative attention to the Keating government through his use of Labor party and electoral office resources to bail out his business partner from a failed sandwich shop venture in Melbourne
- The Rudd government stripped **Peter Garrett** of the residual responsibilities for the insulation scheme and demoted him to minister for environmental protection. Garrett was not asked to resign from government like the theory indicates should happen, instead, due to the decision of Rudd, Garrett remained in government.
- **Minister Fitzgibbon** resigned as defence minister after saying that he did not fully comply with the ministerial code of conduct. Pressure was applied onto Fitzgibbons to resign after the uncovering of inappropriate use of ministerial office as well as conflict of interest issues with personal corruption.

Despite censure motions not always being effective in the houses, they have the ability of embarrassing government and can result in pressure from the Prime Minister on that minister to resign.

### Collective Ministerial Responsibility

Through Collective Ministerial Responsibility, the cabinet is held to account. All ministers are bound by the solidarity of cabinet and is a key element of responsible and representative government, the executive should 'stand and fall together'. The cabinet is directly responsible for government policy and is obliged to resign if it loses the support of the House of Representatives.

Another aspect of Collective Ministerial Responsibility is that if a cabinet member cannot uphold cabinet conventions/support cabinet they are obliged to resign. The executive presents a united front. Parliament holds the executive to account through question time and committees.

KEATING LEAKY CABINET UNDER HAWKE GOVERNMENT

### ***Motions of No-Confidence***

Due to the voting system adopted by the House of Representatives, government hold the majority of seats in the House of Representatives and hence will, essentially, have the support of the majority of the House of Representatives and presents the idea that government will only be dismissed at elections, by the people.

However, motions of no-confidence can be passed against the government is an attempt to dismiss the government, and are expected to resign if one passes (which, due to the dominance of the executive is unlikely). There has only been one successful motion passed against government – 1941 against the **Fadden Government; two independents crossed the floor to vote with Labor and hence Fadden was unable to maintain the majority of support in the House of Representatives.**

## The Executive & Committees and Accountability

### 'Strong Bicameralism' and the Senate

A feature of the Australian system adopted from America is strong bicameralism. The Australian Senate is a powerful house with an electoral system that usually creates a chamber that is not controlled by the government, hence allowing it to perform its house of review function.

## Senate Legislation and References Committees

A Parliamentary Committee is a specialised subset of the Members of Parliament. A committee has defined membership and a specific area of work to focus on. Committees report back to Parliament and are an effective aspect of accountability. They allow for a wide range of information and options, however, sometimes party loyalty can impact on the effectiveness of committees, which can result in ignorance when discussing issues.

The Senate has numerous committees, but there are eight particularly important standing committees

- Community Affairs
- Economics
- Education and Employment
- Environment and Communications
- Finance and Public Administration
- Foreign Affairs, Defence and Trade
- Local and Constitutional Affairs
- Rural and Regional Affairs and Transport

Together, these committees cover almost every area of government activity. They are arranged in 'paired' committees. Each of the eight committees is made up of a references committee and a legislative committee. When the Senate refers a matter for inquiry it will send it to the relevant references committee, and when considering legislation, it will send bills to the relevant legislative committee.

## Senate Estimates Committee

The Senate Estimates Committee was initially established to question ministers about the budget and spending of national money, however now has much broader powers. Their scrutiny now includes virtually all government activity, as all government action involves the spending of money. The Senate Estimates Committee is a way for non-government ministers to probe into issues of government policy and expenditure.

### **Estimates**

Every year the government prepares the budget. As part of this annual process the Senate refers estimates of government expenditure to the estimates committee. Inquiries into government spending are an important accountability process. The independence of the Senate from the House of Representatives and the lack of government control over the estimates process have led to the evolution of much greater capacities to make wide ranging investigations into all areas of government activity.

Modern Senate estimates hearings can call any minister (if they are a senator) and any public servant including any member of the senior executive service; the highest ranking public servants. They can be asked almost any question related to the running of their departments, government policy, controversial events and scandals. These hearings can draw media attention and scrutiny, hence creating a chain of accountability to the people.

Examples of committees holding government to account;

- In 2013, the Abbott Government managed to 'cloak' some of its more controversial activities and avoid scrutiny into the activities of the Department of Immigration and Border Force – agency was given powers to intercept asylum seeker boats. Government claimed that operational matters related to national security so were classified as secret.
- In 2016, Larry Marshall chief executive of CSIRO, a commonwealth agency, was questioned by Senate estimates hearing into his decision to cut 350 jobs including scientist from its climate change modelling section. The inquiry generated much debate in the media and raised the issue to one of national concern.

## **Evaluation of Senate Estimates**

Despite their power to hold government to account there are some limitations to the estimates ability to practice accountability. Given that most ministers sit in the House of Representatives, the Senate Estimates Committee cannot call ministers from the lower house to appear directly in front of the committee hearings. Lower ministers are therefore represented by a delegated Senator to appear on their behalf.

Despite these limitations, Senate Estimates have evolved to become one of the most robust and effective accountability mechanisms within the Australian government.

## Parliamentary Joint Committee on Human Rights

The *Human Rights (Parliamentary Scrutiny) Act 2011* establishes the Parliamentary Joint Committee on Human Rights. This committee is a standing committee with the purpose of scrutinising all legislation and delegated legislation introduced into the Parliament for its compatibility with;

- *International Convent on Civil and Political Rights*
- *International Convent on Economic, Social and Cultural Rights*
- *International Convention 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, Inhumane or Degrading Treatment of Punishment*
- *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities*

## **Accountability of Bills and Regulations**

The Parliamentary Joint Committee on Human Rights publishes a report called a scrutiny report to both houses of Parliament in each sitting week. The reports alert the Parliament to any human rights concerns discovered when scrutinising bills.

The prohibition of ministers being members of the Parliamentary Joint Committee on Human Rights helps to maintain the committees' independence from the executive.

## **The Executive & Accountability Through Judicial Review**

Judicial Review – a long established avenue of executive accountability is the capacity of the citizens to take action through the courts to challenge the administrative actions of Parliament. (courts can only rule on the legality of an executive, not on its reasonableness or fairness.)

Judicial review applies to the review of government's administrative decisions by the courts. Judicial review enables a person aggrieved by an administration decision to seek review by a court of the lawfulness of that decision.

## Separation of Powers

The judiciary is the third arm of government, with a very strict Separation of Power between the other two arms of government (legislative and executive). The judiciary deals with disputes between two parties that are brought to the courts and ensures there is sound accountability of the executive and public service.

The Rule of Law is critical in keeping government and executive power accountable. The Rule of Law requires;

- Everyone, including government is subject to the law
- An independent judiciary
- Due processes be observed in law making, including government policy and regulations made under delegating legislation.



## The Role of Courts

The ability of the courts to review administrative decisions is different to their role in the appeals process. Courts can only decide whether an administrator has exceeded the powers given to them under a statute.

## Reasons to Overturn an Administrative Decision

- **Ultra-Varies** – a decision can be overturned if it is clearly not authorised by the statute involved. When Parliament/government make laws that are beyond their powers it can be declared ultra-varies. Meaning they do not have the power to create legislation in this area
- **Abuse of Power** – administrative decisions must be designed to achieve the purpose of a statute and not be made for any other purpose
- **Procedural Fairness** – natural law – the right of individuals to put their own case, for relevant evidence to be considered, and for there to be a right for appeal.

## Judicial Remedies for Administrative Wrongs

Due to the formalities and costs involved in going to court, parties often opt for remedies

### ***Writs of Mandamus***

If a court finds that a government department or agency made a decision that was not in accordance with the law it may issue a writ of mandamus to an official of the government. Section.75(v) gives the federal judiciary (High Court) this jurisdiction. A writ of mandamus is a court order requiring a government official to carry out a specific act that the official is obliged to do by law.

The court will interpret the relevant statute, declare its meaning and then issue the writ of mandamus to force the government to obey the law.

### ***Injunctions***

Courts may also issue prohibitions or injunctions to government departments and agencies. These are writs which prevent certain actions.

In 2016, the High Court issued an injunction against the Department of Immigration and Border Control. S99 (plaintiff) was an African Refugee who was raped while suffering an epileptic seizure on Nauru. She became pregnant as a result of the incident. S99 wished to have an abortion but the law on Nauru prohibits it. The Australia government transferred her to Papa New Guinea for a medical abortion, but S99 felt that Papa New Guinea lacked medical facilities required.

S99 Moved to have the abortion done in Australia but it was denied, so she went to the High Court seeking an injunction preventing an abortion in Papa New Guinea – which was granted.

## The Executive and Judicial Review

### ***The Malaysia Solution***

The Australia government proposed the Australia would 'swap' 800 asylum seekers held in detention centres for 4000 refugees waiting in Malaysia. The High Court, in a 6-1 decision ruled that the Gillard Government's proposal was illegal. The High Court ruled that the proposal contravened *Section 198a* of the *Migrant Act*.

The High Court found that Malaysia was not legally bound to protect the asylum seekers under the *Australian Immigration Act 1958*, which therefore made the policy invalid. Most significantly, the High Court held that the Minister for Immigration cannot validly deport asylum seekers to a third world country unless that country is legally bound by international law or its own domestic law.

### ***Williams Number 1 (2012)***

In the first Williams case Ron Williams successfully challenged, in the High Court, that the Commonwealth's direct funding for school chaplains went beyond the Commonwealth's executive powers.

In 2012, the High Court held that the funding agreement between the Queensland Scripture Union and Commonwealth, and the payments made under it were not supported by the executive power of the Commonwealth under s.61 of the Constitution.

## The Public Service and Judicial Review

### **ATO Tax Fraud**

2017 ATO Tax Fraud scandal involving the Deputy ATO commissioner Michael Cranston, and eight other ATO employees charged with criminal offences.

Senior ATO official Michael Cranston was charged with abusing his position as a public official (service). Cranston was issued with a court attendance notice for his involvement in a major fraud investigation in which \$125 million was allegedly stolen from the Commonwealth, and charged with abusing his position as a public official, along with eight other employees.

Through this investigation of the High Court into the actions of the public official indicates how the judiciary has the power to hold members of the public service to account.

### **Nick Petroulias**

Former assistant tax commissioner Nick Petroulias was convicted in December 2007 of corrupt conduct and unauthorised publication of Commonwealth documents. Petroulias was found guilty by the High Court of two offences – agreeing to receive money on an understanding that his role at the ATO would be effected, and publishing documents without authorisation.

Between 1997 and 1999 Petroulias, while assistant tax commissioner, accepted \$41,00 in return for providing confidential ATO information. Petroulias and his business partners also used this information to benefit their own enterprise (marketing purposes).

## The Executive & Accountability Through the AAT and Auditor General

### Accountability in the Modern Era

The scope, size and scale of government in the modern era is much larger than it has ever been before. Hence traditional Westminster Conventions are no longer enough for holding the government to account. Due to this, new institutions such as the Auditor General and Administrative Appeals Tribunal (AAT) have been created to ensure accountability is still being applied to the modern government.

### The Auditor General

The Auditor General is an independent officer of the Australian Parliament. The office and mandate of the Auditor General is created under the *Auditor General Act 1997* along with the Australian National Audits Office (ANAO) – a statutory authority. The Auditor General is the head of the ANAO, with the *Public Governance, Performance and Accountability Act 2013* covering the work of the Auditor General and ANAO.

The **role** of the Auditor General is to provide the Parliament with an independent assessment of selected areas of public administration and assurance about the reporting of the public sector. The aim is to improve public sector performance through independent reporting and scrutinising of Australian government and executive programs.

The Auditor General has the **power** to access Commonwealth documents and information in regards to all areas of decision making/policies/ ministers/etc. However, are **limited** through their inability to punish anyone and aspects of parliamentary privilege. The Auditor General can report their findings to Parliament whereby government makes a decision as to what to do with the information, but they do not have the power to outline or implement punishments.

The Auditor General is assisted by the ANAO in many of its roles. The purpose of the ANAO is to ensure and drive **accountability** and **transparency** in the Australian government sector through quality and evidence based audit services.

### ***Accountability***

The Auditor General acts as the 4<sup>th</sup> arm of government known as the 'integrity branch'. A branch that oversees the requirements of productivity, transparency and accountability of Parliament.

The architecture of traditional accountability of parliament is historically established through the Westminster Conventions and chain of accountability. However, the independent role of the Auditor General (centred on the Parliaments responsibility role) is seen as part of the new architecture of accountability in Parliament. Through its ability to hold the government to account and oversee all government actions.

Through the work of the Auditor General and ANAO the public can have confidence that the Auditor General is scrutinising and reporting on the Australian government and public sector entities. And, also, ensuring that the use of public money is done

- Economically
- Efficiently
- Effectively
- Ethically

### ***Appointment and Independence***

**Grant Hehir** is the current Auditor General, appointed in 2015 by Prime Minister at the time Tony Abbot. Auditor General sit a 10-year term in Parliament, this long term means they endure many parliaments and hence encourages the position to be non-partisan.

The Auditor General is appointed by the Joint Committee of Public Accounts and Audit hence encouraging the selected Auditor General to be a person with bipartisan support – an important requirement for an officer whose role is to ensure that government administration is accountable. After the committee recommends a candidate for the position the Prime Minister will then advise the Governor General to make the appointment.

### ***Operations of the Auditor General and ANAO***

The Auditor General's mandate is set out in the afore mentioned Auditor General Act and provides for a range of functions across the Australian government sector. Under the Act the Auditor General conducts audits of all Australian government departments, agencies and other entities (administrative executive [public service]).

An audit is an official inspection of an organisations operations and finance. There are two main audits that the Auditor General conducts with the assistance of the ANAO;

- Performance Audits
- Financial Audits
- Assurance Reviews

### ***Performance Audits***

An inspection of how a government department or agency carries out its day to day business. Everything from how contracts are handled, human resources are managed and how stationary is ordered may be audited by the Auditor General.

Performance audits use Key Performance Indicators to measure effectiveness, economy and efficiency. (A KPI is a measuring standard used to make judgements).

The Auditor General advises Parliament as to how public money is being spent and whether or not their intended outcome is being achieved, hence holding parliament to account.

