

Chapter 2: Sources of Law: Legislation

Legislation

- Law that is enacted by a legislature
 - Can be referred to as an Act, statute, statutory law, enactment
- The Commonwealth, the states and the self-governing territories all have legislatures that can make law in the form of legislation
 - Local councils have a similar power to enact subsidiary legislation known as local laws or bylaws
 - Bylaws are invalid if they are inconsistent with state or federal law, or if they exceed the powers given to the local government
- Law made in the form of legislature is the most prolific source of new law
- There are nine governments in Australia, so there are nine different legislatures
- Legislation is cited by the name of the Act, the year in which it was enacted and an abbreviated reference to the Commonwealth, state or territory legislature that enacted it
 - Eg. Competition and Consumers Act 2010 (Cth)

Legislative Powers

The Legislative Powers of State Governments

- The legislature of each state is given a general legislative power by the relevant constitution 'to make law for peace, order and good government'
- However, the legislation enacted by the state or territory only operates within its particular borders
- State and territory legislatures also share some legislative powers with the Commonwealth parliament

The Legislative Powers of the Territories

- The legislatures have a broad power to legislate, similar to that of the states, but it is subject to the overriding power of the Commonwealth government
- Cannot validly enact laws that are contrary to Commonwealth law

The Legislative Powers of the Commonwealth Government

- If it is properly enacted in accordance with its constitutional powers, Commonwealth legislature applies throughout Australia
- Commonwealth's legislative power is more limited than state and territory power and is specified in the Commonwealth Constitution
 - Some powers are exclusive to the Commonwealth parliament whereas some are shared with the states
 - Various sections of the Constitution lay down a limited number of matters in relation to which **only** the Commonwealth government has the power to legislate
 - Eg. Lighthouses, bankruptcy, marriage
 - Section 51 of the Constitution lists a large number of matters in relation to which the Commonwealth government **shares** legislative power with the state governments (concurrent)
 - If this conflicts with state or territory legislature, the Commonwealth legislature overrides it and as such, the shared powers operate as a limitation on state and territory legislative powers
 - Eg. If the Commonwealth says are lighthouses must be red, whereas the state says all lighthouses must be green, the legislatures are in conflict
 - They take each other to the High Court of Australia and the judges check that the Commonwealth are actually allowed to legislate on this topic - if they're

1. Proposals for new legislation

2. Procedure in the House of Origin

3. Procedure in the House of Review

4. Final stages before the Bill becomes operational as law

- not, the Commonwealth law is invalid - if they are allowed to legislate, then the Commonwealth legislation prevails
- If the Commonwealth has the power, then the court looks at the conflicting aspects and takes it out of the state law - state legislation is declared invalid

The Legislative Process

- For a legislature to validly enact new legislation, the legislatures of the Commonwealth, states and territories must follow recognised rules and procedures referred to as the 'legislative process'

Bills

- **DRAFTING A NEW LAW**

- A government proposal for a new law is first considered by the cabinet (Prime Minister and the top-ranking government Ministers) to settle any policy issues
- Experts in legal drafting, employed by the government as parliamentary counsel, are asked to prepare a draft of the proposed law with all the provisions needed to give effect to the government policy
 - Bill: The completed draft of the proposed legislation

Identifying the need for new law	Circumstances or beliefs give rise to particular ideas and policies that require change to the law.
Political processes	A decision is taken by those with political power to introduce new proposals into the legislature.
Development of specific proposals	A Bill is drafted by parliamentary draftspersons.

- **THE EXPLANATORY MEMORANDUM**

- In addition to drafting the Bill, parliamentary counsel may also prepare an explanatory memorandum, summarising the Bill and explaining the effect of each provision

- **REVIEW OF THE BILL**

- Once drafted, the Bill is reviewed by the relevant minister, by government party committees and by the relevant government department in case changes are thought necessary
- After any changes have been made, the Bill is ready to be introduced into the legislature

Procedure in Legislature

- **THE FIRST READING OF THE BILL**

- Bills can be introduced into either the lower House or the upper House in bicameral parliaments, but they are usually introduced into the lower House
 - However, financial Bills must be introduced into the lower House
- House of origin: The House into which a Bill is first introduced
- House of review: The House to which the Bill then proceeds
- A Bill is introduced into a legislature by having it listed for its first reading
 - A member of the House proposes that 'the Bill be read for a first time'
 - The House votes to approve the introduction of the Bill
 - Only the 'long title' of the Bill is read out – no debate is undertaken at this stage
 - After the first reading, printed copies of the Bill are distributed to all the members of the House
 - *Only the title is read out*

***Must secure the majority in both Houses to pass laws
 **Senate has 12 seats given to each state → if 50% of Victorians vote for party X, then 50% of the seats are affiliated with party X*

- **THE SECOND AND THIRD READINGS OF THE BILL**

- The minister responsible for the relevant portfolio moves that the Bill be read a second time
- The minister then delivers a speech outlining the provisions of the Bill, providing reasons for its introduction and explaining what the proposed legislation will achieve
 - Debate of the Bill may take place, after which the members of the House vote on the motion that the Bill be read a second time