LAWS 104
LEGAL READING, WRITING and RESEARCH

(Lectures with Helen Haslem and Kay Maxwell-Monahan)
Textbook: Catriona Cook, Robin Creyke, Robert Geddes, David Hamer and Tristan Taylor, Laying Down the Law (LexisNexis Butterworths, 9th ed, 2015)

D.B. Notes – Student's Lecture and Study Guide

AUSTRALIAN CATHOLIC UNIVERSITY
THOMAS MORE SCHOOL OF LAW
NORTH SYDNEY CAMPUS

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Week 1
AUSTRALIAN LEGAL SYSTEM:
Introduction to law: Fundamental concepts and distinctions

The Different Legal systems: Common Law and Civil Law

Different legal systems have evolved in different parts of the world. Two main types of legal systems: common law and civil law.

In common law systems, laws are found in the decisions of judges and statutes. Common law counties include the United Kingdom and former colonies of the United Kingdom, such as Australia.

The Civil law system means that all laws, both substantive and procedural, are contained in comprehensive documents called 'codes'. Civil law countries include most states in continental Europe, and former colonies of these countries. The Romans created a legal code which they took with them throughout their empire (*Corpus Juris Civilis*). For a time the text of the *Corpus Juris Civilis* went missing. Later in the 11th century, the missing texts were found. From that point, the common law and the civil law developed separately – common law by procedure, methods and decisions of the English courts; civil law on the basis of custom, canon law, local usages and royal decrees.

The common law began at the end of the 11th century. It developed its particular characteristics because it was common to all of England and Wales. The relative stability of government in England over subsequent centuries allowed it to grow. Not until the 19th century where most countries in continental Europe in a position to develop wide-reaching and complex legal systems. In France, by 1810, the *Civil Code*, the *Code of Civil Procedure*, the *Commercial Code*, the *Code of Criminal Procedure* and the *Penal Code*, together known as the *Code Napoleon*, had all become law. Most continental states in Europe have since drafted their own codes.

The law is influenced by globalisation. The globalisation of the law is occurring formally, through instruments and institutions of international law dealing with matters as diverse as trademarks, global warming and organised crime. Globalisation is also occurring informally, through increased contact and communication between nations. Convergence is particularly strong in the European Union, with a high degree of uniformity in laws across Europe.

Sources of law in the Common law system

There are two main sources of law in common law countries such as Australia: cases and legislation.
- Cases: decisions and the reasons for decisions made by judges.
- Legislation: legal rules made by Parliament and by those whom Parliament has delegated authority.

The law is necessarily quite abstract. Record keeping is an essential aspect of the common law method – one needs to consult reports of legal cases. Only in 1865 had the reporting of cases become more systematic. Cooke's *Institutes of the Laws of England* (1628-41) represent one of the first attempts to outline in a systematic way the entire body of English common law. Blackstone's *Commentarie on the Laws of England* (1765-1770) followed Cooke and became very highly regarded.

Today's academics publish encyclopaedias, monographs and periodical articles. Law has developed to cover new fields, e.g. space law, animals, internet. Technology makes accessing material manageable. Law is much more than the mechanical listing and application of rules.

Legislation is often expressed in general terms, with much room for discretion. When a case in court raises a difficult issue, expert lawyers and judges may come to completely different conclusions. Tension exists between the law's ideal of objectivity, and the inherent subjectivity of an individual's idea of justice.

Legal Research and Legal Theories

Finding the law can be difficult both because of the volume of law, and also because of the highly dynamic nature of some areas of law. Well-developed legal research skills are essential for anyone wishing to find and use the law. Finding the law allows those legal rules found to be applied to a particular case and allows for the possible solution to a legal problem.

Competing legal theories and philosophies have developed since the 14th century. Positivism, legal formalism, utilitarianism, and feminism have all contributed to the understanding of law. Lawyers study jurisprudence or legal theory to understand the factors informing development of law in different jurisdictions.