- **Sophie Mirabella** was the federal member for Victorian electorate Indi until losing her seat to independent Cathy McGowan in 2013. She was reselected to run again as candidate in the 2016 election. During her electoral campaign, Mirabella made a claim that her electorate had missed out on \$10 million dollars of government hospital funding when she failed to win her seat in the previous election. (She failed the 2016 election)
  - Government and Members of Parliament are not allowed to offer rewards/incentives in return for votes. The Shorten ALP Opposition referred the matter to the Auditor General and it could lead to possible political corruption.

## Financial Audits

Financial audits check the financial statements and records of a government department or agency. Every year in the annual budget departments and agencies are allocated fund for the purpose of carrying out their responsibilities. Financial audits ensure that their spending is accountable. Inefficiency and corruption may be detected when the Auditor General 'goes through the books'.

- **Sports Rorts Affair (1993).** Auditor General could not find any documentation to explain how the Labor sports minister (Ros Kelly) had distributed \$30 million in sporting grants – it was done on a whiteboard. The Auditor General complained about the matter in which the department administered these grants and as a result could not assess her decision-making process.
  - There has to be documentation as to how the money was spent. The Auditor General ensures that there is reasoning behind the payments and that everything has properly been complied to.
- **FIFA Payment.** Under the Rudd government, the football federation made a \$500,000 payment to FIFA through a public account. This matter was investigated by the Auditor General as there was no reasoning as to why it was paid from a public account and as to why the payment was made.

## Assurance Reviews

The Australian Public Service is governed by

- The *Public Service Act 1999*
- The Public Service Standards
- A Code of Conduct

The Auditor General ensures that these laws, standards and guidelines are adhered to within all government entities.

An assurance review is a check to ensure that a government department or agency is carrying out its responsibilities using the correct information. They are designed to manage 'information risk' by making sure that organisations are complying with the law, regulations and policies that may apply. The laws and policies the apply to the public service change all the time. Assurance reviews aim to make sure departments and agencies are up to date with what is required of them.

## Final Word

Through the reviews and audits conducted by the Auditor General the executive and public services continues to be held accountable for their actions. All audits that are conducted by the Auditor General (and ANAO) are published online and made available to all members of the public. This ensures that, despite the Auditor General not being able to directly punish and Members of Parliament for their actions/lack of they can be held to account by the people.

## The Administrative Appeals Tribunal (AAT)

The Administrative Appeals Tribunal (AAT) is created by the *Administrative Appeals Tribunal Act 1975*. The AAT is concerned with the accountability of the public service; government department and agencies previously describes as part of the administrative executive. The AAT reviews decisions made by government ministers and other departments created under the Commonwealth law – the public service.

### Tribunals

Tribunals are much like courts in the sense that they adjudicate decisions but they have a very different role than courts as tribunals do not exercise judicial power. Tribunals review administrative decisions is they are disputed.

Tribunals emphasise fairness, informality, efficiency, timeliness and economy. In tribunals there are no lawyers, instead parties represent themselves in front of a panel of adjudicators and present their side of the dispute.

### The AAT's Jurisdiction

The AAT reviews administrative decisions (any decision made by a government department or agency in the course of carrying out the law). The AAT can only review administrative decisions where an Act or regulation says that is can. the most common areas in which the AAT can make decisions are;

- Child Support
- Family Assistance/Paid Leave
- The National Disability Insurance Scheme
- Taxation
- Veterans Entitlements
- Worker's Compensation
- Migration and Refugee Visas
- Citizenship

The AAT looks at the decision that has been made and has the power to;

- Affirm the decision; leave the decisions as it is
- Vary; alter the decision in some way
- Set Aside; agree or partially agree that the original decision was wrong and might replace it with a new decision
- Remit; send the matter back to the department that made the decision to make a new decision in accordance to instructions/recommendations given to that department from the AAT

[The AAT's decision can be appealed]

### The AAT and Accountability

The AAT is an important aspect of accountability of the executive and public service as it formalises the citizens right of appeal against an executive decision and aims to ensure that all complaints are treated in a consistent and just way.

- **The Penis Case (2014).** A man injured his genitalia at work when caustic soda was spilt onto his clothes. He failed his legal bit to claim the disability support pension. Centrelink refused to pay him a pension on the ground that his pain was not significant enough. He appealed to the AAT, but the tribunal rules in favour of Centrelink and therefore could not receive a disability support pension.
  - despite losing his case, this is an example of how the AAT can be used as a means of disputing Public service/Administrative decisions (Centrelink)
- **Kashkooli V Minister for Immigration and Boarder Protection (Citizenship) (2016).** Iranian citizen who was granted a refugee visa. After arriving in Australia, he committed to minor criminal offences and failed to go to the police station for fingerprinting and photographs – convicted for shoplifting. When he applied for his citizenship he backdated the application and answered 'no' to committing any offences. Administrative decision was made to deny his application. The AAT upheld the original decision to refuse citizenship. (This shows how the public service can be held to account).

# Accountability of the Governor General

## Governor General and Accountability

### Roles of the Governor General

#### Constitutional Role

- The issuing of writs for elections **S.32** (House of Representatives) **33** (Bi-election)
- Dissolve Parliament **S.5, 57**
- Appoint High Court Justices **S.72**
- Commander in chief of the armed forces **S.68**
- Giving and withholding assent to legislation **S.58**

#### Ceremonial Role

- Opening Parliament
- Swearing in Prime Minister and Ministers
- Receiving ambassadors and diplomats

#### Non-Ceremonial Role

- Speaking engagements
- Patron for charities and community agencies
- Symbolising the nation's spirit – mateship and bravery

### Powers of the Governor General

#### Express Powers

The powers that are explicitly mentioned in the constitution and are used daily by the Governor General, on the advice of the Prime Minister and the Federal Executive Council (under **S.62**). These powers are exercised on behalf of Parliament with the advice of the Federal Executive Council. The Governor General has no personal discretion in regards to these powers

#### Reserve Powers

Powers that the Governor General can exercise without the advice of the Prime Minister or the Federal Executive Council, at his/her own discretion. Reserve powers are to be used when political leaders cannot act, or during a political crisis (1975).

- Power to dissolve the House of Representatives **S.5**
- The power to appoint and dismiss ministers **S.64**
- The power to dissolve both houses of Parliament Simultaneously **S.57**

### Accountability through Appointment

Chapter 1 establishes the office of the Governor General in Australia's political system, with his/her appointment outlines in section 2, being the pleasure of the Queen on the advice of the Prime Minister. This section implies that the appointment of a Governor General and their assignment of powers by the queen is the formal mechanism through which the Governor General is held to account.

As of 1930, the selection has been made by the Prime Minister in consultation with staff or colleagues (who then advises the Queen of their selection). The Queen can decline the advice of the Prime Minister and ask for another recommendation or appoint someone of their own choice.

- 1930 Sir Isaac Isaacs was strongly opposed by King George for the position of Governor General, as he was not considered appropriate for the position. However due to the pressure applied by British Prime Minister James Scullin the appointment was made.

By convention, Queen Elizabeth II is bound to accept the advice of the Prime Minister in regards to appointing the Governor General. The ability of the Prime Minister to appoint the Governor General implies that they have the power to appoint someone who is suited to and will uphold the values of the government of the day. This was evident in the selection of Sir Peter Cosgrove by Prime Minister Tony Abbott in 2014. Abbott commented on the significance of Cosgrove's military service, reflecting the importance of conservative values held by the Liberal Party.

The power to choose someone to that position implies that the Prime Minister has the ability to also dismiss that person from the position of Governor General.

### Accountability through Tenure and Removal

The tenure of the Governor General is at the pleasure of Queenie, however in practice the Governor General serves for a five-year period.

By convention the Queen may choose to recall or dismiss a Governor General before their term is done, on the advice of the Prime Minister. Section 4 enables the Queen to appoint an administrator to carry out the role of the Governor General in the event of a vacancy. Such vacancy should theoretically be caused by the resignation or dismissal of the Governor General by the monarch. Since federation there has never been a Governor General dismissed from office but it is important to acknowledge the position is kept accountable through the Prime Minister's ability to remove them at any time.

In reality it is public and media whom ensure the Governor General is held to account, this is best demonstrated through the resignation of Hollingworth following the Hollingworth Affair.

### The 1975 Constitutional Crisis

On the 11<sup>th</sup> of November 1975, Governor General John Kerr used his reserve power (under section 64) to dismissed the Whitlam government and Gough Whitlam from his position as Prime Minister and appointed Malcom Fraser as caretaker Prime Minister. This was done following Whitlam's refusal to call a double dissolution following the State's refusal to pass the Supply Bill. Kerr believed that an essential part of any government was the ability to pass supply and Whitlam could not do this.

#### Factors leading to the dismissal

- The country had reached an economic recession due to stagflation (high inflation and high unemployment). The economy was exceptionally weak at this time with rising unemployment
- The policy failures and internal crisis experienced by the Whitlam government – Loans Affair – which lead to the sacking of Jim Cairns (Deputy Prime Minister and Treasurer) and forced resignation of Rex Connor. This embarrassed the Whitlam government, exposing it to claims of improper practice.
- The Senate blocked the Supply Bill. Following this Whitlam, by convention, should have either resigned or called for an election. Neither of which he did and as a result Kerr took action. He believed it was essential for a responsible government to be able to guarantee supply
- In September Labour Senator died and was replaced with an independent (it was after this that the Senate vacancies bill was introduced in order to prevent this from happening)

Kerr felt accountable to the people to do something in regards to the situation that was currently facing Parliament and decided to check the constitutionality of his decision with the Chief Justice, Sir Garfield Barwick. This was an unprecedented step on Kerr's behalf and Whitlam argued that Kerr acted outside of the conventions of responsible government.

Kerr's use of reserve powers was controversial as it had never been done before, and as a result Gordon Scholes (speaker of the House of Representatives) wrote a letter to the Queen discussing his concern over the actions of the Governor General. He requested that Whitlam be reinstated as Prime Minister. The Queen responded by saying "the constitution place the prerogative powers of the crown in the hands of the Governor General...the only person competent to commission an Australian Prime Minister is the Governor General." She also made it clear that it would not be proper for her to intervene on something clearly in the jurisdiction of the Governor General. (This response outlines the lack of any Governor General accountability).

This issue led to the debate regarding the role of the Governor General in the crisis and in Australia's political system in regards to the Governor General reserve powers and that an unelected body has the power to dismiss an elected Prime Minister. And highlights the issue of accountability. Who is the Governor General accountable to if they can act on their own accord and not need to consult with anyone? And raises the question, is there a procedure for the removal of the Governor General?

### ***The 'Loans Affair'***

Rex Connor

At the time, Rex Connor was the Minister for Minerals and Energy. Connor saw potential for Australia to further develop and control mineral and energy resources. However, in order to do this, he started looking overseas for loans to fund his plans, this came to be known as the 'Loans Affair'.

Jim Cairns

Jim Cairns, at the time, was the deputy Prime Minister and the Treasurer of Australia, however due to his involvement with the loan he lost his place on the front bench.

While still on the front bench Cairns was approached by George Harris, Melbourne business man, who offered to secure funds for the Australian government. In March 1975 Cairns signed a letter to agree to a 2.5% commission for the Loans Affair. After word got out about the letter Cairns was dismissed from the Ministry.

### ***Conventions Broken***

- In the event that supply is blocked by the Senate the Prime Minister should resign or call an election
- Kerr made Fraser the Prime Minister, but he did not hold the majority support of the House of Representatives.
- Senate casual vacancies were filled with non-Labor Senators
- Westminster Conventions V Constitution. The Westminster Conventions state the Governor General must act on the advice of the Prime Minister, however the constitution gives the Governor General reserve powers whereby he doesn't have to act on the advice of the Prime Minister, with this being one of those situations – S.64.

### **Consultation with the Chief Justice**

#### ***Against***

- The Westminster Conventions outline that the Governor General's only source of advice is from the Prime Minister and Federal Executive Council.
- The Chief Justice is unable to advise anyone on legal issues

#### ***For***

- Chief Justice Barwick believed that on non-justiciable questions he did not compromise the independence of the judiciary
- Kerr could not consult with Whitlam as it was a conflict of interest
- Kerr's actions in ignoring Whitlam was constitutional and proper, and his subsequent dismissal was well within his reserve powers and rights



- It has been said that the Governor General can seek advice from anywhere that assists in the exercise of various functions
- There is historical precedent before 1975 or at least 3 Chief Justices advising 8 Governor General on their roles. These have all occurred in the instance that the Governor General is unable to consult the Federal Executive Council due to conflicts of interest.
  - Lord Northcote consulting CJ Griffith regarding whether or not to allow an election because Watson failed to pass a crucial Bill. Instead Northcote commissioned Reid (opposition leader) to form government.
  - CJ Barwick advised Lord Casey on what to do following Holt's disappearance. He appointed McEwen and Prime Minister whilst Gorton was moved into the House of Representatives and a new Liberal leader was found

Constitutionally both the Senate and the Governor General acted correctly and within their powers. The constitution was not broken, only several Westminster Conventions. They had and still have the right and ability to do what they did. The only way to prevent an incident such as this from happening again the constitution needs to be amended to remove the Governor General as the Head of State.

### The Hollingworth Affair

The closest Australia has ever come to dismissing a Governor General is Dr Peter Hollingworth, who was previously the Archbishop of Brisbane. Hollingworth was commissioned as Governor General in 2001 on the recommendation John Howard. In 2003 allegations arose that whilst Hollingworth was Archbishop he had covered up allegations of child sexual abuse in the Anglican Church. Hollingworth denied these allegations. Howard refused to withdraw his support for Hollingworth and as a result he could not be removed from his position.

In the end, it was public opinion that made it impossible for Hollingworth to continue his role as Governor General. A campaign calling for Hollingworth to resign was led by Hetty Johnson, a child sex abuse advocate. In 2003 Hollingworth was forced to defend himself against allegations that he had raped a woman during the 1960's.

In spite of public support from John Howard, the other senior ministers from the cabinet including Deputy Prime Minister and Treasurer suggested that Hollingworth should reconsider his position. Hollingworth was forced to resign in response to public pressure and media scrutiny on the 25<sup>th</sup> May 2003. Hence indicating that the people have the ability to hold the Governor General to account for his/her actions.

