

## Topic 2: Sources of law and legal institutions

### Primary sources of law

- **Legislation:** Statutes, Acts of parliament
- **Delegated legislation:** Rules, regulations, orders and by-laws of bodies to whom parliament has delegated authority.
- **Court judgments**

### Secondary Sources of law

- **International law:** Especially treaties signed by Australia
- **Law reform commission reports**
- **Academic commentary:** Journal articles, books and conference papers

### Legislation as a preferred form of regulation

- Unlike courts, which have to wait for a dispute that raises particular issues of law before they can address them, parliament is a self-starting agent for legal change – it can pass new legislation, or amend or repeal existing legislation, at any time
- It can be proactive, where courts can only be reactive.
- Courts are retrospective, in that they are limited to resolving disputes arising from past conduct, while parliaments can make new law that has a future, or prospective effect.
- If there is an inconsistency between statute and common law, the statute will prevail. This is keeping with the doctrine of parliamentary sovereignty- parliament's key role is to make law, it prevails over law-making efforts by the courts and the executive.

### Functions of legislation

- To make new law
  - May be done to override what parliament considers to be unsatisfactory common law, or to cover an emerging area that has not yet been subject to law e.g. DNA testing and e-commerce
  - *Charter of Human Rights and Responsibilities Act 2006 (Vic)*
- To repeal an old law
  - Removing laws which are no longer necessary.
  - These can be old statutes or principles in old cases that are no longer in use

- *Summary Offences Act 1966 (Vic)*
- Codify (or consolidate) existing law
  - Bringing together the law in a particular area which may presently be spread throughout a number of cases and statutes into the one statute.
  - It makes it easier for interested people to find the law on that particular area and it gives parliament the chance to streamline and improve the structure and operation of the law
  - *Wrongs Act 1958 (Vic)*

### Creating new legislation

- ACT, NT and Queensland have unicameral (one house) for bills to be passed

### Commencement of legislation

- In NSW, Victoria, Western Australia legislation comes into force 28 days from the date of assent unless the legislation says otherwise.
- In Tasmania, legislation comes into force 14 days from the date of assent
- In Queensland, South Australia and the Northern Territory, legislation comes into force on the actual day of assent, unless the legislation says otherwise.

### Structure of an act

- **Number:** Includes the year eg. 'Act No. 152 of 2004'
- **Date:** Usually given in square brackets and this information is useful to check whether the Act was in force at the time of the relevant conduct or event.
- **Long title:** States the purpose of the Act and can be useful when interpreting the statute. It usually begins with 'An Act to....' or 'An Act for...'

#### **PART 1—PRELIMINARY**

- 1 Purpose and citation
- 2 Commencement
- 3 Definitions
- 4 What is a public authority?
- 5 Human rights in this Charter in addition to other rights and freedoms
- 6 Application

#### **2 Commencement**

- (1) This Charter (except Divisions 3 and 4 of Part 3) comes into operation on 1 January 2007.
- (2) Divisions 3 and 4 of Part 3 come into operation on 1 January 2008.

- **Short title:** Usually contained in the first section of the Act, saying: 'This Act may be cited as....'
- **Preamble:** Set out the principle and reason for developing legislation on the relevant subject matter.
- **Parts and divisions:** In longer Acts, sections may be grouped into logical parts to make it easier for the reader to follow. An Act may be divided into chapters.
- **Objects or purpose section:** Most new Acts have a specific objects or purpose section. They are used when an Act have several purposed or where it is not convenient to sum up the overall purpose into one sentence.
- **Interpretation section:** Like a glossary in a book, sets out the meaning of words used in the Act.
- **Footnotes, endnotes and margin notes:** To make the Act more user friendly.
- **Schedules:** Follows the main sections of the Act and are usually used for detailed information in table form or long lists. They are like an appendix of a book.
- **Explanatory Memoranda:** Statutes are interpreted in the light of their purpose and where statutes aim to be drafted in plain English to make them more comprehensible.