Debate between H L A Hart and Lon Fuller on positivism, morality, and the nature of law and example of continuing discourse. Many scholars stress the importance of taxonomy, or classification, operating at the micro level as well as theory at macro level.

Intellectual disorder and 'palm tree justice' must be avoided. Balance to be found between the necessary sensitivity and flexibility, and stability and consistency in deciding an appropriate response to and event.

Public vs Private Law

- Public law:
  - governs the operation of the state and the relationship between the state and its citizens.
  - nature of matters include crime, taxation, entitlement to welfare.
- Private law:
  - concerned with the relationship between citizens.
  - deals with commercial matters, claims arising out of accidents, disputed wills and disputes over property.

Legal Terms

Law has a large body of technical language. Some legal terms originated in Latin (*habeas corpus*, *ultra vires*, *mens rea*). Other legal terms derived from French (*chose in action*). Some English words are used in an unusual or archaic sense, e.g. ‘instant’ = present; ‘determine’ – bring to an end. Despite the sometimes technical nature of legal language, ‘pseudo-technical’ language and unnecessary jargon should be avoided.

History and Development of Common Law

The Norman Conquest of England (1066 A.D)

- conquest of England by William, Duke of Normandy.
- set in motion the train of events resulting in Australia and other former British colonies sharing the distinctive legal tradition that we now refer to as the common law.
- Anglo-Saxon laws pre-conquest would continue in force.
- Anglo-Saxon laws were based heavily on local custom, which lead to great regional variation throughout England.
- System of economic and social organisation refined by the Normans.
- System of land ownership based upon a formal social hierarchy with the king at the top.

Feudalism

Hierarchy of feudalism:

King (dominion over all lands in the kingdom)
↓
Tenants-in-chief (held title to land by direct grant from the Crown)
↓
Series of levels of sub-tenants (each owing land by virtue of grant from next higher level in the chain)

Feudal loyalty was owed one level upwards: each landowner swore an oath of allegiance to the lord or immediate superior in the chain. Landowners provided the lord with some of their crops and military service when necessary. Feudal system of land formed the basis of property law in England until 1921.

Importance of feudalism:

- This laid the foundation for a stable system of government in which the institutions of civil authority could develop and replace dictatorial military rule.

The extension of the king's jurisdiction

Key duty of monarch was to hear complaints and petitions from subjects. Many complaints dealt with the arbitrariness of local courts. Monarch's obligation to hear complaints becomes more burdensome. To deal with the difficult job of the monarch hearing complaints, a system set up:

- like cases should be treated alike (foundation of the system of *stare decisis*)
- to follow precedent in the present case is to decide the case in the same way as previous similar cases have been decided.

Over time, a body of royal rulings dealing with petitions for justice was built up. Importantly, the body of rules stemming from royal holdings came gradually to be known as the common law. King's rules applied everywhere throughout the land.

Formalisation of legal structures

Curia Regis:

- body of trusted advisers to the king
- general advisory body, providing the king with counsel and advice before he made decisions.

Gradually, some decisions left to members of the *Curia Regis* itself. Kings began to appoint officials called justiciars: acted as a form of viceroy in the king's absence from England. Appointment of *Curia Regis* and justiciars marked an important step in the transformation of the common law from a personal instrument of the king to a real apparatus of government. No longer a need to visit the king in person.

Justices in Eyre:

- group of travelling justices who carried the king's commission to hear and resolve disputes in all parts of the country.
- instrumental in developing a common bank of cases or precedents which they applied throughout the land.

Curia Regis gave birth to body of professional judges who heard and decided disputes of common folk (Court of Common Pleas). Body of financial advisers: heard disputes involving the royal revenue and became known as the Court of Exchequer.

Coram Rege (King's Bench):

- travelling advisers whose task was to advise on the resolution of individual dispute in the king's name
- had monopoly on disputes involving the king himself, or touching on royal interests.

Council: travelling advisers whose job was to advise king on general questions of policy. The Common Pleas, the Exchequer and the King's Bench together became known as the common law courts.