### Accountability of the Office of the Governor General

The Office of the Official Secretary of the Governor General was established as a statutory body in 1984. The role of the Official Secretary is to provide the Governor General with the support needed in order to enable them to carry out their constitutional, ceremonial and non-ceremonial duties. The Office of the Official Secretary must meet the same accountability standards as the public service. This means producing an annual report which is presented to both houses and presents information on the outcome and program of the Office along with details on budgeting and reporting requirements.

## Accountability and the Courts

### Accountability and the Courts

#### The Paradox of Judicial Independence and Accountability

The Rule of Law within the Australian political and legal system demands that the judiciary acts as an independent body. Independence, by definition, meaning that the courts are free from the interference from other arms of

government (legislative and executive). However, this leads to the question, how can a truly independent court ever be held to account?

## Introduction to the Accountability of the Courts

The constitutional system in Australia recognises the judiciary as one of the three arms of government alongside the executive and legislative branch. It also recognises the need for the judiciary to be accountable and independent if it is to properly fulfil its constitutional role. Much like the accountability of Parliament, the Governor General and other bodies of the legislative and executive branches the courts (judiciary) must be held accountable for the way it exercises its judicial powers. Judicial powers enable courts and judicial officers to make legally binding decisions and to create new common law in their areas of jurisdiction. Holding such power to account is a critical feature of good governance.

Holding the judiciary to account is a special case due to the convention of Separation of Power and fundamental principle of the Rule of Law. The separation of powers ensure that the judiciary acts as and remains an independent body from the legislative and executive branches of government, however this raises the issue that the greater the degree of accountability, the less the degree of independence. The more accountability measures applied to the judiciary then the greater the chances are for the legislative and executive branches to encroach on the judiciary's independence.

The principle of judicial independence is not proclaimed in order to benefit the judge, it is proclaimed in order to guarantee a fair and impartial hearing and an unswerving obedience to the rule of law. (By independence it refers to the independence of the judiciary from the other two branches of government).

At its core accountability means that a person or persons is answerable for his or her actions and decisions to some clearly identified individual or body *"To talk about accountability is to define who can call for an account and who has a duty of explanation"*. Judicial accountability is based on the system of natural justice and Rule of Law. This required the court processes and judgements to be fair, transparent and unbiased, and full reasoning and evidence of verdicts must be provided to the people and made public. Legal standards must be publicly known and generally accepted. The law must apply to everyone equally and court hearings and proceedings need to be open to the public and media scrutiny. Everyone is entitled to access and equity – equity being fairness to everyone in the way they are treated throughout the process. Judicial accountability in essence is the costs that a judge expects to incur in case his/her behaviour and/or his/her decisions deviate too much from a generally recognised standard, in this case referring to the letter of the law.

Currently, within Australia there exist many methods through which the judicial branch of government is, and has been over the years, held to account for the actions, decisions and behaviours of judges. These methods of accountability exist internally and externally in the court system. Internal mechanisms for accountability include the appeals process and transparent processes and public confidence. These are procedures and processes used within the court system where by judges hold one another to account for their own actions and ensures that justice is met within the courts. External mechanism of accountability includes parliamentary scrutiny and the censure and removal of judges. This forum of accountability is external as it requires an outside body, the two other arms of government, to hold the courts to account. Through these processes the Australian judiciary can be held to account, but the question is, to what extent are the courts held to account for their actions?

## The Appeals Process

Define

The most direct accountability mechanism is the appeals process (this is an internal mechanism of accountability). Appeals allow a more superior court to re-examine the process of the court that made the original judgement allowing the court to quash the original judgement or to send it back to the lower court for re-trial. An appeal can only be made under the circumstances;

- 'By right' or with the permission of the court. This means that the appeal could be on the grounds of an error of law, for example relevant evidence was excluded or that the original case gave wrong evidence to the jury. This is the case that the verdict was a miscarriage of justice.
- 'By leave' whereby there is a basis for claimed error of fact and/or law.
- Against the sentence handed down and sufficient reasons/grounds for appeal, for example – new evidence.

An appeal can be against the sentence handed down or a claimed error of fact and will only be granted if the higher Court is satisfied that an alleged error may have been made and/or there may have been an alleged miscarriage of justice.

### Explanation

The court system in Australia is based on a system of natural justice. The courts in Australia have processes and make judgements that are fair, transparent and unbiased, and allows for appeals to be lodged on verdicts made by justices.

Without a court hierarchy, an appeals process cannot exist within the court system. A hierarchy ensures that there is an internal accountability mechanism within the court to ensure that the decisions made by a lower court can be checked and held to account. The appeals process is a process in which the decision is reviewed by a higher court. Within Australia the court hierarchy that exists is – Magistrates, District, Supreme and finally the High Court.

The High Court of Australia, being the highest court, is the final court of appeal in Australia. Section 73 outlines the appellate jurisdiction vested in the High Court, stating that the court has the jurisdiction to hear and determine appeals from all judgements of any justice or justices and of any other federal, supreme or state court.

In exercising this jurisdiction, it is an indication by the High Court has discovered a miscarriage of justice, and hence has the duty of reversing the decision. The High Court does not have to grant appeal – for example the case of Gary Ernest White vs The Director of Public Prosecutions of Western Australia was appealed to the High Court and the appeal was upheld. However, there are many examples of cases which have reached the High Court on appeal including the case of Andrew Mallard v The Queen, Rafael Cesan & Ruben Mas Rivadavia and Dietrich v The Queen which made appeal on the basis that they were a miscarriage of justice.

When a judge makes a decision on any given case they must provide a fully detailed explanation of their reasoning for their verdict supported with evidence – *ratio decidendi*. The reasons are then published and made available to the public and for examination by appeals courts. This process acts as a powerful check on the quality of the original decision and the capacity of the judge who made it.

A judge whose decisions are regularly reversed via appeal may be subject to scrutiny by higher courts and on occasion by the Attorney General. This check acts as a strong incentive, imposed by the court system, on judges to ensure that they seek justice in all decisions. Through this process of internal scrutiny by the courts it ensures that all justices can be and are held account for the decisions they make. Judges must ensure that all verdicts are based on true and fair evidence to prevent appeals from occurring and their judgements being overturned.

Appeals allow for a mechanism in which cases can be reheard in order to ensure that justice has been achieved. However, like many systems, there is a limit to the accountability achieved through the appeals process. The appeals process is effective when appeals are granted, though there is no guarantee that the disputed judgement will be re-heard. Within the court system there are no guidelines/rules that state that appeals must be heard or the higher court may not accept the grounds for appeal, so as a result of this many cases are never re-heard and justice is not served. In addition to this, the time limit to lodge an appeal is generally 21-28 days (3-4 weeks) and the process is long and expensive which many people are unable to afford. Due to the lack of affordability there is a limit to the ability of the legal representation.

The appeals process promotes accountability by acting as a direct check on the quality of the court judgement and providing an opportunity to correct mistakes is procedure and judicial discretion to ensure a fair trial is achieved.

## Application

### ***Andrew Mallard v The Queen***

In 1994 Andrew Mallard was convicted of murder by the Supreme Court and sentenced to life imprisonment. Mallard was convicted of the murder of Pamela Lawrence, a business proprietor, who was killed at her shop on the 23<sup>rd</sup> May 1994. The evidence that was used in Mallard's trial was scanty and obscure, and it was later revealed that police withheld vital information from his defence team which subsequently led to the original guilty verdict.

Almost a decade after Andrew Mallard was convicted fresh evidence was presented and an appeal was lodged with the High Court of Australia where his conviction was quashed and all charges against Mallard were dropped. Andrew Mallard is one of the most historic examples of a miscarriage of justice in the Australia, legal system, and despite his sentencing being quashed, Mallard still remains the prime suspect and that if further evidence became available he could still be prosecuted.

### ***Dietrich v The Queen***

On the 17<sup>th</sup> of December 1986 Olaf Dietrich was arrested by the Australian Federal Police after a trip to Thailand and was alleged to have imported seventy grams of heroin into Australia. There was compelling evidence that Dietrich had swallowed small packets of the drug to smuggle it through customs, however he claimed that the drugs had been planted by the police.

Dietrich was charged on four cases of drug trafficking, though in the trial he had no legal representation. He applied for assistance but they would not represent him unless he plead guilty to all charges. Dietrich appealed his convictions to the Supreme Court – appeal was refused. He then appealed to the High Court and the majority of the judges decided that Dietrich had the right to a fair trial. =

Dietrich later changed his name to Hugo Rich and received life sentence for the murder of a security guard.

### ***Rafael Cesan & Ruben Mas Rivadavia***

Cesan and Rivadavia were both found 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. Cesan and Rivadavia appealed to the High Court on the grounds that they had not received a fair trial and that a miscarriage of justice had occurred. They argued that the jury was distracted and that the judge's snoring interfered with cross-examination evidence, to which the Chief Justice agreed to in writing.

The chief Justice, Robert French, said a judge must be seen to be upholding his duty. Further *"where the judge is noticeable and repeatedly asleep or inattentive during the trial there can be a miscarriage of justice."* He declared the trial was flawed and ordered a retrial.

## Parliamentary Scrutiny and Legislation

### Define

Parliamentary scrutiny is the ability of the Parliament to monitor the decisions of the judiciary by creating legislation to reinforce, minimise, or overturn common law precedents. It ensures that there are no disagreements between Parliament and the courts in regards to common law, and if there is, the Parliament has the ability to override it via the establishment of statute law. A new statute that is created in regard to common law changes the law for future cases, but cannot change the judgement already made. However, an act of Federal Parliament cannot overturn High Court judgments made in regards to constitutional cases – this can only be done via referendum. State constitutions on the other hand can generally be altered by Parliament.

## Explanation

Common law is defined as the unwritten laws based on precedents established by the courts. It occurs when judges make decisions on specific cases and through that, distinguishes the particular case at hand from any prior case by overruling old precedents or by reversing the *ratio decidendi* of a case on appeal. Statute law is defined as a written law passed by a legislature on a state or federal level. Statutes set forth general propositions of law that courts apply to specific situations. A statute may forbid a certain act, direct a certain act, make a declaration or set forth governmental mechanisms to aid in the governing and functioning of society. Due to this statute law is superior to common law.

In Australia, Parliament sovereignty is a defining aspect of the Australia's political and legal system. Sovereignty is the principle upon which parliamentarianism is based, and indicates that democratic power lies with the Parliament (Parliament has been given the power to govern) and hence has the ultimate law making power and the ability to create legislation. Parliamentary sovereignty ensures that Parliament may override judge-made common law by passing a statute. Through this, Parliament has the ability to limit judicial discretion with laws that require judges to make decisions in regulation to set laws, for example mandatory sentencing.

These examples (as discussed later) provide evidence that the Parliament can, and has created legislation in order to hold the courts to account.

It is the right of the Australian Parliament to override common law with statute law as supported by and outlined by the convention of rule of law. Rule of law underpins the way Australian society is governed. Everyone, including citizens and the government – is bound by and entitled to the benefits of the law. It ensures that law created by the Australian Parliament apply to all citizens of Australia, and as a result of this gives statute superiority over common law and hence judges are required to apply statutes to all cases heard in court even if they conflict with common law precedent.

The accountability of the courts through parliamentary scrutiny and legislation is deemed as an external mechanism of accountability as it relies on outside bodies and conventions to ensure that all decisions made by courts can be monitored. If the Australian Parliament does not agree with decisions made by judges and the common law that the courts creates (and/or they overstep boundaries), the Parliament has the power and ability to create new statutes, through with the courts can be held to account as they are bound by statutes.

However, not all common law can be overridden with statute law. High Court cases concerned with the constitution require a referendum, as outlined under section 128 of the constitution. The High Court has the jurisdiction to hear cases concerned with matters regarding the constitution under sections 75 and 76.

## Application

### ***Mandatory Sentencing***

Mandatory sentences are legislative interventions introduced by the government that set a fixed minimum mandatory sentence for certain offences. Mandatory sentencing laws in Western Australia and the Northern Territory force judges to jail offenders of given offences regardless of the circumstances of the situation and the offender. It is usual practice for judges to be granted judicial discretion, and hence pass sentences that fit the crime and the offender by taking into account the unique circumstances of each case.

Mandatory sentencing is an example of Parliament implementing legislation that erodes judicial discretion in response to public pressure. In 2010, the Western Australian Parliament imposed a mandatory sentence of 1 year imprisonment for assault on a police officer, prison officer or public security officer. This has led to the executive making decisions in regards to sentencing rather than the judiciary.

This example indicates how legislation that is intended to hold the courts to account for their actions, can in fact to the limitation of the jurisdiction of the judiciary.

### ***Mabo v Queensland No.2***

*Mabo v Queensland No.2* deals with native titles in Australia. This High Court decision recognised a common-law form of land rights known as 'native title'. This term abolished the legal principle 'terra nullius' – the idea that prior to British settlement Australia was a land owned by nobody; '*nobody's land*'. The introduction of native titles raised concerns that people's homes, farms and backyards would be at risk to be claimed by potential native title holders.

As a means of addressing the government's concern the Commonwealth Parliament passed the *Native Title Act 1993*. This act recognised the existence of native title in certain circumstances. 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.

Through this example, the parliament acted in support of the judiciary by clarifying the new law of native title rather than abolishing it.

### ***Trigwell v State Government Insurance Commission (SGIC)***

The case of *Trigwell v SGIC* is another example of the Parliament abolishing a court decision. This case deals with the incident whereby a fatal road accident was caused when livestock had escaped through a broken fence and caused a woman driving along a highway to cross the divider and hit another car driving in the opposite direction. The woman was killed and the family in the second car (the Trigwells) were injured.

The owner of the animals who had failed to prevent the livestock from escaping and the insurance company of the deceased (SGIC) were sued by the Trigwells. The case was taken to the High Court where by the High Court rejected the plaintiff's claim based on precedent of an old English common law (*Searle v Wallbank*) which established the owner of the livestock was not responsible.

In response to this ruling the Victorian Parliament passed the *Wrongs (Animals Straying on Highways) Act 1984* to override past common law precedent in order to ensure that those who allow animals to escape, and as a result cause accidents, are liable for the damages caused.

