The Legal System

Principal Focus

Students develop an understanding of the nature and functions of law through the examination of the law-making processes and institutions.

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## SYLLABUS

### Principal Focus

»» Students develop an understanding of the nature and functions of law through the examination of the law-making processes and institutions.

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| **1. Basic Legal Concepts** | **1. Define law**
| - Meaning of law | **2. Distinguish between customs, rules, laws, values and ethics**
| - Customs, rules and law | **3. Describe the characteristics of just laws and the nature of justice**
| - Values and ethics | **4. Define and investigate procedural fairness and the rule of law**
| - Characteristics of just laws | **5. Define anarchy and tyranny**
| - Nature of justice: | **6. Outline the origin of common law**
| - Equality | **7. Examine the hierarchy and jurisdiction of state and federal courts**
| - Fairness | **8. Outline the role and structure of parliament and the legislative process**
| - Access | **9. Describe the function of delegated legislation**
| - Procedural fairness | **10. Explain the difference between division and separation of powers**
| - Rules of law | **11. Examine the role of the High Court in the interpretation of the constitution**
| - Anarchy | **12. Examine the characteristics of Aboriginal and Torres Strait Islander Peoples’ customary law**
| - Tyranny | **13. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| **2. Sources of contemporary Australian law** | **14. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| Common law - | **15. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - British origins, including: | **16. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Development of common law | **17. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Equity, precedent | **18. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Adversarial system of trial | **19. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Court hierarchy: | **20. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Jurisdiction of state and federal courts | **21. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| Statute law - | **22. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Role and structure of parliament | **23. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
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| - Delegated legislation | **25. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| The Constitution - | **26. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Division of powers | **27. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Separation of powers | **28. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Role of the High Court | **29. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| Aboriginal and Torres Strait Islander Peoples’ customary laws - | **30. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**
| - Diverse nature of customary laws | **31. Outline to the extent to which Aboriginal and Torres Strait Islander Peoples’ customary laws**

**Note:**

- The syllabus includes topics on the nature and functions of law, law-making processes, institutions, and various aspects of contemporary Australian law. It emphasizes the development of understanding in areas such as basic legal concepts, sources of law, and characteristics of just laws. Students are also expected to master specific legal definitions, principles, and processes related to procedural fairness, the rule of law, and the constitutional framework. Additionally, the syllabus highlights the importance of understanding the characteristics of Aboriginal and Torres Strait Islander Peoples’ customary laws and their role in the legal system.
## Legal Studies

- Spiritual basis, significance of land and water
- Family and kinship
- Ritual and oral traditions
- Mediation and sanctions
- Relevance to contemporary Australian law

### International Law
- Differences between domestic and international law
- State sovereignty
- Sources, including:
  - International customary law
  - Instruments (declarations and treaties)
  - Legal decisions, writings
- Role of:
  - United Nations
  - Courts and tribunals
  - Intergovernmental organisations
  - Non-governmental organisations
- Relevance to contemporary Australian law

### Classification of Law
- **Public law**
  - Criminal law
  - Administrative law
  - Constitutional law
- **Private law (civil law)**
  - Contract law
  - Tort law
  - Property law
- Criminal and civil court procedures including legal personnel
- Common and civil law systems

### Law Reform
- Conditions that give rise to law reform including:
  - changing social values, new concepts of justice, new technology
  - Islander peoples’ customary laws have been integrated into Australian law

- Distinguish between domestic and international law and examine the impact of state sovereignty
- Examine the sources of international law
- Describe the role of the various organisations involved in international law
- Examine how international law impacts on and is incorporated into Australian law
- Outline different types of law
- Compare the purpose of different types of law
- Distinguish between civil and criminal court procedures
- Identify the role of legal personnel involved in the court process
- Compare and contrast common and civil law systems
- Examine the conditions that give rise to law reform
- Describe the role of agencies involved in law reform
**5. Law reform in actions**

Two examples of law reform must be studied. Law reform in relation to native title is mandatory.

**A) Native title -**
- Terra nullius
- The roles of the High Court and federal parliament
- Major native title decisions
- Legislation

**B) A contemporary law reform issue -**
- Young drivers and the law
- Sport and the law
- Alcohol and violence
- Bikie gangs and law

- Examine the operation of the different mechanisms of reform
- Explain why terra nullius was an obstacle to achieving native title
- Examine the roles of the High Court and federal parliament in recognising native title
- Examine major Australian native title decisions
- Assess the effectiveness of the law reform process in achieving just outcomes in regard to native title
- Identify and investigate a contemporary law reform issue
- Examine the conditions that give rise to the need for law reform, the agencies of reform and mechanisms of reform
- Assess the effectiveness of law reform in achieving just outcomes with regard to a contemporary law reform issue
MEANING OF LAW

The law is a set of rules that applies to everyone in a society (universal) that can be enforced/punishable by the state.
- Laws are fluid (they can be changed)
- New ones can be created
- Can be abolished

Laws must reflect society and its values

PURPOSES OF LAW

- Safety to the community (victims, offenders, society)
- To maintain order, set boundaries
- Establishing standards
- To protect human rights