The Writ system

Procedures were implemented to formalise and regularise the procedure of the common law courts in response to overwhelming demand. Chief means of systemisation was the writ system. In the legal context, the writ was a command from the king to the sheriff that a person against whom a complaint had been made be brought to court to answer the allegation in the complaint.

Writs were 'standard forms' for complaints – a different writ for each complaint. Number of writs multiplied until 1258, when the Lords exacted a promise that new writs would not be issued without a council's approval. Writ system is important, as it highlights an underlying feature of the common law system, namely an obsession with procedure.

Trial Procedure in the early common law

The early common law was not free of systemic deficiencies. In an attempt to circumvent the problem that the king had a lack of local knowledge in resolving disputes, a system of divine appeal was created.

Trials by ordeal and battle reflected an expression of faith that God would identify the wrong-doer. Trial by ordeal was commonly used in criminal cases, but came to an end in 1215.

Trial by battle was used in non-criminal cases and was based upon the premise that God would not allow a party in the wrong to be victorious. Trial by battle obsolete by the end of the 13th century, yet not formally abolished until 19th century.

Over time, the travelling justices would enlist the services of a number of men from locality who would, on the basis of their local knowledge, determine which party was probably telling the truth. These men came to be known as the jury. Notion that jury should be impartial with no prior knowledge is relatively modern. Today, in Australia, juries are used almost exclusively in criminal cases, with the exception of defamation trials.

Equity

Equity is highly discretionary. Chancellor retained a discretion not to grant a remedy if the plaintiff was not morally deserving. Equitable maxims which capture the essence of this discretion:

- 'He who seeks equity must do equity.'
- 'He who comes into equity must come with clean hands.'

Initially, equity and the common law coexisted, but eventually the two systems became rivals. King called a conference of all the senior judges to discuss the issue. Recommended that, in the case of conflict between the two, equity should prevail. Equity remains an important source of law. Significant area of modern law almost entirely made up of equitable principles is the law of trusts. A number of important legal remedies owe their origins to equity, e.g. injunction, contractual remedies of rescission and specific performance.

Modern Constitutionalism

In the early days of the common law, it was impossible to distinguish public law from private law. Gradually, as the kings began to appoint more and more officials who could exercise power on their behalf, there came to be a separate body of rules which delineated and regulated the boundaries among the various royal delegates (today known as constitutional law).

The process of the evolution of constitutional law involved much conflict. In 1215, King John was forced to sign Magna Carta (the 'Great Charter') – Response to 'the Barons' demanding certain freedoms in the wake of heavy taxation.

Magna Carta contains important freedoms:

- the Common Pleas would be heard in a fixed place.
- a promise that justices and sheriffs appointed were learned in the law.
- a guarantee that freeman would not be imprisoned or dispossessed of their property except by lawful judgment of their by peers or by the law of the land.
- justice would neither be delayed nor denied.

In 1265, the first assembly called a parliament was summoned. For a long time parliament remained purely an advisory body, and the king was under no obligation to summon it regularly. In 1414, Crown formally acknowledged that no new statutes should be made without the assent of the commons.

The increase in parliament's influence was repeated during the reign of Henry VIII (1509-1547). To secure cooperation of important people in his desire to establish the Church of England separate from the Catholic Church, Henry had to involve Parliament in the decision-making process. Open defiance of Pope's authority by Henry and his parliaments had an important longer-term effect of freeing the parliamentarians from what had previously been a very strong limitation: the political authority of the Roman Catholic Church.

King Charles I attempted to dispense with the services of Parliament altogether, and to raise taxes without parliamentary sanction. By 1642, Parliament was in open civil war against Charles. In 1646, led by Oliver Cromwell, the parliamentary forces defeated the Royalists. Charles was executed, the monarchy and the House of Lords were abolished and England was renamed a 'Commonwealth'.