### ***Malaysia Solution***

On the 25<sup>th</sup> of July, 2011, the Gillard government signed a deal with the Malaysian Government known as the 'Malaysia Solution'. The Government proposal was that Australia would swap 800 asylum seekers held in detentions centres in Australia for 4000 refugees waiting in Malaysia for resettlement.

The deal was struck down by the High Court in a six to one decision as it breached the *Migration Act*. In response to the High Court's ruling the Gillard government attempted to amend the Migration Act in an effort to push forward with the Malaysia Solution Policy. However, the amendment was blocked by parliament as government lacked the support of the Greens (on moral grounds) and the liberal opposed the amendment for political reasons. Due to Gillard not holding majority in the House she required the support of the greens for the amendment to pass.

Despite the amendment no passing through Parliament it poses as an indication of parliaments ability to hold High Court decisions to account via the introduction of legislation.

## **Transparent Processes and Public Confidence**

### **Define**

Transparency is the availability of information to the general public, which prevents corruption and increases accountability of the court system (media, civil society and the public can scrutinise the judicial system and expose

corruption). Through transparency past decisions and information regarding court proceedings are published. This ensures the public can freely find the rulings made on any given case and reasoning for that decision.

Public confidence in the courts can be defined as the courts being seen to applying justice. This is achieved by ensuring the courts are transparent, open and not affected by bias and discrimination. They are ultimately held accountable to the community whom they serve. Public confidence warrants that the public has faith in the system and that they will get a fair hearing and the right to their day in court.

### Explanation

In Australia, the adversarial system of trial is used, and through this system court proceedings offer transparency and authority in the exercise of judicial power. The convention of rule of law and C justice is a demanding aspect of the adversarial system, and hence court proceedings are designed to ensure a fair trial and that there is full consideration for both sides of the argument. This requires that the adjudicator (judge and/or jury) is impartial, each side is able to present their own case, decisions made are based on evidence and hearings must be open and transparent except in exceptional circumstances (to protect the identity of children and/or to keep government intelligence documents private).

The impartiality of the judge and jurors is one of the defining aspects to natural justice and hence must remove themselves from a case if there is a conflict of interest or any aspect of the case that may sway the bias of their decisions. This ensures that all decisions that are made are based solely on the information that is presented before the court.

It is also an aspect of the adversarial system and natural justice that both sides can present their case before the court. The judge ensures procedural fairness and that both sides have the ability to do so. Each party can call upon and examine witnesses, and cross-examine witnesses of the other party. This ensures that both sides of the case are equally presented and the jurors/judge can make an educated verdict based on evidence provided.

Rules of evidence exist in court proceedings to ensure that only the highest quality is admissible into court. Each party has the ability to present evidence, but it is to be noted that hearsay evidence, opinion, irrelevant and circumstantial evidence is inadmissible in trial. If evidence presented is deemed inadmissible then the opposing party has the ability and right to appeal to the evidence and have it ruled out.

All court proceedings in Australia are open to the public and media with the exception of a few cases Judges can chose to hold the trial, or part of it on camera in order to protect vulnerable witnesses or sensitive information – national security intelligence. The media reports on all trials and most courts have a public viewing gallery whereby members of the public are free to oversee cases in progression.

If a judge or juror should fail to act impartially or fail to uphold their duty to ensure a fair trial it opens grounds of appeal, as does failure to apply the correct rules of evidence. If either are proven by an appellate court the decision may be reversed and order a retrial to ensure that the judges/jurors are held accountable for their actions. And the openness of trial proceedings in Australia ensure that the public has confidence in the system and ensures all decisions made can be held to account.

Largely, the public tend to have confidence and faith that the courts and judges can be relied upon to make authoritative decisions based on law and evidence. The people rely on the courts to be apolitical, and hence they are trusted as they have no 'policy' and no party loyalty. This is due to the Separation of Power of powers that exists in Australia that ensures that the courts are an independent body form the legislative and executive and cannot/will not face influence from the Parliament.

When judges make verdicts on cases they never appeal to populism in order to keep their jobs. Through section 72 of the constitution judges have job security that ensures they cannot be removed from their position if they make a

decision that the government does not agree with, nor can their pay be reduced. This aspect aids in ensuring judges are impartial, and as a result of this represent a body that the people can trust. In addition, judges never have to compete with other judges in order to keep their job as, as previously mentioned, through section 72 they are secure. As a result of this there are never any feuds between judges in an attempt to outshine one another (much like what is seen in Australian politics).

The Australian people have trust in the courts and their processes as, through the Separation of Power are a completely independent body from Parliament and the executive. This ensures the people that all decisions will be fair and not in favour of the government in all situations as the courts have no loyalty to any other body.

As a result of this, courts in Australia are trusted as they are open, transparent, impartial, predictable, stable and accountable (through transparency of all decisions). Court proceedings are open to the public who can scrutinise the courts. Public confidence, and hence accountability, is ensured in the process as long as natural justice is upheld and the proceedings for the adversarial system are followed.

## Application

### ***Chief Justice Tim Carmody***

Chief Justice Tim Carmody was a controversial figure due to the nature of his election to office. Carmody was appointed to the position by the Queensland State Government Premier, Campbell Newman. This was controversial in the sense that Carmody was openly supportive of several of the Newman Government policies, in particular the anti-motorcycle gang laws. Carmody was Chief Magistrate at the time his support was shown (an inferior position) and was soon after promoted to Chief Justice of the Supreme Court (the highest state judicial office).

Carmody was criticised for his open support of government as it was seen to undermine the principles of the Separation of Power and insuring that the judiciary is and remains an independent body. Carmody faced criticism from the people, the media and judicial colleagues as he was perceived as too close to the government, was inefficient and lacked legal competence.

The final straw for Justice Carmody was an accusation of bias caused in a meeting on an appeal case of a convicted child murderer. In addition to the bias formed, Carmody failed to read the previous judgements on the case.

Through enormous pressure from the media and public Tim Carmody resigned as Chief Justice. The judge had overstepped the conventions of natural and the adversarial system of trial. These aspects ensure the courts are transparent, however they were broken and as a result Justice Carmody lost the support of the public and through that faced scrutiny that in the end led to his removal from his position he held at the time.

## Censure and Removal of Judges

### Define

Judicial independence requires that all judges have secure tenure, and that it should be possible to remove judges under dire circumstance. The process for the removal of judges is set out under section 72 of the constitution, stating that; "Judges shall not be removed except by the Governor General in Council, on address from both houses of Parliament in the same session, insisting on such removal on the ground of proved misbehaviour or incapacity."

Removal of judges only occurs in situations whereby the behaviour of a given judge puts doubt on their competence, impartiality and independence.

### Explanation

Within Australia the Separation of Power exist to ensure that the judiciary, and with it judges, exists body independent of the legislative and executive branch (Parliament). The aspect of an independent judiciary allows judges to make decisions without being tempted to compromise or be swayed by public policy or opinion. It ensures that judges can



make decisions knowing they will not be punished for the verdict they make. Due to the importance placed on this aspect of the Australian political/legal system it is rare and only under exceptional circumstances that will allow for a judge to be dismissed. This is because in order for judges to be dismissed it requires a breach of independence.

Therefore, by making the process of the removal of judges a difficult and only under exceptional circumstance there is no temptation for judges to succumb to external pressures – the media and politicians.

However, **if** there is no accountability mechanism in place for the removal of judges and the tenure of their position then it can allow for the wrong people to remain in their position and never face punishment for their lack of impartiality, competence and independence. Hence why there are limited situations at both federal and state levels whereby judges can be removed from office, via section 72 of the Australian constitution. This section outlines that a judge's time on the bench expires at the age of 70, and that there are only two grounds in which they can be officially removed from office – proven misconduct and incapacity.

Censuring and removal of a judge in Australia is a complex process as there are no judicial codes of conduct. It involves both houses of Parliament, as well as the executive government. The misconduct of incapacity is thoroughly investigated before the judge is removed by the Governor General. Judicial misconduct is difficult to investigate and prove. Justices are required to administer the law in a fair, predictable, consistent and impartial way. Judges who break the law are faced with the same consequences as other citizens and have their matters dealt with in the appropriate court and if convicted will be removed from their position (Murray Farquhar).

Section 72 provides both independence and accountability of the courts. The courts are held accountable through the ability of Parliament and the Governor General to remove a justice and ensures that all actions can be monitored and held to account.

Different systems of political and legal governance choose their judges by executive appointment, through a selection committee, by legislative confirmation or through popular election. In Australia, the political executive has historically appointed judges. It is specified in the constitution that the High Court Justice and other federal judicial officers "*shall be appointed by the Governor General in council*" with the advice of the Federal Executive Council (the executive). This selection process sets no qualifications for being a judge nor indicate any of the appointment procedures.

This process of appointment of judges has been criticised for many reasons including; it is often claimed that the appointments are too political, with a number of former politicians being appointed in recent years, the selection process is too narrow – not enough women or members of ethnic minorities are appointed and the scope of consultation is too narrow and it has been argued that the community should play a more active role in the selection role. Politics are elected by the people and hence accountable to the people, however the people cannot hold the courts to account in this same way as they have no input in the appointment process. The only body that can hold them to account in this manner is the executive, but in order for that to be done it requires a breach of judicial accountability.

## Application

### ***Justice Murray Farquhar***

In 1985 Justice Murray Farquhar was sentenced to four years of jail time after being found guilty in attempting to pervert the course of justice by pressuring fellow judges to drop a case against a friend. However, due to his retirement in 1997 he was not removed from his position as he has already removed himself from the bench.

In 1977 Kevin Humphries, the then chairman of the Australian Rugby League faced charges in regards to his defrauding of the Balmain Leagues Club where he was secretary manager. Farquhar, who still held office at this time, insisted that Magistrate Kevin Jones hear the case and had pressured him to not commit Humphries. These actions pose as an

indication of misconduct on Farquhar's behalf and would have led to removal if he still held office at the time they were uncovered.

### ***Justice Lionel Murphey***

Senator Lionel Murphey was appointed by the Whitlam Government to the High Court. Murphey was a controversial figure who was accused of distorting the course of justice in 1984. A Senate committee was established which eventually led to the recommendation that Justice Murphey be prosecuted.

Murphey was found guilty by the New South Wales Supreme Court of '*attempting to pervert justice*' but this was later reversed on appeal by the New South Wales Court of Criminal Appeal.

Following the Appeal, a special Parliamentary Commission of Inquiry (composed of three retired judges) was established via legislation to inquire into Justice Murphey's fitness to be a High Court justice. Many allegations were investigated by the commission, however, at this stage Murphey was diagnosed with terminal cancer. The Parliamentary Commission of Inquiry was disbanded and its documents were placed under restriction for 30 years. Justice Murphey returned to the High Court for one week and then dies in October of 1986.

Had Justice Murphey not become terminally ill the Parliamentary Commission of Inquiry would have continued investigations and would have made recommendations to Parliament as to whether section 72 should have been used to remove Justice Murphey from his position.

### ***Justice Angelo Vasta***

Justice Angelo Vasta was a justice of the Queensland Supreme Court before being removed by the Queensland Parliament following the Commission on Inquiry into Possible Illegal Activities and Associated Police Misconduct in Queensland. The Queensland Parliament set up a commission of inquiry, led by former Chief Justice Sir Harry Gibbs, to investigate allegations made in the Fitzgerald Inquiry.

Vasta was accused of wrongdoing in relation to a company with which his family were associated. While the inquiry had found no misconduct in relation to his decisions as a Supreme Court Justice, it did find that he had committed acts of misconduct in relation to tax arrangements which prompted the Parliament to remove him from his position. In 1989 Justice Vasta was removed from office by a vote from the Queensland Parliament.

Justice Vasta is the only Australian superior court judge to be removed from office in the 20<sup>th</sup> and 21<sup>st</sup> century.

## **Codes of Conduct**

### **Explanation**

Codes of conduct are forms of voluntary self-accountability. The complexity of modern governance and problems with traditional accountability mechanisms has led to the implementation of codes of conduct within many branches of the Australian government.

An Australian Institute of Judicial Administration is a non-government organisation composed of 30 representatives from across the legal profession, including judges. The aim of this institution is to implement a judicial code of conduct which would be adopted by the Australian judiciary.

There is currently no code of conduct implemented in the court system in Australia. If one were to be introduced it would set out guidelines as to how the Separation of Power is to be adhered to by the courts and impose legal injunctions if the independence of the judiciary were to be breached by any member of the judiciary.

As previously discussed Tim Carmody breached the Separation of Power that exists between the courts but all that held him to account was the scrutiny of the public. However, it was only after many other actions of misconduct that he resigned from his position. If a code of conduct were to be implemented into the system it would ensure that issues such as these were addressed as soon as they arose in court and that judges can be held to account for their conduct in the exercise of their role.

## Application

### ***New South Wales Magistrate Roger Prowse***

The new South Wales Department of Public Prosecutions sought judicial review on Magistrate Prowse after he accused police of interfering in a minor assault case.

The day of the trial the victim was charged of threatening and hence influencing a witness which is a criminal offence. As a result of this, the original assault case could not go ahead. In response to this Justice Prowse insisted the accused be 'un-arrested', however the prosecutor had no power to do so. In response to that Magistrate Prowse accused the police with 'immaterial interference with a court hearing' and threw the case out of court after being asked to step aside.

Judicial review was carried out and found that Magistrate Prowse had become frustrated with the police and sought to punish them, and through these actions undermined the proper administration of justice. This case provides an example of judicial accountability being carried out by the judiciary itself through the review into the conduct of judges. It illustrates how there is no code of conduct present in the court system and as a result situations such as this one can arise, and that the only way accountability can be achieved is through review.

# Human Rights and how to Protect Them

## Human Rights and how to Protect Them

### What are Human Rights?

The Australian Human Rights Commission defines human rights as rights inherent to all human beings, whatever out nationality, place of residence, sex, ethnic origin, colour, religion, language or any other status may be. It implies that everyone is equally entitled to human rights without discrimination. It is recognising the value of each person and their entitlement to be treated with dignity and mutual respect. Today human rights are internationally recognised and prompted by bodies such as the United Nations. (The first ever attempt to list human rights was by Eleanor Roosevelt in 1948 following World War 2 in an attempt to restore human rights.)

