

1003CCJ Law, Government and Justice

Weekly Topics:

Week 1: Law, Government and Criminal Justice

Week 2: Law and Government in Australia

Week 3: Federalism

Week 4: Politics & the Media

Week 5: Liberalism, Democracy & Justice

Week 6: Human Rights Protection

Week 7: Reading Week

Week 8: Case Studies

Week 9: Indigenous Rights and Recognition

Week 10: Accountability and Justice

Week 11: International Comparisons

Assessment

- 2 x 10% Quizzes (Weeks 1-3, and Weeks 4-6) Open Book, 30 mins
- Law Reform Report 40% (Due Week 9, 8-10 questions, 2000 words, about law in Australia)
- Final Exam 40% (2 hour + 10min perusal, 40 questions, true/false/multi choice)

WEEK 1: LAW, GOVERNMENT AND CRIMINAL JUSTICE

RULE OF LAW (key Principles)

- System of legal rules rather than arbitrary decisions
- Those rules are transparent, stable and prospective
- A constitutional framework that properly regulates the exercise of governmental power
- All citizens treated equally by the law
- Fair process for adjudication in application of the law ('natural justice')
- Adjudication by a judiciary that is free from political influence ('independent')

Topic 1.1 – How is Law Relevant to Criminology

- Law and politics shapes the criminal justice system
- It will influence how you work
- If you want to make changes, you need to understand the system
- To become a more thoughtful and educated citizen

Topic 1.2 – Legislation

Legislation

- There are two forms of legislation
 - Statutes of Acts (made by parliament)
- Delegated or subordinate legislation (made by office-holders or bodies to whom parliament has delegated law-making power)
- Delegated legislation includes rules, regulation, ordinances, by-laws and legislative instruments

Legislation and Parliamentary Supremacy

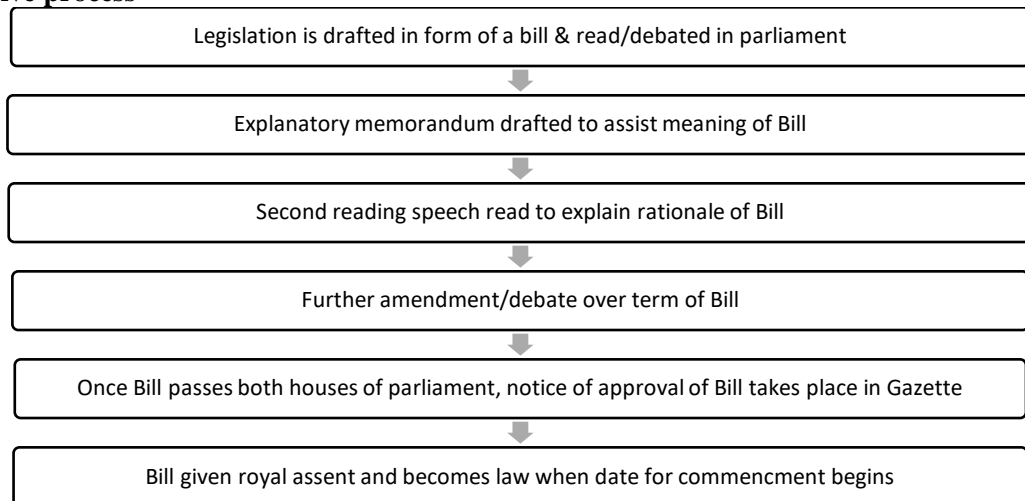
- Parliaments are supreme law-makers
 - Judges make law too, but statutes are supreme (except in interpreting the Constitution)
- Limits on legislative power?
 - British system historically imposed no legal limits on parliament

- But Australian parliaments are limited – by the Constitution, enforced by the High Court.

Legislation: How is it made?

- Legislation is Parliament-made law
 - Bills originate from party policy, government departments, judges' decisions, law reform or royal commissions or public pressure
 - Pass through parliament & receive assent from the G-G/Governor before becoming law
 - After assent, acts only have legal force once they commence
 - Can be amended and repealed

The Legislative process



Legislation Vs Case Law

- Statutes set out general rules – Courts adjudicate individual disputes

Legislation

- Legislation is now prolific as it is logical, rational and reforming. However, the common law remains significant – why?
 - Statutes must still be interpreted, allowing judges to develop and apply common law principles
 - Some key areas of law remain largely common law based (e.g. contract law, torts law)

How Courts interpret legislation

- Courts must interpret legal rules and apply to cases
- Courts use rules to guide interpretation – these are not fixed or absolute rules but general principles
 - Traditional approach – literal rule
 - Golden rule – avoiding absurdities
 - Purpose rule – court may depart from the literal meaning where that does not conform with the legislative purpose and policy of the Act – now enshrined in *Acts Interpretation Acts*
 - *Acts Interpretation Acts* contains definitions of terms that commonly recur in legislation.