Commonwealth had been an unhappy period and Charles II invited by Parliament to assume throne after Cromwell's death. In the Glorious Revolution of 1688, Parliament deposed Catholic-sympathising James II and invited William and Mary of Orange to the throne. This marks the end of any basis for the claim that English monarchs ruled by anything other than parliamentary consent.

Bill of Rights (1689):

- The terms under which William and Mary accepted the throne
- asserted that the Crown had no power to suspend the operation of law
- reaffirmed the principle that taxation could be levied only with the consent of Parliament
- forbade the keeping of a standing army in England
- provided parliamentary debates could not be called into question by the monarch, or in any proceeding in the courts
- reiterated that the Crown ought to summon parliaments on a regular basis.

Act of Settlement (1701):

- gave judges security of tenure.

Constitutional principles

Rule of Law

According to A V Dicey, the rule of law means:

1. The absolute supremacy of government by law as opposed to government by arbitrary fiat.
2. Government can operate only if they have specific legal authority to do so.
3. A person can be punished only for a breach of the law and not otherwise.

Principle of legality: governments must find lawful authority for every action they take.

Separation of powers

Three distinct organs of state:

1. Legislature – makes the laws.
2. Executive – public officials who administer the laws.
3. Judiciary – courts which adjudicate on disputes about the meaning or the application of the country's laws.

The separation of powers prevents a concentration of public power in one individual or institution, and in turn avoids those abuses of power which led to the constitutional struggles in the history of the common law.

The constitutional settlement gave prominence to the workings of Parliament and the enactment of statutes. Originally statutes were royal decrees. Came to be enactments of the monarch (or his or her representative) in Parliament. According to constitutional theory all legal authority can be traced back to royal authority. Glorious Revolution culminated in the balance of constitutional power that we know today: supremacy of Parliament. More democratic Lower House has greater power since it alone can initiate money Bills. Today a statute (or Act) is an instrument of Parliament.

Industrial Revolution lead to agitation for change in the legal system. Common law slowly became less responsive to the needs of ordinary litigants - costly and slow, procedurally complex. Equity was no better. During the 19th century, Parliament passed a series of statutes which reformed and simplified procedure in the courts. *Judicature Acts* merged the three common law courts with the Court of Chancery to form Supreme Court of Judicature; provided for the concurrent administration of common law and equity.

In Australia, Queensland was first to follow the English reforms, by passing the *Judicature Act* 1876. The other colonies followed suit.

Australian Jurisdiction

At settlement our laws were the customary laws of England and Wales ('common' to both) – eg contract, tort, crime. 'Rule of law' is upheld and Parliamentary Supremacy is observed. We follow the doctrine of prcedent or *stare decisis et non quieta movere*: 'to stand by decisions and no disturb the undisturbed' – A system for ensuring that similar cases are treated consistently, by requiring courts to follow the principles revealed by prior decisions

Modern Australian Government

- Two levels
  - State and Commonwealth
    - International 'laws' are not binding because Australia is a sovereign nation

Arms of the State governments

- Legislature
  - Changes/makes new laws (*plenary power*)
- Executive
  - Enforces the laws
- Judiciary
  - Interprets the laws, finally determines disputes between individuals and between individuals and governments ('rule of law')

The Federal Parliament

The Constitution established a Commonwealth, or federal Parliament, which is bicameral. This means it consists of two houses: the Senate and the House of Representatives. Laws can only be passed or changed with the approval of both houses and the Royal Assent of the Governor-General. The 226 members of Parliament—150 in the House of Representatives and 76 in the Senate—are responsible for making federal laws.

Sections 51 and 52 of the Constitution describe the law-making powers of the federal Parliament. For example section 51 lists 40 areas over which the federal Parliament has legislative (law-making) power. These include:

- trade and commerce
- postal and telecommunications service
- foreign policy taxation census and statistics
- weights and measures
- bankruptcy and insolvency
- quarantine
- lighthouses, lightships, beacons and buoys
- fisheries
- currency
- copyright
- marriage
- immigration
- defence

Under section 51 of the Constitution, state parliaments can refer matters to the federal Parliament. That is, they can ask the federal Parliament to make laws about an issue that is otherwise a state responsibility. Any federal law then made about the issue only applies in the state or states who referred the matter to federal Parliament or who decide to adopt the law.