Human rights do not have to be enforced by law to exist, they apply to all humans and they can be ignored and abused, but they cannot be removed.

### Characteristics of Human Rights

Human rights are;

- **Universal** – they apply to all human beings regardless of any distinctions of race, ethnicity, religion, gender, age, disability, wealth or any other characteristic.
- **Internationally Guaranteed**
- **Interdependent** – you cannot have some rights without others. To break any right diminishes the others.
- **Legally protected**

- **Equal and indivisible** – rights cannot be ranked into an order of importance or only partially allowed. All rights are of equal importance.
- **Inalienable** – you cannot separate a person from his or her human rights. The only exception is loss of rights by law. For example, a person who has committed murder has breached another person’s right to life. Law allows the guilty person’s right to liberty and freedom to be removed as a consequence.

## Two Categories of Rights

### Negative Rights; ‘Certain Freedoms’

These rights can be through of ‘certain rights from...’. The right to life liberty and the pursuit of happiness.

These are called negative rights because they oblige a government (and everyone else) to take no action against another person that takes away they life, liberty or their quest to live their life as they wish. Thus, the right to **Life**, which ensures freedom from the government or anyone one killing or injuring you, **Liberty**, ensures freedom form anyone arbitrarily depriving a person of their freedom, and **Pursuit of Happiness**, which ensures freedom from anyone stopping a person from choosing their own path and making their own life choices.

The only limit to these rights is the point at which on person’s enjoyment of his/her freedoms interferes with another person’s enjoyment – the harm principle. Essentially, you can live your life as you please as long as you do no harm to anyone else’s life, liberty or property.

### Positive Rights; ‘Certain Entitlements’

Modern society cannot just rely on negative rights. People need an education, decent health care, equal access to employment as well as other opportunities. These are referred to as positive rights as they require the government to take action to that everyone’s entitlement rights are met.

Thus, the right to; **Education**, obliges the government to provide universal free primary and secondary schooling, **Health**, obliges the government to provide a minimum standard of health care, and **Equal Treatment**, obliges the government to make and enforce laws against racial, sex, age, disability and other forms of discrimination.

## Generations of Rights

### First Generation Rights:

Emerged during the enlightenment period and are identical to negative rights

### Second Generation Rights:

Emerged in the 20<sup>th</sup> century as Western societies became wealthier. These are the same as positive rights.

### Third Generation Rights:

This generation of rights has only recently emerged. Examples are group rights, such as indigenous rights to land, native title rights and rights of cultural and religious minorities to maintain traditional practices.

## Conflicting Rights

Some third-generation rights are controversial as they conflict with other rights. Some cultural practices, such as child marriage and female genital mutilation, strongly conflict with first-generation (negative) rights. Conflicting rights and how to resolve them are a key part of modern human rights debates.

## Classifying Human Rights

### Civil Rights

A broad category or rights aimed at protecting people from discrimination and empowering them to live full lives within their communities and societies. They include rights which enable participation in the democratic processes of a country.

For example; the freedom of conscience, speech, press, association and religious beliefs. Rights to life, liberty and equality.

### Political Rights

Often regarded as a subset of civil rights. They empower the people to participate in the government/governing of their country. This include the right to vote, the right to run for political office, the right to assemble and the right to join political associations (party/pressure group).

### Economic Rights

Entitlements to a minimum standard of living. They ensure that a person's material needs are met: his or her need for shelter, freedom from hunger and the right to earn a living. As well as the rights to own property, work, earn a minimum wage and to trade.

### Social Rights

Rights which enable a person to develop and live their life in the way of their own choosing. Economic rights are aimed at material wellbeing, social rights are aimed at personal wellbeing. It includes the freedom to choose your own marriage partner, have children and a family, move about within your country and between others.

### Cultural Rights

Cultural rights apply to specific cultural groups based on ethnicity, religion or status. They are commonly applied to the 'First People' in settler countries and to migrants from very different background to the mainstream of a given country. They are designed to allow for people to practice their cultural traditions and preserve their identities. These rights include the right to use one's own language and develop cultural activities.

### Legal Rights

Legal rights are applied to those accused of wrongdoing and subject to civil or criminal proceedings in court. The rights of an accused person protects them from the severe consequences of being found liable for civil wrongs of guilty of a crime, if they are they face losing some of the aforementioned rights. The loss of rights is a very serious thing. Legal rights are a safeguard protecting those at legal risk of losing their rights – this is done through the right to silence, the presumption of innocence and the right to a fair and unbiased trial.

## Where do Human Rights Come From?

The International Covenant on Civil and Political Rights

The right to participate in the democratic process, including;

- Freedom of speech, religion and the right to vote
- Freedom from unfair arrest and detention and the right to a free trial
- Freedom of association and the right to join trade unions

The International Covenant on Economic, Social and Cultural Rights

Deals with rights to basic living standards, including;

- Access to food, housing and work
- Security, education, health, a fair wage and safe working conditions

## How do Countries Agree to Protect Human Rights?

- **Conventions** – promise to engage in or refrain from a specific action
- **Treaties** – an agreement under national law entered into by actors into international law.
- **Protocols** – international agreement that supplements a treaty. It can amend the treaty or add provisions.
- **Declarations**

## The Protection of Rights

Putting rights into law is the most powerful form of protection. The Rule of Law makes law the only valid way to limit governments and citizens in ways that protect and enhance rights. Laws protecting human rights come in different forms;

- Superior Laws
- Ordinary Laws
- International Laws
- Bills or Rights

Each type is used to protect rights in different countries in different ways.

### Superior Law (Constitutional Law)

Constitutions are superior law and binds all institutions – Parliament, government and the courts – and the people. They have special mechanisms for alteration, hence making them very secure and difficult to change (Australia – section 128. The ‘double majority’). Constitutional rights tend to be political and civil rights. Constitutions can specify rights in writing or can imply rights if judges decide that a constitution suggests them.

#### **Advantages**

- ☑ The difficulty to make changes to the constitution makes specific rights entrenched in the constitution very safe.
- ☑ Government policy cannot contravene constitutional rights, and Parliament cannot pass laws that infringe constitutional rights because that would be unconstitutional and hence, unlawful.
- ☑ There is a strong protection on these rights through constitutional (chapter 3) courts. The judiciary is the only body empowered to interpret the constitution and can strike down any policy or law if it breaches constitutional rights.
- ☑ Judges can discover implied rights in the constitution, hence keeping constitutional law up to date with changing social values. Rights can be implied without actually being written into the fundamental law. This can be controversial as it gives the judges a lot of power ‘Judicial Supremacism’

#### **Disadvantages**

- ☒ The constitution is hard to change meaning adding new laws or removing outdated ones is hard. The United States has major gun control issues due to the outdated nature of the 2<sup>nd</sup> amendment. Removing that right is almost impossible.
- ☒ Due to not all rights being specifically mentioned, some rights are seen to be inferior and less important than others.
- ☒ Judicial supremacism is an issue as it gives too much power to an unelected and unaccountable body. Judges may strike down laws they think are unconstitutional even though those laws represent the will of the majority.

### Ordinary Law (Statutes)

Statutes are laws made by elected parliaments and is a good way to protect rights as Parliament is sovereign and hence represents the will of the majority. It can be assumed that the peoples Parliament will not enact laws that oppress the people. Laws based on parliamentarianism principles are ‘dialogical’, meaning they are designed to create a dialogue between the courts and Parliament. It binds the government and the courts, however does not bind parliaments (as no Parliament is bound by a previous Parliament).

Statutory rights may include civil, political, economic, social, cultural and some legal rights.

#### **Advantages**

- ☑ After constitutional law, statute law is the most powerful form of law.
- ☑ New rights can easily be added and old ones can be removed or modified. This method does not suffer the same inflexibility and lack of adaptive capacity as constitutional law.

- ☑ Statutes can reflect changing values and attitudes of a society accurately as they are responsive to democratic influence and can be amended quickly if Parliament wills it.
- ☑ Statutes may be interpreted by the courts, so the same advantages of independent judicial review apply
- ☑ Degree of judicial empowerment can be determined by the way a statute is written;
  - May give power for judge to strike down other acts
  - May limit a judge's power to declare that another act is in breach of human rights. This would leave it up to Parliament to decide whether the offending act need to be changed.

### **Disadvantages**

- ☒ Statutory rights are less protected than constitutional rights because they can be changed/ watered down/removed relatively easily.
- ☒ Especially worrisome in systems where the executive dominated the legislature.
- ☒ Rights generally impose restraints on governments. If government controls parliament, then statutory rights are at greater risk as government can seek ways around them.
- ☒ As statutes are written, the issue of listing and limiting rights that applies to superior law applies to statutory law.
- ☒ Rights not listed are not protected and are regarded as inferior.
- ☒ Even though Parliament can retain over how judges interpret rights. There is still the argument that unelected judges are empowered too much by statutory rights.

### **Ordinary Law (Common Law)**

Common law is judge-made law. It is made in courts via the doctrine of precedent, and hence is inferior to statute and can be overridden by Parliament. Most common-law rights are legal rights – negative rights including the right to silence, a fair trial and the right to the presumption of innocence.

Ordinary law bounds lower courts within a court hierarchy, it does not bind Parliament, and government is only bound to common law if they are a party to a particular case.

### **Advantages**

- ☑ 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. It is built into the adversarial trial processes and procedures (the high burdens of proof, the impartiality of judges, the equal opportunities for the parties to present their cases and natural justice).
- ☑ The adversarial trial system has built on these principles which are designed to ensure justice. It is the means by which common law itself is created.

### **Disadvantages**

- ☒ 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. If there is a high casualty terrorist attack then there may be a desire to override common law protections for criminal suspects.
- ☒ Recent anti-terror laws overdose common law rights to silence and the presumption of innocence.

### **International Law**

International law is law made between nations or by international organisations. International law can influence domestic Australian law, but only if the Australian government and Parliament agree to adopt it.

### **Advantages**

- ☑ Allows for the adoption of rights which are developed internationally
- ☑ Allows for Australian to promote human rights internationally by being involved with drafting laws
- ☑ Raises the profile of human rights in Australia and internationally

## **Disadvantages**

- ☒ International law is unenforceable. It has moral force, but no legal force
- ☒ The only exception is when a country signs and then ratifies international law, converting it into enforceable domestic law.

## **The United Nations and International Law Making**

International law is made by international organisations or by sovereign nations entering into treaty agreements with each other. The most important international organisation for human rights is the United Nations. The United Nations is the world's largest and most influential international organisation with several key objectives including maintaining international security and peace, upholding international laws and protecting human rights.

The most important body in the United Nations is the Security Council. The security council is a body of 15 nations – 5 permanent (United States, Russia, China, Britain and France) and 10 on 2 year rotations. The 5 permanent nations have the power to veto decisions of the security council. The Security Council can make solutions authorising the United Nations to take action, including military action, to prevent human rights abuses and end conflicts.

The United Nations has a dedicated human rights body; United Nations Human Rights Council (UNHRC). It has a membership of 47 countries and acts as a forum for protecting human rights. The Office of the High Commissioner for Human Rights (OHCHR) is the main United Nations agency promoting human rights in the world. The OHCHR appoints investigations of working groups into places where human rights might be being violated and hence placing pressure on countries committing the offences.

There are other agencies within the United Nations with specific mandates to investigate and report on human rights abuses in particular areas, for example, asylum and refugee policies.

However, the United Nations and its agencies cannot directly intervene in the affairs of another nation as it has no legal jurisdiction. The United Nations cannot enforce its international laws, it only has moral force in regards to human rights.

## **International Courts**

There are two international courts that have a role in human rights.

- **International Court of Justice**; one of the main 6 bodies of the United Nations. It mostly settles disputes between nations. These disputes do not often involve human rights issues, but they may be a feature of certain cases.
- **International Criminal Court**; has a greater focus on human rights, and convicts former national leaders of violating and abusing human rights (crimes against humanity).

## **How do International Human Rights Work?**

**Step 1 – the agreements.** United Nations members negotiate agreements on human rights, the most famous of these being the *Universal Declaration of Human Rights (UDHR) 1948*. *Elimination of all Forms of Racial Discrimination was signed by Australia in 1965*.

**Step 2 – nations sign up.** The executive arm of government signs the agreement; however, this international law is not yet domestic law – it is the role of the legislative branch to create law. Australia has signed the following major international human rights agreements;

- *1960 Convention Concerning Discrimination in Respect of Employment and Occupation*
- *1965 The Convention on the Elimination of All Forms of Racial Discrimination (CERD)*
- *1966 The International Covenant on Civil and Political Rights (ICCPR)*
- *1966 The International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *1971 Declaration on the Rights of Mental Retarded Personnas (DRMRP)*



- 1979 *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*
- 1981 *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*
- 1984 *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*
- 1989 *The Convention on the Rights of the Child.*
- 2006 *The Convention on the Rights of Persons with Disabilities (CRPD)*

**Step 3 – ratifying the agreements.** Ratification = codifying international law and making it into statutes and hence making them enforceable. Ratified international law must pass through the Commonwealth Parliament through the legislative process like any bill created by government/parliament. Section 51(xxix) – the external affairs power – gives the Commonwealth Parliament the power to do this. **Convention was ratified by the Commonwealth Parliament when it passed the *Racial Discrimination Act 1875*.**

**Step 4 – administering and enforcing laws.** Parliament can set up a special executive agency to administer the new law and may have certain powers under the Act to force compliance with human rights. Two examples include the *Australia Human Rights Commission* and the *Race Discrimination Commission*.

### Bills of Rights: Constitutional and Statutory

Bills of rights can be constitutional or statutory, hence having the same advantages and disadvantages of each system. Bills of right focus exclusively on rights, and Australia is the only true liberal democracy that does not have a bill of rights at the national level. However, Australia does have a state bill of rights in Victoria and the ATC.

Bills of rights can work in different ways – it depends on what role the judiciary and Parliament play. Hence, bills of rights can be two types based on the principles by which they are designed. These two principles are parliamentarianism and judicial supremacism.