Topic 1.3 – Case Law

- Be Careful of use of term ‘common law’
 - Common law = a legal system (e.g. Australia is a common law system, not a civil law system)
 - Common law = a type of subject matter (e.g. different from the law of equity etc)
 - But most important for us... common law – judge-made law. That is, this the law that arises from cases decided by Judges over time.

Fundamental to case law...

Doctrine of Precedent

- “Where a court has decided a case in a way, then subsequent cases involving similar facts should be decided in the same way. The legal principles that apply to a particular set of facts should always apply to situations with similar facts” (Carvan, p.79)
- Why is this important to a system that relies on case law?

Rationale for the Doctrine of Precedent

- Telstra Corporation vs. Treloar (2000) 102 FCR 595 at 602:
 - Stare decisis promotes certainty because the law is then able to furnish a clear guide for the conduct of individuals
 - The doctrine achieves equality by treating like cases alike
 - Stare decisis promotes efficiency.
 - Stare decisis promotes the appearance of justice.
 - (Per Banson and Finkelstein JJ)

Ratio Decidendi

- ‘*ratio decidendi*’ means the reasons for the decision
 - i.e. this is not the outcome of the case, but the reason for the outcome decided.
 - These reasons are the things that are binding on Judges in courts lower in the hierarchy (i.e. the *ratio* creates the precedent).
 - This is different to *obiter* data (remarks in passing) which might be persuasive in later cases, but don’t form part of the final decision in the case.

Identifying the Ratio Decidendi

- What were the legal questions which mattered for the outcome of the case?
- How did the judge decide those questions?
- What was the judge’s explanation of the legal principle?

How case law develops through precedent

- Judges must apply existing rules to new situations
- But judges have a choice of how to apply these rules or precedents
- Occasionally they make new rules or overturn old ones
- Sometimes it is very difficult to determine the *ratio decidendi* of a case, and, precedent (and therefore, the law) often develops over time as more cases are heard and the *ratio* is clarified and applied.
- Parliament can overturn judge-made-law (except in constitutional interpretation). Parliament reigns supreme.

Doctrine of Precedent and Court Hierarchies

- Judges in lower courts are bound by the decisions of courts higher in the hierarchy.
- Normally, courts at the same level should follow their own decisions unless convinced that the previous decision was clearly wrong
- Decisions of other courts (outside hierarchy) are persuasive
- So, e.g. a judge of the District Court in QLD would have to follow a QLD Court of Appeal decision, but not a VIC Court of Appeal decision