Section 52 of the Constitution stops state parliaments from making laws in some areas, including defence and communication. This means the federal Parliament has exclusive power to make laws in these areas. States are also barred from charging customs duties, which guarantees free trade within Australia. The creation of a single Australian market was a key reason for federation–before 1901 each colony taxed goods imported from the other colonies, which made trade difficult and was considered bad for their economies.

The State Parliament

State and territory parliaments make laws that are enforced within their state or territory. By defining federal powers, the Australian Constitution reserved or left most other law-making powers to the states. As a rule, if it is not listed in sections 51 and 52 of the Constitution, it is an area of state responsibility. State laws relate to matters that are primarily of state interest such as:

- schools
- hospitals
- roads and railways
- public transport
- utilities such as electricity and water supply
- mining and agriculture
- forests
- community services
- consumer affairs
- police
- prisons
- ambulance services

On some matters the federal Parliament and the state parliaments may make laws about the same things, for example, roads and health. However, section 109 of the Australian Constitution states that if the federal Parliament and a state parliament pass conflicting laws on the same subject, then the federal law overrides the state law, or the part of the state law that is inconsistent with it.

Section 122 of the Constitution allows the Parliament to override a territory law at any time. The federal Parliament has only used its power under section 122 on a few occasions and only in cases where the territory law has created much debate or controversy within the Australian community.

Example – what laws apply?

- Import and sale of illicit drugs:
  - State laws
    - Common law of crime
    - *Crimes Act 1900* (NSW), *Drugs Misuse and Trafficking Act 1985* (NSW), *Bail Act 2013* (NSW), *Criminal Procedure Act 1986* (NSW), *Evidence Act 1995 (NSW)*
  - Commonwealth laws
    - Common law of crime
    - *Crimes Act 1914* (Cth), *Criminal Code* (Cth), *Customs Act 1901* (Cth), *Judiciary Act 1903* (Cth), *Constitution*, *Evidence Act* 1995 (Cth), *Constitution*

Week 2
AUSTRALIA'S COLONIAL LEGAL HERITAGE

The Australian legal system shares much of its history with the English legal system. Both trace their origins back in an unbroken line over 1000 years to the Norman conquest of England in 1066. Australian law branched off from that of England in 1788, but as in other common law countries, the law of Australia still shares much with England.

History of The Australian Legal And Political System

- In 1717, the Imperial Parliament of passed a statute (4 Geo 1, c 11) which allowed judged to commute the death sentence of most prisoners on condition that they agreed to go to one of the colonies.
- In 1786, Orders of Council were made designating NSW as a particular place in which prisoners from England could be transported.
- In October 1786, Captain Arthur Phillip RN was named 'Governor-designate' of New South Wales.
- In May 1787, the First Fleet sailed from England carrying 717 convicts and 290 free persons.
- In January 1788, Captain Phillip became the first Governor on arrival in Sydney Cove. First Fleet arrived on 29 January 1788 at Botany Bay and Governor Phillip claimed the territory for King George III.

- The transportation of prisoners to NSW was terminated in 1840, in Tasmania in 1852 and the last were sent to WA in 1868.
- Nearly 160,000 prisoners were dispatched to Australia from the British Isles.
- Subsequent development of law and government was influenced by the fact that legal authority was first exercised in the context of a penal colony.

Arrival of Common Law

Traditionally, international law recognised three ways for a country to acquire new territory:

1. Conquest.
2. Cession (one power giving up or 'ceding' its sovereignty over territory to another).
3. Settlement.

Where 1 and 2 were applicable, the laws in force in the acquired territory continued until altered by the acquiring power. Where 3 was the method used, the laws of the acquiring power would apply to the extent applicable.