### **Judicial Supremacism**

A bill of rights can grant the judiciary the power to strike down laws that are incompatible with it. This puts the judiciary in the ultimate position of power with respect to rights. Constitutional bills of rights will always empower the judiciary to strike down laws, as the Rule of Law demands all laws are subject to a fundamental law (the court is the only body which can judge this). Statutory bills of rights can also empower the judiciary to strike down laws – if the bill is constructed to give the courts this power. The Canadian Parliament adopted this model when it passed the *Canadian Charter of Rights and Freedoms 1982*.

The United States Bill of Rights is an example of the constitutional model. It is a series of amendments to the United States constitution, and hence gives great power to the judges of the supreme court.

High Court (judicial supremacy) results in a change in the federal balance of powers as there is no democratic check on the judiciary.

### **Parliamentarianism**

Parliament is the people’s legislature and must remain sovereign and supreme, it must never be subject to the will of judges. It focuses on the assumption that the people’s Parliament is the best protector of the people’s rights as the people would not allow for their own legislature to abuse them.

Westminster systems are founded on the principle of parliamentary sovereignty. Australia’s resistance to a constitutional or even statutory bill of rights stems from a strong belief that Parliament should be the sovereign body.

The Victorian, ACT, New Zealand and British statutory bills of rights do not grant the judiciary any power to invalidate laws, only to declare them a violation of human rights. Once a declaration of incompatibility has been issued it constrains Parliament because it will come under public pressure to either amend the law or justify why it is necessary.

# Australia and the USA: Contrasting Human Rights Approaches

## Contrasting Human Rights Approaches (Australia and the USA)

### Australia

#### Rights Protection in Australia

Australia uses statute, ordinary and a charted of human rights (in Victoria and the ACT) to protect human rights – the approach of parliamentarianism (the mixed approach).

#### Constitutional Law

The Australian constitution provides on a limited protection on rights.

#### Express Rights

Rights protected in the constitution – they are explicitly mentioned

- Section 41 – the right to vote
- Section 51 (xxxi) – the requirement that a compulsory acquisition of property by the Commonwealth must be on just terms
- Section 80 – the right to trial
- Section 116 – the right to freedom of religion
- Section 117 – the requirement that Australian law must not discriminate against a person because of their state of residence.

Parliaments and government cannot override express rights

#### Implied Rights

The High Court can interpret the constitution and decide that certain rights may be implied by its words or intentions. Parliaments and governments cannot override implied rights.

Implied rights must be discovered in the context of case law;

- **Nationwide News v. Wills (1992) – implied right to political communication.** Media outlet was prosecuted for publishing strong criticism towards a Commonwealth body. Nationwide news challenged the prosecution, claiming there was an implied freedom of political communication.
- **Roach v. Electoral Commissioner (2007) – implied right to vote.** Howard government took away prisoners right to vote. Roach challenged this so that those serving three years or less remain to have the right to vote.

#### Commonwealth Statute Law

For international law to have force in Australia it must be ratified into statute law. The Commonwealth overwhelmingly protects human rights through statute laws.

Examples of international law becoming statutes in Australia include;

- *International Convention on the Elimination of all Forms of Racial Discrimination – Racial Discrimination Act 1975*
- *Convention on the Elimination of all Form of Discrimination Against Women –Sex Discrimination Act 1984*
- *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment – Crimes (Torture) Act 1988*

Equal Opportunity Act 1986: a failed attempt at overarching human rights protection  
The Commonwealth Parliament has attempted to enact a single broad and powerful Act with a strong Human Rights Commission to enforce human rights. It is the closest thing Australia has ever had to a bill of rights. The Act would have created a Human Rights and Equal Opportunities Commissioner (HREOC) to administer the new law.

HREOC was intended to create a powerful dispute resolution body with the power to hear human rights violation complaints. However, HREOC's judicial power was struck down by the High Court in the case of *Brandy v. HREOC*. The High Court judges that HREOC was not a chapter three court and therefore could not exercise judicial power. This judgement diminished HREOC's power and hence weakened the protection of human rights.

Kevin Rudd attempted to revive the idea in 2008 with the *National Human Rights Consultation Committee*, but it led to nothing.

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

### ***Anti-discrimination Commission***

People who have alleged that their rights have been violated can make a complaint to the relevant commissioner. Most cases use conciliation to solve these cases. This is the case with the anti-discrimination commission, it hears violations regarding discrimination due to race, sex, age, ability, religion, etc. it also raises awareness for human rights.

However, these bodies do not have the power to make legally binding decisions so the effectiveness of them can be questionable.

### ***The Parliamentary Joint Commission on Human Rights (PJCHR)***

The PJCHR is a standing committee with the purpose of scrutinising all legislation and delegate legislation introduced into the Commonwealth Parliament for compatibility with the following international covenants and and conventions to which Australia has agreed to be bound to;

- *International Covenant on Civil and Political rights*
- *International Covenant on Economic, Social and Cultural Rights*
- *International Convention on the Elimination of All Forms of Racial Discrimination*
- *Convention on the Elimination of All Forms of Discrimination against Women*
- *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities*

The PJCHR publishes a report on each house weekly in regards to their compliance with these human rights conventions. These assist in maintaining the status of international covenants, protocols and treaties by ensuring all bills and regulations are assessed against the human rights standards.

### ***Protocols***

Optional additional treaties related to original international human rights covenants and conventions. An optional protocol has the status as a treaty and must be signed, ratified and then enforced.

Australia has signed the optional protocols to the following international treaties;

- *Second Optional Protocol to the International Covenant on Civil and Political Rights – Aiming at the Abolition of the Death Penalty.*
- *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*
- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.*

### **Statutory Rights: vulnerable or flexible?**

In response to the *Little Children are Scared* report by the Board of Inquiry into Protection of Aboriginal Children from Sexual Abuse, the Howard government implemented the Northern Territory National Emergency Response. Howard the Australian Arm into NT remote communities to intervene and take control and exercise forced medical checks of Aboriginal children.

To make this legal, the Howard government had to amend certain sections of the Racial Discrimination Act 1975. This required the suspension of racial discrimination rights, however was easy to do as government had control of both houses of Parliament.

This example highlights how vulnerable rights are to a government, as they can easily be changed. It raises the issue that statutory law is flexible and can easily be altered by Parliament. It suggests that statutory rights are not safe from removal.

### **State Laws**

Some Australian states have sought to overcome the limitations of Commonwealth law by enacting their own statutory bills or rights – *The Charter of Human Rights and Responsibilities Act 2006* (Victoria) and *The Human Rights Act 2004* (Australian Capital Territory – ACT). They are designed to encourage dialogue between Parliament and the judiciary, with Parliament retaining the upper hand.

### **The Charter of Human Rights and Responsibilities Act 2006**

The charter promotes and protects 20 basic human rights.

Basic facts about the charter;

- It requires parliament and all agencies of the Victorian executive government to consider human rights when developing laws and policies
- All laws passed in the Victorian Parliament must be checked against the charter and a statement of compatibility outlines how laws comply with human rights
- The Victorian parliament can still override the charter, but must explain why the law does not meet the standards of the charter
- Aims to prevent human rights problems
- The Supreme Court of Victoria does not have the power to strike down a law which conflicts with the charter

### **Castle v. Secretary to the Department of Justice [2010]**

Kimberly Castles was serving a sentence for social security fraud – prior to this she has been receiving IVF treatment. She requested that this treatment continue while she was in prison at her own expense. The department of justice did not grant her request saying prisoners do not have these entitlements.

Ms. Castles argues that under the Victorian Charter she had the rights to family and equality (s.13), equality (s.8) and to human treatment in detention (s.22) – and hence the treatment was granted

### **Human Rights Act 2004 – ACT**

The Human Rights Act is similar to the Victorian counterpart, however a key difference between the two is that the ACT allows complaints to bring direct action in regard to human rights (it does not have to be ‘piggybacked’ onto another case).

Basic facts about the Act;

- Human rights covered in the act are civil and political
- ACT Legislative Assembly must review all potential legislation for compatibility with human rights.
- ACT Attorney General must issue compatibility statements for each new law proposed
- For bills that are not compatible the Attorney General must explain why
- The Supreme Court of ACT may issue a declaration of compatibility

### ***Nona v. R [2012]***

Nona was charged with four offences and a warrant was issued in 1998. He was finally summoned to trial in 2009 with the case actually commencing in 2012 (14 years after the warrant was issued). Nona, due to this, applied for the case to be permanently set aside, however the application was refused.

Under the Human Rights Act he had right to be tried without unreasonable delay, and that 14 years was unreasonable.

Arguments for and against the charter/Act.

Positive outcomes;

- Fosters a positive human rights culture
- Makes government and Parliament more aware of human rights, and to consider the impact of these on laws they create
- Many disputes can be settled outside of court (the charter)
- Government agencies include human rights training for their personnel

Criticisms and limitations

- Government and parliament still have the capacity to create laws that breach the charter as it does not have the force of law. They can override the human rights outlined if they provide reasoning as to why it is necessary.
- Giving unelected judges too much power
- You cannot bring action straight to court for human rights issues in Victoria, it must be 'piggybacked' onto another case.
- The human rights outlined do not hold any power when it comes to law making. It does not have to be followed

## **Common Law Rights Protection**

Most common-law rights operate at the state level as states have the residual power over criminal and civil law.

Common Law rights are legal rights apply to those who find themselves subject to criminal or civil trial. The rights include;

- The right to a free and fair trial
- The right to the presumption of innocence
- The right to silence

### **Anti-Terror Laws and their impact on Common Law rights**

Common law protects the rights of that accused and the parties of the case. However, these rights are vulnerable to executive dominated parliaments. Since 2001 Australia has passed a number of statutes criminalising terrorist acts and providing the ASIO (Australian Securities Intelligence Organisation). These have been criticised for being in breach of common law rights.

Rights affected by counter terror laws passed since 2001 include;

- The right to a fair trial – terror subjects are not allowed to know the evidence against them
- The right to the presumption of innocence – can be detained in secret without charge for seven days

- The right to silence – can be charged for not answering questions

### Dietrich's Case

In the Dietrich's case the court declined to change the common law to recognise a new right to counsel at public expense, despite international human rights law saying so. However, did create the common law to recognise a stay in proceedings if the absence of legal representation would render the trial unfair.

### Mabo Case

Another example of Common Law recognition of rights is the Mabo Case 1992, which recognised indigenous native title rights in Australia. The High Court recognised a common-law form of land rights known as 'native title'. This abolished the term terra nullius – the idea that Australia was nobody's land prior to British settlement.

The parliament supported this and create the Native Title Act.

## Human Rights Violations in Australia

Both the Human Rights and Equal Opportunities Commission and Amnesty International have expressed concern regarding Australia's protection (or lack of) human rights. There are numerous examples of breaches of Human Rights in Australia, the following are examples of how the government has failed to respect human rights;

- Asylum seekers – including children – have been detained in immigration detention centres indefinitely and for prolonged periods of time
- Australian citizens and others entitled to live in Australia have been illegally detained or deported
- Anti-terrorism laws have infringed on fundamental human rights

### The Haneef Case

Dr Haneef was held for nearly one month in detention – two weeks of which he did not know his charge and was not able to apply for bail. The charge of providing support to a terrorist group was eventually dropped. he also had his work visa revoked. Dr Haneef's treatment seriously compromised his right to the presumption of innocence.

Counter terrorism laws outline how easy it is for government to persuade Parliament into passing laws that override common law rights.

### Australia's Treatment of Asylum Seekers and Refugees

Since 2001 Australian governments have implemented harsh policies designed to deter asylum seekers from Australia. Australia has set up offshore detention on Nauru and Manus Island where asylum seekers arriving on boats are sent to. Australia also intercepts boats at sea, and tried to implement the Malaysia Solution. Many of these policies have been found to be in breach of human rights by the United Nations.

Australia has international obligations to protect the human rights of all asylum seekers and refugees who arrive in Australia, regardless of how or where they arrive. The government, under treaties, must ensure the protection of their human rights – however this is limited.

### ***Ms Cornella Rau and Mandatory Immigration Detention***

Issue arising for the mistaken detention of Ms Cornella Rau, a permanent resident of Australia. When by numerous different names and identities and was detained by police in North Queensland as a suspected illegal immigrant.

Currently the Department of Immigration can detain anyone they consider to be a non-citizen. Australian courts do not have the opportunity to determine the appropriateness of the decision. The denial of such a fundamental human right means that persons in Australia can be detained without end.

## Mandatory Detention and Human Rights

Mandatory detention does not take into account the different situations of individuals. Under Australia's international human rights obligations, anyone deprived of their liberty should be able to challenge their detention to court – Australia does not provide access to such review.

## Mandatory Sentencing

Mandatory sentencing laws strip courts of their power to interpret laws and compromises the Separation of Power. It prevents courts from making their own decisions on a case and applying case law. It limits the ability to a fair trial as it prevents a judge from applying a judgement appropriate to the crime.

## Federal Act to Protect Human Rights

### Arguments For

- Would significantly improve the protection of human rights in Australia
- Make the Parliament consider how new law impact people's rights
- Make the executive government consider how to address human rights issues when it develops policy
- Make courts consider human rights when interpreting legislation
- Make public servants consider human rights when making decisions and delivering services
- Provide enforceable remedies if a federal government authority breaches human rights
- Contribute to the human rights culture in Australia

### Arguments Against

- There are already sufficient human rights protections in Australia
- The best rights protection in Australia is our democracy system – we should have trust in our politicians and vote them out if necessary
- There is no historical basis for national human rights laws in Australian

## USA

The United States uses the judicial supremacy model to protect human rights (constitutional bill of rights). They have a constitution that explicitly codifies the rights of the citizens.

## Constitutional Bill of Rights

A bill of rights, sometimes called a declaration of rights, is a list of the most important rights to the citizens of a country. The purpose of these bills is to protect those rights against infringement. Bills may be entrenched (cannot be modified through normal procedure – requires a referendum) or unentrenched (normal statute law and hence can easily be modified).

The United States codifies the fundamental rights of its citizens in the constitution through an entrenched bill of rights, giving it the status of superior law. This is the highest level of rights protection as the bill cannot be altered by the executive, this results in the supremacy of the judiciary in regards to rights.