#### PART 3—APPLICATION OF HUMAN RIGHTS IN VICTORIA

##### Division 1—Scrutiny of new legislation

- 28 Statements of compatibility
- 29 No effect on Victorian law
- 30 Scrutiny of Acts and Regulations Committee

##### Division 2—Override declaration

- 31 Override by Parliament

##### Division 3—Interpretation of laws

- 32 Interpretation
- 33 Referral to Supreme Court
- 34 Attorney-General's right to intervene
- 35 Notice to Attorney-General and Commission
- 36 Declaration of inconsistent interpretation
- 37 Action on declaration of inconsistent interpretation

##### Division 4—Obligations on public authorities

- 38 Conduct of public authorities
- 39 Legal proceedings

(2) In determining if a function is of a public nature the factors that may be taken into account include—

- (a) that the function is conferred on the entity by or under a statutory provision;

##### Example

The **Transport (Compliance and Miscellaneous) Act 1983** confers powers of arrest on an authorised officer under that Act.

Example to s. 4(2)(a) amended by No. 6/2010 s. 203(1) (as amended by No. 45/2010 s. 22).

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### Delegated Legislation

- Parliament giving power to relevant government ministry to devise suitable regulations that give effect to the Act.
- Not made by the parliament enactment process
- Typical delegated bodies are the Governor-General or Governor and ministers.
- Methods may be prescribed by the statute which authorises the particular form of delegated legislation. eg. Parliament may create a statutory body such as roads and transport authority and may give power to make laws relating to motor vehicles and driving without a driver's license.

- Regulations, the most common form of delegated legislation, are made by a process of:

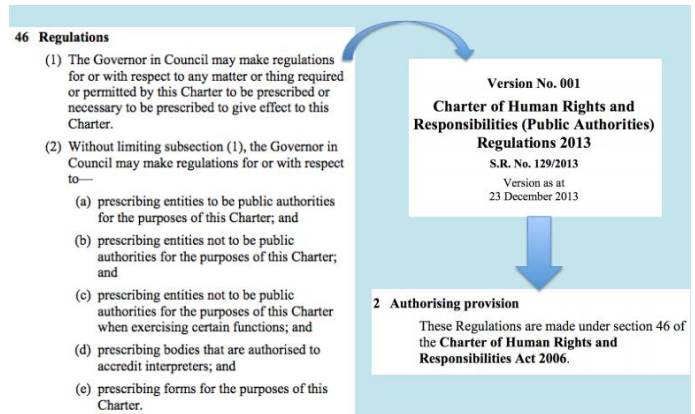
- Signature
- Notifications
- Tabling in parliament

- Benefits of delegated legislation:

- Quicker and cheaper than going through the formal parliamentary processes
- Reduces pressure on parliament
- Enables more complex pieces of legislation to be created by those with specific expertise

- Criticisms of delegated legislation:

- Not subject to the same level of public and parliamentary scrutiny as a bill
- Often passed in secret and the public may not know it has been passed
- Offends the doctrine of separation of powers because it involves the executive making law
- Traditionally more difficult to locate than primary legislation (less information)



### Amending Legislation

- Legislation is amended by passing a new piece of legislation that contains amendments to the older act.
- Typically the title of such legislation is the same short title plus the word 'Amendment'.
- For example: Native Title Act 1993 (Cth) became Native Title Amendment Act 2007 (Cth)
- 'Omnibus' – one Act that amends a number of different Acts

### Repealing Legislation

- Some legislation is automatically repealed as a result of a 'sunset clause' in the legislation – a clause which says that the Act has force for a definite period, or until a certain date.
- Other legislation is repealed by a newer piece of legislation that names a certain Act or Acts and states that they are hereby repealed.
- An Act may also be repealed if a new piece of legislation is enacted that is inconsistent with it, such that it would be impossible for both Acts to apply.