Was Australia conquered, ceded or settled? *Terra nullius*: Latin, land belonging to no one.

The reason that Australia was initially deemed to be settled rather than conquered, was that it was considered to be uninhabited. In asserting the principle of *terra nullius*, the British were relying on a well-accepted understanding among European nations that a people could be considered civilised only if they had a recognisable legal system which included principles about land ownership. Such principles developed if land was owned and used for agricultural or other purposes and reflected contemporary European notions of property ownership.

Initially the British considered that the indigenous peoples did not have a recognisable political and legal system (including a system of land ownership), so Australia was, from a legal point of view, regarded as 'settled' by the British. As a consequence of 'settlement' English law (common law, equity and statute) *as applicable to the situation* in the new colony applied here (ie not much) – Blackstone's *Commentaries*

What British laws applied?

Australian Courts Act 1828 (Imp) (9 Geo 4, c83) confirmed that all case law and legislation in force in England on 25 July 1828 applied to Australia if 'applicable to the conditions', and the Supreme Courts could determine what laws were 'applicable to the conditions'

But the common law was not fixed at the date of reception, according to *SGIC v Trigwell* (1979) 142 CLR 617…that is how *Donaghue v Stevenson* (a case decided by the House of Lords in 1932) became part of the common law of Australia

Creation of Australian courts

- Initially 'military rule' in the colony, the Governor was the legislature, executive and judiciary
- Supreme Court of NSW established in 1823 pursuant to the *1823 Act* (4 Geo 4, c96) ('the *New South Wales Act*') and judges given 'like jurisdiction and authority…as the judges of the courts of the King's Bench, Common Pleas and Exchequer in England'; **Forbes CJ** was first Chief Justice
- *Australian Courts Act 1828* (Imp) (9 Geo 4, c83) established trial by jury in criminal matters

Creation of Australian legislatures

- *New South Wales Act* created the Supreme Court and the Legislative Council; the Governor could enact laws for the 'peace, order and good government' of NSW on the advice of the Legislative Council if "*not repugnant*" to the laws of England
- An Executive Council advised the Governor from 1825
- From 1832 there were *three arms of government*, as the Governor was no longer part of the legislature: *Australian Constitutions Act (No. 1)* 5 & 6 (Vict, c76) (Imp)
- The *New South Wales Constitution Statute 1855* 18 & 19 Vict, c54 (Imp) created a bicameral legislature

Legal uncertainties

- How to determine if NSW legislation was invalid because **repugnant** / inconsistent with English law?
- How to determine if **British legislation** applied in Australia?
- In 1865 the *Colonial Laws Validity Act* (28 & 29 Vict, c63) confirmed that legislation passed by the British Parliament only applied in NSW if by express words or necessary intendment
- The UK Parliament retained power to legislate for the States until the commencement of the *Australia Acts 1986* (UK) and (Cth)
- A party to a legal proceeding could **appeal to the Privy Council** (a judicial committee of the British House of Lords) from a decision of a State court until the passage of the *Australia Acts* in 1986

The path to Federation

- Discussion started in the late 1840s motivated by concerns about German and French expansionism in the South Pacific, immigration, trade
- The convention debates (public debates) reveal the intention behind the early drafts of the Australian Constitution

The Australian Constitution

- Commonwealth of Australia Constitution Act 1900 63 & 64 Vict, c12 (Imp) commenced on 1 January 1901
  - A 'machinery' document that sets up the Commonwealth Executive, Judicial and Legislative arms of government but says almost nothing about the substantive legal rights of Australians
- The Commonwealth Parliament has **exclusive power** to legislate on the Commonwealth Public Service, defence, currency (ie not much)
- **Both State and Commonwealth Parliaments** may legislate on matters listed in s51 of the Constitution, but **Commonwealth legislation prevails** if inconsistent with State legislation, so the Commonwealth dominates these areas (s109)
- The Commonwealth government has more money than the State governments because of its **taxation of income**
- The Commonwealth can influence State government policies by making conditional **grants of money** to the States under s96