The 10 amendments;

1. Freedom of religion, speech, press, right to assemble peacefully and the right to petition government.
2. Right to keep and bear arms
3. Freedom from the quartering of soldiers in private homes
4. Freedom from unreasonable searches and seizures – the requirement of a warrant
5. Right to silence for an accused person
6. Right to certain legal rights; quick trial, public trial, impartial jury, to know the accusation against you and certain rules of evidence
7. Right to a jury in a civil case

8. Restriction on government imposing excessive bail, fines and cruel or unusual punishments
9. The listing of these rights shall not deny or limit other rights held by the people
10. Reserves all unspecified rights and powers to the states or the people

## Judicial Supremacy

The United States bill of rights is constitutional so it strongly empowers the judiciary. Judicial supremacy results in systems that have codified constitutional bills of rights and therefore can be interpreted by the judiciary. The United States Supreme Court is the only body which can interpret the constitution.

## Statutes Protecting Human Rights

Much like Australia, the United States has passed important statutes protecting rights, the most important of these is the *Civil Rights Act* 1964, this gave equal rights to all American citizens regardless of race. This was aimed specifically towards the rights of African Americans who faced discrimination post-Civil War as decedents of slaves.

## Common Law Rights in the United States

The United States is a common-law country much like Australia, and has similar right to Australia under the adversarial system. The only difference is that some rights have been elevated to constitutional status – the 5<sup>th</sup> and 6<sup>th</sup> amendment.

## The United States and International Human Rights Law

The United States supports international law, however since 2002 has refused to ratify any into law. The United States is one of only two United Nations countries to not ratify the *Convention on the Rights of the Child*, and one of only seven not to ratify the convention on the *Elimination of All Forms of Discrimination against Women*. It justifies this by refusing to enter into legal agreements that its enemies could use against it – Americans refuse to allow American soldiers to go before the International Criminal Court (ICC).

## Problems with Human Rights Protection

### Counter Terror Detentions – Guantanamo Bay

Detainees held at the detention facility in Guantanamo Bay continue to be denied their human rights. Guantanamo Bay is a detention for captured and suspected terrorists as it is out of the jurisdiction of the United States. Prisoners here cannot access judicial review.

### Migrants Rights

More than 35,000 unaccompanied children and 34,000 families apprehended crossing the southern border (Mexico and America) escaping violence. Families were detained for months while pursuing claims to stay in the United States. Many were held in facilities without access to proper medical care, sanitary food and water and legal counsel.

### Death Penalty

27 men and one woman were executed in 6 states, bring the total to 1,422 since the death penalty was introduced in 1976. Almost 3,000 remain on death row.

## Evaluation

The constitution guarantees rights and empowers the judiciary to a degree. This can be seen as both a positive and negative aspect – the judiciary is independent (good)/the judiciary is an unelected body (bad).

The bill of rights suffers from inflexibility. Some rights are outdated, however still have influence as it is exceptionally to remove/amend these rights.



## Criticisms

### Judicial Supremacy

- Places rights in the hands of an unelected body
- Prevents the legislature (people's representatives) from amending and controlling rights

### Parliamentarianism

- Executive dominance prevents Parliament from protecting rights from executive power
- Parliament can represent extreme views that may trample rights

# Australia and the USA: Evaluating Democracy in Practice

## Evaluating Democracy in Practice (Australia and the USA)

### What is a Democracy

Democracy, by definition, is a government of the people, by the people, for the people. For a government to be considered democratic it must uphold the five pillars of democracy – Rule of Law, political representation, popular participation, judicial independence and natural justice. These five pillars establish the extent to which democracy is upheld within a country. In addition to these, a democratic country must also be able to demonstrate the following; legitimacy (there is public support for the government), policies that benefit the majority of society (not just an elite), a framework of government (the constitution in Australia), a means for protecting Human Rights and ensure accountability of government.

There are three systems of democratic government's that exist – representative, direct and liberal. A direct democracy is a form of democracy in which the people participate directly in their own government. All laws and governance of the country is done directly by the people. However, this method has become somewhat cumbersome and expensive and has been replaced by the representative democracy. A representative democracy is when the people elect representatives to act on their behalf (represent them). This method has been adopted by both Australia and the United States. Lastly, a liberal democracy is based on both popular sovereignty (the will of the majority) and the respect and protection of rights.

### Political Representation

Political representation is the way in which people can engage in and ensure their values and beliefs are present in public policy and the political process. Political representation occurs when political figures speak, advocate, symbolise and act on the behalf of others political standings and beliefs. The government must be able to demonstrate that they listen to the people's concerns and act on them through their engagement in the political process and ensure all components of society are represented.

Australia and the United States have two classes of representatives. Those who represent the people directly sit in the House of Representatives/Lower House and those who represent the people in the state sit in the Senate/Upper House. The difference between the two is the manner in which the executive represents the 'will of the people'. In Australia, the executive is formed by the House of Representatives and hence indirectly represents the peoples will. However, the president of the United States is directly elected by the people and therefore directly represents their will.

## Australia - Upheld

- ☑ Australia has an electoral system which facilitates political representation in both the Parliament and executive Cabinet. Australia is a world leader in electoral systems, being the first liberal democracy to bring in the private vote. Is Australia political representation is upheld via;
- ☑ Australia is one of the few liberal/representative democracies which has compulsory voting. Compulsory voting provides a firm expression of the will of the majority achieving majority political representation. This also prevents well-funded minorities from achieving political overrepresentation.
- ☑ Proportional voting allows for minorities to be elected and hence increases the diversity of the Senate.
- ☑ **Roach V Electoral Commission 2004 gave prisoners/convicted felons the right to vote if they are serving/served less than 3 years. Prior to this anyone who was/had been convicted lost their right to vote.**
- ☑ **Australia has a long history of electoral reforms with the aim of improving political representation – 1918 (Preferential voting was introduced in both the House of Representatives and the Senate), 1949 (Proportional voting was introduced in the Senate), 1962 (Aboriginals were given the right to vote) 1984 (the Australian Electoral Commission was established and compulsory enrolling and voting for Aboriginals and Torres Strait Islanders was introduced) and 2016 (Senate voting reform – allowing voting both above and below the line).**
- ☑ The Australia Electoral Commission is an independent statutory authority tasked with administering the Commonwealth Electoral Act 1918. The independence of this body ensures prevention of electoral fraud.
- ☑ **Uses an electoral compromise to achieve all the desirable outcomes of an 'ideal' system – a balance of stable government and effective political representation.**
- ☑ Regular free and fair elections

## Australia – Undermined

- ☒ Preferential voting used in the House of Representatives favours major parties. This makes it hard to achieve large political diversity in the lower house. Theoretically Senate should be a mirror representation of a cross section of society, but this is not achieved in either the Senate or House of Representatives.
- ☒ There is no diversity in gender, age, education and race in Senate
- ☒ Malapportionment exists. 1 vote should have one value, however in rural areas of Australia votes have more value. This is intended to ensure that the rural voices are heard, however prevents voter equality.
- ☒ Minority government. Have to form alliance with minor parties and hence results in a change in political views and standings – Gillard Government Carbon Tax Policy
- ☒ A combination of minorities (the opposition, cross bench parties and independents that represent a Senate majority) can veto a popular decision.

## America – Upheld

- ☑ **America uses the first past the post electoral system to elect congress. This system provides a strong link between representatives and the electors and also achieves a very clear and overwhelming degree of political representation.**
- ☑ **America has short electoral cycles. Elections are every two years in America. The high frequency of these elections provides for a greater opportunity of political representation to be exercised.**
- ☑ Regular free fair and open elections
- ☑ Unlike Australia, in the Senate one vote = one value

## America - Undermined

- ☒ Voting in America is non-compulsory. As a result of this only 61% of all eligible American voters voted in the 2016 election. The non-compulsory nature of voting prevents congress from being a true representation of what the people want. In addition to this, any individual who has a criminal record cannot vote, further limiting the representation in congress.
- ☒ First past the post virtually wipes out any chance of minorities achieving formal political representation in national government.
- ☒ Gerrymandering is used in America. Gerrymandering is the deliberate manipulation of electoral boundaries for political advantage (the United States is the only democracy that has the ability to do this). This gives parties the ability to control votes and obtain a majority.
- ☒ Money in politics is a critical issue in the United States. Prior to the case *Citizens United V the Federal Electoral Commission 2010* there was a legal limit as to the amount of money that could be donated by corporations to

parties and Presidential candidates. Citizens United removed the barriers, ruling that the first amendment forbids laws from limiting the freedom of speech which includes political donations. In 2016, the Koch brothers donated \$900 million to candidates of congress and the presidency.

## Rule of Law

Rule of Law is the concept that all individuals are equal before the law and that all laws are known and apply to the actions of everyone – there is no elite in the face of the law, this includes government. Laws are clear, consistent, transparent, predictable and accessible. Laws are adjudicated in independent and public courts, and any disputes arising from the law are settled in a fair and efficient manner using predictable and consistent policies.

The Rule of Law only exists when these following principles also exist; constitutional limits to power – the Separation of Power, laws are universal and apply to all, government acts in accordance to the law, laws are coherent and capable of being obeyed, legal rights are respected – presumption of innocence, laws are not retrospective – not made to apply from a past date, the judiciary must be independent and trials are fair.

Both the United States and Australia are examples of how the Rule of Law operates in a country. Both are thriving democracies with constitutional limits to power, separate branches of government, adequate rights protection and independent judiciaries.

### Australia – Upheld

- ☑ In Australia, there is a constitutional framework that supports the Separation of Power, and is also supported by unwritten conventions – the Westminster Conventions.
- ☑ Government processes are open and transparent. Laws are made by a representative legislature using established legislature processes. The laws are intended to represent the people and what they want as they are created by a majority government elected by the people. All laws that are made are made openly and freely accessible to the people.
- ☑ The High Court, through its roles and powers, as outlines in section 75 and 76 of the constitution (original jurisdiction – jurisdiction to interpret the constitution) can interpret the constitution and also ensure that all laws are upheld and abided by.
- ☑ Australia has a history of judicial review whereby parliaments legislative power has been held accountable to constitutional law and government policies held accountable to constitutional law (*Williams No.1 & The Malaysia Solution* – discussed later in more detail)

### Australia - Undermined

- ☒ Rule of Law illustrates how Australia governments have ignored international law on matters relating to asylum seekers and refugees. The secrecy with which the offshore detention system is kept from public view reduces the openness and transparency with which the *Migration Act 1958* is implemented. *Plaintiff M68/2016 v. Minister for Immigration and Boarder Protection 2015 – A Bangladeshi asylum seeker challenged the lawfulness of her detention under the Migration Act, claiming that it was unconstitutional/unlawful. The Australia government entered an agreement about the transfer of asylum seekers, which at the time of signing the Migration Act did not Authorise, so the government created a retrospective law.* Retrospective law is a breach of the principle of Rule of Law as it prevents laws from being known and predictable.
- ☒ **Mandatory sentencing** (WA and NT). Reduces judicial discretion in sentencing and may affect the rights of minorities. Those guilty of minor offences may be sentenced to jail. This is a breach of the idea of proportionality in sentencing and unfair for a petty criminal.
- ☒ **Anti-Bikie laws** in QLD. May infringe upon freedom of association and target specific groups. It is a law that constitutes bikie gangs/groups unlawful. Undermines equality of all above the law – bikie members are treated differently in the face of the law.
- ☒ **Bail laws** in NSW. Reverse the onus of proof by requiring an accused person to show cause as to why they should not be remanded, instead of the prosecution showing why they should. This can be considered a denial of the presumption of innocence.

- ☒ **Anti-terror laws** – Commonwealth law. Reverse the onus of proof, and denies the right to silence and the presumption of innocence.
- ☒ **Surveillance and metadata retention laws** – Commonwealth law. Allows the interception and storage of citizen's metadata for two years (details of all texts, emails, web browsing and electronic communication). This applies to everyone, not just criminals. Reduce checks arbitrary use of power.
- ☒ Many argue that there is a need for a Commonwealth version of the NSW *Independent Commission Against Corruption* or the West Australian *Crime and Corruption Commission* to investigate **political corruption**. For example; in the 2016 electoral campaign, the ALP accused the Liberal Party of funnelling public funding for its MP's electoral offices through a party owned business.

### America - Upheld

- ☒ There is a strong rights culture in the United States which makes citizens acutely aware of their rights and they are prepared to defend them against government interference. A litigious culture means that citizens are prepared to use court action to clearly mark out the boundaries of power.
- ☒ Article 1, Section 9, Clause 3 of the United States constitution prohibits Congress from passing 'ex post facto' law. This is a constitutional prohibition on retrospective law/legislation and a clear distinction between the United States and Australia on this key principle of the Rule of Law.
- ☒ In the United States the President is not above the Law. This can be seen through the Nixon and Watergate scandal 1974.
- ☒ Public decisions are made on the basis of the law and these laws must be obeyed by all – including those who make and enforce them.
- ☒ The Supreme Court has the power to examine the constitutional validity of legislation – *Cooper v. Aaron 1958* (landmark decisions which held that the states are bound by the Court's decisions and must enforce them even if the state disagrees) and *Stogner v. California 2003* (the Supreme Court held that California's retroactive extension of the statute of limitations for sexual offences committed against minors was an unconstitutional ex post facto law) – the government can't retroactively void statutes of limitations in criminal cases.

### America – Undermined

- ☒ The United States' conduct on the war in terror illustrates some Rule of Law concerns – the detention of 'enemy combatants' and terrorist suspects beyond the reach of law, outside the United States – hence outside the jurisdiction of the courts. This can be interpreted as an attempt to avoid the Rule of Law. The Supreme Court has extended its own jurisdiction to cover the detainees at Guantanamo Bay, by giving them the protection of the United States constitution.
- ☒ The United States PATRIOT (*Providing Tools Required to Intercept and Obstruct Terrorism Act*) Act was a law passed post 9/11 authorising executive agencies to obtain information about a person under investigation for suspected terror offences. The act allows for the suspect to be prevented from ever finding out what they are accused of, nor do they have access to judicial review. The Act also permits interception of communications without a warrant, and the delayed notification of search warrants. This act undermines the presumption of innocence, the right for a suspect to know the charges against them and the right to the independent judiciary.
- ☒ Sovereign Immunity – the federal Government cannot be sued unless it has waived its immunity or consented to suit. Indication that the government is above the law.