State Court Hierarchy Flowchart

- **High Court of Australia**
 - The High Court of Australia is the only Court that was established under the Commonwealth of Australia Constitution Act 1901 (UK) (the **Constitution**).
 - It has an **original** and an **appellate jurisdiction**. In its original jurisdiction, the High Court only hear matters authorised by the Constitution (e.g. regarding the extent or proper exercise of section 51 powers, disputes between the Commonwealth and the States, interpretation of the Constitution etc)
 - Its **appellate jurisdiction**, the High Court can hear appeals from its original court, the Federal Court, the Family Court, and the State Supreme Courts (Courts of Appeal). Most appeals are **by leave** of the Court.
- **Federal Court of Australia/ Family Court of Australia**
 - The six Australian States each have one Supreme Court. The Supreme Court exercises both an **original** and an **appellate jurisdiction**, in both civil and criminal matters.
 - In its **original criminal jurisdiction**, the Supreme Court (Trial Division) hears and determines serious indictable offences. A **full jury trial** is conducted if a defendant pleads not guilty.
 - In its **appellate criminal jurisdiction**, the Supreme Court (Court of Appeal) hears appeals on convictions or sentences imposed in the Supreme Court (Trial Division), and in intermediate and lower courts.
 - In its **original civil jurisdiction**, the Supreme Court (Trial Division) can determine disputes involving complex issues and copious amounts of money. In its **appellate civil jurisdiction**, the Supreme Court (Court of Appeal) can hear appeals from decisions in the Supreme Court (Trial Division), and from intermediate and lower courts.
 - Appeals from the Federal Circuit Court of Australia involving family law are heard by the Family Court of Australia. Appeals are usually heard by a single judge from the Family Court, but can be heard by the Full Court of the Family Court if necessary. Appeals from the Federal Circuit Court involving other kinds of federal law (such as bankruptcy etc) are heard by a single judge from the Federal Court of Australia.
- **Full Court of Australia**
 - There are intermediate courts in all States except Tasmania. These courts mainly operate as **courts of first instance** (i.e. exercising **original jurisdiction**) with respect to a wide range of civil and criminal matters. In some States, they have a limited **appellate jurisdiction** to hear appeals from the Magistrates' Court or some specialised Tribunals. Usually, however, appeals from the Magistrates' Court go directly to the State Supreme Courts.
 - In their **criminal jurisdiction**, intermediate courts hear and determine a range of **indictable offences**. A **full jury trial** is conducted if a defendant pleads not guilty.
 - In its **civil jurisdiction**, intermediate courts can determine disputes involving more complex issues and larger amounts of money.
 - Appeals from the Federal Court of Australia are heard by the Full Court of the Federal Court of Australia (the appellate division of the Federal Court). This means that three or more judges hear the appeal, rather than a single judge.
- **Full Court of the Family Court of Australia**
 - State lower courts only have an **original jurisdiction**, where a dispute is heard in the first instance. They do not have an **appellate jurisdiction** (i.e. they do not hear appeals (except on some very minor administrative matters, like parking tickets etc)).
 - A Magistrates'/Local court has a civil and a **criminal jurisdiction**. In its criminal jurisdiction, it can determine **summary offences**, and many **indictable offences that can be heard summarily**. A **summary trial** is conducted if a defendant pleads not guilty. (A summary trial does not involve a jury). **Committal hearings** are also held in Magistrates' courts – this is where a Magistrate will determine whether there is sufficient evidence for an accused person to be sent to trial in a higher court in relation to an indictable offence.
 - In its **civil jurisdiction**, Magistrates' courts can determine minor disputes involving less complex issues and smaller amounts of money.

- Appeals from the Family Court of Australia are heard by the Full Court of the Family Court of Australia (the appellate division of the Family Court). This means that three or more judges hear the appeal, rather than a single judge.
- **Federal Circuit Court of Australia**
 - The Federal Circuit Court of Australia has jurisdiction to hear a range of matters including family law and child support, administrative law, bankruptcy, human rights, consumer protection law and privacy law. It is a new court, established in 1999 to help with the workload of the Federal and Family Courts by hearing shorter, simpler cases on various matters.
- **Federal Court of Australia**
 - The Federal Court of Australia hears a range of matters involving federal Commonwealth law, such as bankruptcy, tax, trade practices and industrial disputes. It was established in the 1970s to relieve the workload of the High Court.
- **Family Court of Australia**
 - The Family Court of Australia is a court of federal jurisdiction which hears matrimonial matters including matters related to the custody of children.

Topic 1.4 – Courts and Jurisdiction

Court Systems and Hierarchies

- We have a federal system so there are both State Courts, and Federal Courts (depending on the law to be examined)
- State Courts deal with legislation passed by the State parliament, and with matters of common law. Federal Courts deal with legislation passed by the Commonwealth parliament.
- The Constitution sets out how power is divided between States and the Commonwealth.

State Court Hierarchy

- Local (Magistrates) Courts:
 - Bottom of the rung
 - Has both a criminal jurisdiction and a civil jurisdiction
 - No appellate jurisdiction (except some administrative decisions, e.g. parking fines etc)
- District Courts:
 - Criminal and civil jurisdiction
 - Limited appellate jurisdiction – can hear matters from local (Magistrates) Court
- Supreme Court: Trial Division
 - Original jurisdiction (trial division)
 - Both civil and criminal jurisdiction
 - Has appellate jurisdiction – Court of Appeal
- Supreme Court: Court of Appeal:
 - Hears appeals from D.C and S.C (and sometimes M.C)
 - Can review questions of law and fact, but usually only reviews law
 - From Court of Appeal, a party can appeal (usually by leave) to High Court.
- Federal Court Hierarchy
 - Federal Circuit Court of Australia – hears more minor family, migration, administrative, bankruptcy, industrial relations etc matters
 - Family Court of Australia – appeals on family matters from FCC
 - Federal Court – original jurisdiction to hear range of Cth, matters, and appeals from FCC (non-family matters)
- High Court:
 - Original Jurisdiction
 - State vs Commonwealth or
 - State vs State cases
 - Appellate Jurisdiction
 - Appeals from state court system
 - Appeals from Federal Court system