

LAW 1501

Foundations of Law

Course Notes

Adelaide University

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## **Basic Points of Law**

The supreme power in the state is the people.

- "Law... that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling" - Frank Frankfurter Reminisces

### **Purpose of Law**

- To maintain public order
- To suppress and punish deviant behaviour
- To resolve disputes
- To constitute and regulate organs of power
- Communicate and reinforce social values (Farrar, 2010)

Law is a social institution - to serve social need – they are what holds society together.

Law is followed because people believe there are social and moral values. It is kept respected because others around follow such, and hence convey a general understanding that the citizens believe in these.

### **Example Reports**

- R v Reid [2007] 1 Qld R 64 - The queen against Reid [2007] 1st report of Queensland in page 64
- Kemp v The King (1951) 83 CLR 341 - Kemp against the king in volume 83 however the case was done in 1951, page 341 of the commonwealth law

\* In a square bracket it's specific to the year - sorted by the year

\* Round bracket generally is sorted by volume consisting of a range of years

### **Judges**

- Applies law to particular disputes
- Must act impartially
- Must act according to law (interpret and reasoning by analogy)

### **Lawyer's Job**

You're a gatekeeper because you are keeping people away from the court and hence are an agent of the law.

You can't breach that trust between a client and yourselves as lawyers and hence representing the client, you are a profession as you represent a part of the law. You don't get to choose your clients.

## Queen's Council

Queens's council generally starts off as a barrister and works up their experience and reputation enough to be granted privilege to represent as a QC

## Order of Power in Sources of Law

1. Constitution (State & Commonwealth)
  - The constitution is the source of the power of all other laws, as it provides authority for closure in other parts
2. Statute Law and Delegated Legislation
  - Statute law can override common law
3. Common Law (Case Law)

## Conventions

A convention is a practice not specifically written for authority, it is taken upon by the government out of practice.

Justiciable: Capable of being decided upon by a court

## Common Law

The expression 'the common law' has multiple meanings:

- Common law v civil law (system of law)
- Common law v statute law (source of law)
- Common law v equity (branches of law)

Origin: State courts, federal courts, 'uniform common law'

Commonwealth has never chosen to establish a criminal federal court, if suspects are sentenced, they will be sent to a state court, and hence suspects would be sent to a state prison.

## Law-Making Bodies in Australia

Federal parliament: Canberra only

Councils get their authority from state laws

Section 109 gives power to federal laws over state laws

## **Statute Law**

Is made by parliament and needs to be passed by both houses of parliament, and needs to be signed off by the Governor General on behalf of the queen (royal assent).

- Statute law is interpreted by the courts
- Statute law primacy and overrides common law
- Can be repealed by Parliament

e.g. Road Traffic Act 1961 (SA) s 44A is a statute law

The maximum penalty of the specific law (s 44A) is \$300 or imprisonment for not more than six months or both.

\* The problem with this, is that in 1961 \$300 was worth a lot more than it is now, whereas 6 months imprisonment in terms of value is generally kept the same

## **Delegated Legislation**

Difference between actual and delegated legislation: Delegated legislation is not made by elected officials, it's made by delegated authorities such as the Minister, Governor, or Governor General. You can also change it more regularly.

## **Constitutions**

Constitutions are the source of authority to other 'ordinary' laws

## **Customary Law**

Customary law tends to have a high level of compliance

Recognises Indigenous law and custom in Australia (i.e. native title and traditional sentencing practices e.g. if one was going to be speared in the leg as traditional punishment, the sentencing would be reduced or considered to change for such).

## Criminal v Civil

CRIMINAL OFFENCE	CIVIL WRONG
Prosecutor prosecutes the defendant	Plaintiff sues the defendant
Action is brought by the state	Action brought by private parties
Special rules apply to the prosecutor	Less than 10% of cases go to trial
Standard of proof: beyond reasonable doubt	Standard of proof: balance of probabilities
Guilty/Not guilty	Liable/Not Liable
Conviction/Punishment	Damages / Injunctions / Specific Performance

## IRAC & How to Write

I - What are the legal issues arising from the facts

R - What are the (legal) rules?

A - What is your argument? (Apply the law to the facts)

C - What is your conclusion?

	<u>Steps</u>	<u>Questions</u>
<b>I</b>	Issues of law and policy	Which facts do you think are relevant to her legal problem? Are there any other facts you need to know in order to solve Imma's problem? What is the main issue raised by Imma's problem? Are there any other issues?
<b>R</b>	Rules and regulations	What rules might you need to use to resolve the problem? How would you locate the rules?
<b>A</b>	Argument (or application)	How would you argue Imma's case to the insurance company? What counter-arguments might they use?
<b>C</b>	Conclusion	Which arguments do you think are most important and persuasive? How do you think an objective observer such as a judge, would decide the issue?