Political independence

- **1914** – Great Britain declared war on Germany (so Australia was at war also)
- **1919** – Australia and Canada permitted to sign the Treaty of Versailles
- **1926** – British Government announces that the dominions are 'autonomous communities within the British Empire' in the Balfour Declaration

- **1939** – Great Britain declared war on Germany and so the PM stated that since Britain was at war, so too was Australia
- **1941** – Australia separately declared war on Japan
- **1941** – Australia appoints first ambassador to the US
- **1942**– Australia adopts an Act of the British Parliament that: (i) declares it will not pass legislation applying to any of the dominions unless requested, (ii) **repeals** repugnancy doctrine and (iii) permits dominions to make **extra-territorial laws**: *Statute of Westminster 1931* (Imp) 22 * 23 Geo 5, c4; *Statute of Westminster Adoption Act 1942* (Cth)
- **1945** – Australia took part in the surrender of the enemy forces
- **1986** – passage of the *Australia Acts* and Australia achieves full legal independence from the UK as the UK gives up whatever power it might still have over Australia as a whole

How are human rights protected here?

- Human Rights are entitlements that an individual may possess in accordance with what is natural. It is the inalienable rights of a human being linked to natural law.
- Human Rights are protected in Australia through the inherited British common law Including:
    - *Magna Carta*, *Petition of Right*, ***Bill of Rights Act 1689…***
    - The rule of law, the separation of powers doctrine, rules about interpreting legislation…
        - Separation of powers is the doctrine that the liberty of the individual is secured only if the 3 primary functions of the state are exercised by distinct and independent organs. The judiciary being largely independent, the legislature and executive depend on one another and members overlap.

In the UK, the *Human Rights Act* requires judges to interpret legislation 'in a way which is compatible with [the *European Convention of Human Rights and Fundamental Freedoms*]' and, if it can't do that, to make a 'declaration of incompatibility' so that the Parliament may consider amending or repealing the law. This legislation is **not entrenched**, so Parliament intentionally pass a law that violates human rights.

The Bill of Rights is an act of the Parliament of England that deals with constitutional matters and lays out certain basic civil rights. It is a restatement in statutory form of the Declaration of Rights. This lays down limits on the power of the monarch and sets out the rights of Parliament, including the requirement for regular parliaments, free elections, free speech in parliament. It sets out certain rights of individuals including the prohibition of cruel and unusual punishment and reestablished the liberty of Protestants to have arms for their defence within the rule of law.

In the US, legislative or executive action can be challenged on the basis that it contravenes the **entrenched** Bill of Rights.

- Australia has **no entrenched** Bill of Rights. The only 5 explicit individual rights in the Constitution are:
    1. Right to vote (s 41)
    2. Protection against acquisition of property on unjust terms (s 51 (xxx1))
    3. The right to trial by jury (s 80)
    4. Freedom of religion (s 116)
    5. Prohibition of discrimination on the basis of state of residency (s 117)
- *Human Rights Act 2004* (ACT) and *Charter of Rights and Responsibilities 2006* (Vic) can be repealed
- Rights protected by the common law or legislation (eg the *Sex Discrimination Act*, *Racial Discrimination Act*, *Children and Young Persons Act*), can also be **repealed** by the sovereign Parliament at any time

Is an entrenched Bill of Human Rights better?

- For: legislative or executive action could be challenged on the basis that it contravenes human rights
  For example: a refugee could seek a declaration that parts of the *Immigration Act* that permit detention of refugee children contravene their human rights and are invalid
- Against: these are essentially political issues that ought to be left to the sovereign Parliament to decide (ie leave it to representative democracy…); it hasn't worked in the US...
- contemporary or historical examples of where 'leaving it to representative democracy' hasn't worked – ie the Parliament has passed laws that have allowed human rights violations?
    - Terrorism act, 'corresponding with a terrorist', family member.