## Popular Participation

Popular participation is the broad interaction of citizens in the direction of and operation of the democratic political system; all citizens are able to be involved in the political process and this gives them power and a sense of belong in a democracy. Popular participation seeks to ensure that all people can and do have access participate in the democratic process.

Popular participation is the activity of making citizens voices, opinions and perspectives present in public policy making processes such that citizens can participate in their own government. Participation is enabled by civil and political rights – in particular, the freedoms of conscience, speech, press, assembly and association. The most popular participation occurs through' elections, political parties and pressure groups.

## Australia – Upheld

### Electoral Participation

- ☑ Australian elections are fair, enabling participation by all citizens through compulsory voting. There are constitutional (implied) rights to freedom of political communication and the Commonwealth Electoral Act 1918 provides a wide franchise and the establishment of compulsory voting for both white and indigenous Australian's. This has resulted in approximately 93% of all eligible Australian voters are enrolled to vote, and of that 95% voting in the most recent election.
- ☑ The use of a centralised national electoral system administered by an independent electoral system (the AEC), combined with compulsory voting, results in greater popular participation through elections than the United States.
- ☑ Since 1984, Australia has publicly funded political parties which obtain more than 4% of primary votes. Public funding helps meet the costs of developing policies and campaigning for elections. In the 2016 election, parties that meet the 4% threshold received \$2.62 from the taxpayer per first preference vote they receive. Such funding reduces reliance on donations and the influence of money in politics.
- ☑ Elections are regular – held every three years for the federal government and 4 years for state governments.
- ☑ Over recent years there has been an increase in the ability of people to vote, and access to voting facilities. The AEC has undertaken extensive mobile polling services, there were polling booths at airports and the postal vote was introduced.
- ☑ Roach 2004 (previously discussed) protected people's right to vote – allowing criminals with a conviction of less than 3 years have the right to vote.
- ☑ Australian's can participate in the political system by signing petitions, writing to their local Members of Parliament and making submissions to committees

### Political Participation

- ☑ Political parties are organisations of likeminded people which seek to influence law making by winning seats in the legislature. Major parties seek to win government. They provide opportunities for politically active citizens to participate.
- ☑ Australia has a broad range of political parties across the political spectrum. They range from very conservative and nationalist right wing to the very progressive Greens and left wing socialist alliance – Labor.
- ☑ In the 2016, federal election 54 different parties contested the available seats in the Federal Parliament.

### Pressure Groups – an association of likeminded people who seek to influence the law-making process

- ☑ Sectional Pressure groups – representing a single group of societies. For example, the Business Council of Australia
- ☑ Promotional Pressure groups – representing a group/acting in the better interests of society. For example, Greenpeace
- ☑ Hybrid Pressure groups – representing both a single group and also society as a whole. For example, Medical Association of Australia
- ☑ Pressure groups such as trade unions, environmental groups, advocacy groups and so on, provide a real opportunity for active citizens to participate in democracy.
- ☑ *GetUp! 2010* allowed for 100,000 more Australians could be allowed to vote after the High Court ruled that parts of the Electoral Act were unconstitutional (the closing of the electoral role).

## Australia – Undermined

### Electoral Participation

- ☒ The decline in registration of younger voters and the increasing tendency for voters to cast early and pre-poll votes is an area that needs attention. Greater focus needs to be made on reaching the younger voting groups.
- ☒ Despite elections being compulsory, only 98% of people actually vote.
- ☒ Reinstating lower thresholds for political donations would improve the transparency of money in politics and reduce its influence. The law was changed in 2005 to increase the limit to more than \$10,000, and it increases each year.

- ☒ Undermined through the Australian Electoral Commission. The AEC is an independent authority whose role is to protect the integrity of the electoral system but it is subject to federal legislation.

#### Political Parties

- ☒ Political parties have all suffered declining membership for decades. No party today has more than 50,000 members, compared to 200,000 in the past.

#### Pressure Groups

- ☒ Not all pressure groups are created equal and some argue that they can threaten democracy. They present the danger of distorting popular participation. They do this through their close relationship with ministers and senior public servants. Corporatism is a danger to democracy.
- ☒ Transparency is required. Donations made are not always transparent, and as a result can be backed by political influence.

### America – Upheld

#### Electoral Participation

- ☒ The United States has constitutionally granted first amendment rights to the freedoms necessary for popular participation. These ensure equal rights to participate for all American Citizens.
- ☒ There is a high level of rights awareness, including the right to participate in government

#### Political Participation

- ☒ Significant popular participation occurs within the two major parties. The system of primaries and caucuses provides opportunities for politically active citizens to join a party. This puts the power to choose the candidates in the hands of party members, rather than party bosses.
- ☒ President – the only qualification for becoming the president of the United States is that you must be an American citizen or born to two parents who are.

#### Pressure Groups

- ☒ Corporatist sectional groups representing the interests of sections of society. For example, the National Rifle Association - participation of millions of Americans who believe in the second amendment right to bear arms
- ☒ Pressure group effectiveness is possibly enhanced by the United States' reliance on judicial supremacy to decide on matters of rights. Well-resourced pressure groups can use the Supreme Court to achieve victories over congress and the President.

### America – Undermined

#### Electoral Participation

- ☒ Many American's are disenfranchised by lack of registration, education, gerrymandering and poverty. These facts disproportionately affect African Americans.
- ☒ The United States has a problematic electoral system, characterised by the decentralisation, partisan control of processes, the influence of money low rates of registration and low voter turnout.
- ☒ The lack of public funding for parties require them to rely on private donations. This can lead to corporate funding and its influence on the political process.
- ☒ Presidential elections are dominated by money and by the two major parties. These elections are complex and run for close to a year – as a result you must have large sums of money to be able to participate in the presidential election.

#### Political Parties

- ☒ The United States has only two viable political parties – democrats and republicans. There are no minor parties which achieve seats in congress due to the FPTP electoral system used in the United States

- ☒ The political system is skewed away from the left. By world standards the Democrats are a centralist party, perhaps even centre right – there is little political representation for those who uphold socialist values

## Judicial Independence

Judicial independence is the separation of the judiciary from the legislative and executive branches of government, and hence making it free from interference and intimidation. Judicial independence is one of the essential features of the Separation of Powers, the Rule of Law and Federalism (both Australia and the United States have federalism systems in place).

Judicial independence is essential for effective judicial review – reviewing laws passed by Parliament, declaring executive policies unlawful and the interpretation of legislation/statutes. An independent judiciary is hence a check and balance against the powers of the legislature and executive.

### Australia – Upheld

- ☒ Australia has a strong and independent judiciary which is achieved through Chapter 3 of the Constitution, in which; **Section 71** vests judicial power in the High Court and other courts parliament may create, **Section 72** guarantees judicial independence by protecting the judges from arbitrary removal or reductions of their pay. A judge can only be removed for proven misconduct or incapacity. This allows for judges to independently make judgements, knowing that they cannot be punished for a verdict they make (that is not in favour of government). ***The Boilermakers Case 1956 and Brandy's Case 1995 both defended judicial power. Both holding that only chapter 3 courts can exercise the power to issue legally binding judgements.***
- ☒ The Westminster system of government ensures that the judiciary is an independent arm and should be removed from all/any external influence and intimidation – this is one of the Westminster Conventions.
- ☒ Via section 75 and 76 the High Court is the only court that can interpret and here cases related to the constitution. ***Plaintiff M68/2016 v. Minister for Immigration and Boarder Protection 2015 is an example of a constitutional case. A Bangladeshi asylum seeker challenged the lawfulness of her detention under the Migration Act, claiming that it was unconstitutional. The High Court ruled (under section 51(xix)) the Commonwealth has the legislative power to establish offshore detention.***
- ☒ ***The Howard government's attempt to use section 61 powers to fund the National School Chaplaincy Program was ruled unconstitutional in Williams No.1. As was the Gillard government's Malaysia Solution, on the grounds that it breached the Migration Act.***

Australia has a robust and well-functioning independent judiciary. The legislative and executive are subject to legally binding judicial review and ensures the bodies are held to account.

### Australia – Undermined

- ☒ Mandatory sentencing laws have been criticised as they reduce the capacity of a judge to apply an appropriate sanction. If removes a judge's ability to apply a punishment that is just for the crime committed.
- ☒ The appointment of High Court Justices is made by the Governor General on the advice of the Prime Minister. This could lead to the selection of justices with certain political leanings (biases)
- ☒ The adoption of a Commonwealth statutory charter (much like that in the ACT and Victoria) would increase the ability of the judiciary to defend basic freedoms and rights.

### America – Upheld

There are many similarities between the United States and Australia's judicial branches. The United States' courts arguably more powerful, but they are no more independent that Australia's.

- ☒ The United States achieves judicial independence through Article 3 of the constitution. Section 1 vests judicial power to the Supreme Court and other courts created by congress. It also states that judges may hold office 'during good behaviour'. There are also other sections in this article that protect the judiciary from political pressure – lifetime appointment and salaries cannot be diminished.

- ☑ Article 2, Section 2 states that the President shall, with the advice and consent of the Senate, appoint the judges of the Supreme Court.
- ☑ Articles 1 and 2 allow judges to be impeached in the same way as any other federal official if their conduct is deemed not of 'good behaviour'.

### America – Undermined

- ☑ Seven states in the United States elect judges rather than using the executive-nominates model. Electing judges exposes them to partisan political processes. Bias is an inherent part of partisanship, this undermines the most fundamental quality of a judge – impartiality. Abolishing the practice of electing judges, and especially that of re-election for more than one term, is perhaps the biggest reform that would improve the independence of the judiciary in the United States.

## Natural justice

Natural justice involves the principle of ensuring citizens have the right to be heard and they are provided with and have the right to respond to any information that is presented to them. Decisions are made free from bias. The concept of natural justice ensures the rights of all individuals and that they have access to court proceedings where they are able to argue their case before an unbiased judge. It also ensures that the individual has the right of appeal if the original trial contained flaws or inconsistencies.

Natural justice is achieved when; the adjudicator is unbiased, both parties can present their side of the dispute, decisions are based on evidence (and supported by it), assumption of innocence is granted, and that everyone can see that these are done properly.

In Australia and the United States the common law and adversarial system of trial is used, sharing almost identical dispute resolution mechanisms. Both countries also have alternative dispute resolution (ADR) mechanisms – negotiation (reaching a mutual resolution), mediation (a neutral third party is brought on to help dissolve dispute), conciliation (achieving a compromise) and arbitration (contracted compromise).

### Australia – Uphold

- ☑ Australia has strong formal and informal dispute resolution processes based firmly on the principles of natural justice. The two processes are supported with legislation – Commonwealth *Evidence Act 1995* legislates the rules of evidence (determining what evidence is admissible), the *Family Law Act 1975* forces parents disputing custody to attempt to settle disputes through ADR (less stressful and takes lesser emotional toll) before going to court. **Section 80 of the constitution guarantees the right to trial by jury** (a defining aspect of natural justice and the adversarial system).
- ☑ The appeals process that exists within the courts allows for cases that have breached natural justice/individuals wrongly accused to appeal their case and have it reheard. This ensures justice is reached and is another way in which Australia upholds natural justice.
- ☑ **The case of *Dietrich v The Queen 1986* established the common law right to legal representation. Dietrich was charged with four cases of drug trafficking, however in the trial had no legal representation – he applied for representation but they would only offer it if he pled guilty to all charges. *Dietrich* led to the creation of legal aid for criminal cases in Australia, helping to improve the 'hear both sides of the case' aspect of natural justice, by ensuring the accused can present their case. A case is to be stayed until a fair trial can be provided.**
- ☑ **Chief Justice Carmody provides an example of ensuring a trial is heard by an unbiased judge, and the result if a judge is seen to be acting in a biased manner. Justice Carmody was accused of bias on an appeals case of a child murdered and that he failed to read the previous judgement on the case as his opinion was already set. As a result, he was forced to step down from his position as chief justice. This case outlines the importance of natural justice in a case and how by it is upheld.**



## Australia – Undermined

- ☒ Everyone should be able to exercise their right to access to the justice system. However, the adversarial system is expensive and, as a result, is a barrier to many when trying to achieve justice. The issue of access is majorly criticised in Australia, as access denied is justice denied.
- ☒ Legal aid is available however, an accused must have exhausted their own resources before being granted legal aid. Then a means test (an assessment on financial capacity) and a merit test (how likely your case is to succeed) must be passed for legal aid to be granted. Additionally, legal aid is (usually) only available in criminal trials.
- ☒ Arbitrary detention for terrorisms, not being told what they are accused of and the denial of the presumption of innocence. This is an undeniable breach of their right to natural justice as it is blatantly denied.
- ☒ In Australia, there is a disproportionately high number of indigenous people who encounter the criminal justice system and end up in prison is a particularly urgent issue needing to be addressed. Mandatory sentencing has resulted in discrimination against this group 'by the system'.

## America – Upheld

Most of what Australia does well, the United States do too.

- ☒ In the United States the Bill of Rights guarantees and protects certain legal rights – the right to silence for an accused person (5), the right to a quick trial, public trial, impartial jury, rules of evidence and to know the accusations against you (6), and the right to a just in a civil case (7).
- ☒ In 1998, the *Alternative Dispute Resolution Act* was passed by congress to aid in facilitating cheaper, quicker and better merits based dispute resolution.
- ☒ The *Legal Services Corporation* was established by congress in the 1970's to provide funding to State Legal Aid Services which provide legal aid to the poor.
- ☒ Supreme Court *Greene v. McElroy*. An engineer was denied a security clearance without the right to confront and cross-examine. The court held that there was insufficient statutory authority for the Department of Defence to eliminate this. The court ensured/ensures that all procedural rights are carried out and followed in a trial.

## America – Undermined

- ☒ The United States is over reliant on litigation to solve disputes
- ☒ Growing levels of wealth and income inequality mean more people are increasingly unable to use the courts as a means of achieving justice – legal aid services are underfunded and doesn't meet most the needs for assistance. This leads to access to justice being denied to those who cannot afford legal representation.
- ☒ Terrorist suspects are stripped of the 6<sup>th</sup> amendment – they do not know what they are being accused of and they can be detained for up to 14 days without trial.
- ☒ Indefinite detention has been used to hold terror suspects.