VALUES

- Values are a set of moral standards which are considered desirable in society

CUSTOMS, RULES AND LAWS

Customs, rules and laws are all interconnected.
- Customs are expected behavioral patterns within a society
- Rules are boundaries placed on specific branches of society, such as in schools or workplaces
- Laws, unlike rules, affect all of society equally and are enforced by the legal system

Customs
- Traditional/usual way of behaving
- Develop over a long period of time
- Not enforceable by the law

Rules
- Clear guidelines on what you can and can’t do
- Only applicable in a certain place or situation
- Not enforceable by the law

Laws
- Laws are made up by a ‘sovereign power’
  - The Queen
- If you break a law you are punishable by the state
- Officially, the ‘rule of law’ applies
VALUES AND ETHICS

▷ There are no punishments for not having or following certain values
▷ Ethics tell people the correct way of behaving in a certain situation
▷ Values and ethics eventually become customs over time

JUST LAWS

CHARACTERISTICS OF JUST LAWS

▷ Laws apply to all members of society
▷ Laws are officially recognized and enforced by the legal system
▷ Laws are accessible by all
▷ Laws relate to the interests of general society, and reflect the rights and responsibilities of those within it

THE NATURE OF JUSTICE AND PROCEDURAL FAIRNESS

Justice is the fair and impartial treatment of all individuals under the law. The legal system is expected to achieve justice in all circumstances.

Three elements of justice in legal processes:

▷ Equality is all people are being treated in the same way
▷ Fairness is the legal system being free from any bias or dishonesty
▷ Access is the right or opportunity to make proper use of the legal system

Procedural fairness (natural justice) must have these factors:

▷ The right to be heard. Anyone involved in any dispute has the right to be heard and their opinion taken into account.
▷ The right to know what you are accused of.
▷ An unbiased decision maker. Anyone in a position of power during legal processes must be unbiased, honest, and fair to all.

CASE STUDY - EXAMPLES

Procedural Fairness was upheld in the case of Kioa v West (1985) -
The High Court ruled that administrative bodies (in this case, the Immigration Department) still had to allow for procedural fairness when making decisions (in this case, the decision to deport a family). The people who are being dealt with by our legal system need to be able to respond to the allegations being made against them.

Procedural Fairness was denied in the case of Mohamed Haneef (2007) -
Dr Haneef was held for 12 days without being told what he was being charged with or what evidence was being used against him (which is a lack of procedural fairness). Soon after he was deported under a section in the Migration Act 1958 that says that the Minister for Immigration is able to deport someone and specifically states that procedural fairness does not apply to that decision (no right to appeal or know why they’re getting deported) (which is another example of a lack of procedural fairness).
**Sources of Australian Law**

**What influences Australian Law?**
- English Law
  - Common Law
  - Origins of English law used trial by ordeal
- ATSI Customary Law
- International law, eg United Nations
- Statute Law
- The Constitution

**Common Law**

Originated in Britain, based on the idea of travelling judges enforcing precedent
- Equity is a body of law supplementing common law, correcting injustice by applying principles of fairness.
- Precedent is a judgement which acts as authority for a later legal decision (stare decisis, the decision stands)
- Injunctions are known as equitable solutions to legal disputes

**Rules of Precedent**
- Must be followed in all courts lower in hierarchy (binding precedent)
- Can use international law as basis for decision in any court (persuasive precedent)
- When making a decision in a current case, the judge must apply the same reasoning and thinking to previous similar cases

**Norman Conquest**
- William the conqueror sent Justices (Judges) around English to ensure disputes were settled the same way everywhere in the country.

**The Doctrine of Precedent**
- Making sure that the law is known, predictable and applies to everyone. To ensure that judges have less decision-making power - their job is not to make up entirely new laws off the top of their heads - we do not elect judges, therefore it would be wrong for them to be our main law-makers.

**Adversarial System of Trial**

Australia uses adversarial system of trial.
- Two party’s prove their case to an impartial third party.
- The burden of proof lies with the prosecution/plaintiff, defense must cast elements of doubt.
- Judge acts as impartial mediator, ensuring proper legal procedure is followed, determining admissibility of evidence and asking questions of law. Case is directed by two parties.
- Each party must be represented equally and controls what they present to court.
THE ALTERNATIVE, AN INQUISITORIAL SYSTEM

➳ Judge directs entire case, and plays active role in investigation
➳ Judge chooses applicable evidence and witnesses
➳ Much higher prosecution rate

COURTS

HIGH COURT

➳ The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts.

SUPREME COURT

➳ The supreme court is the highest court within the hierarchy of courts in many legal jurisdictions. Other descriptions for such courts include court of last resort, apex court, and high court of appeal.

CRIMINAL COURT OF APPEAL

➳ The New South Wales Court of Criminal Appeal, part of the Supreme Court of New South Wales, is the highest court for criminal matters and has appellate jurisdiction in the Australian State of New South Wales.

DISTRICT COURT

➳ The District Court of New South Wales is the intermediate court in the state’s judicial hierarchy. It is the largest trial court in Australia and has an appellate jurisdiction. It hears serious criminal offences, appeals from lower courts and civil proceedings.

DRUG COURT

➳ Drug courts are judicially supervised court dockets that provide a sentencing alternative of treatment combined with supervision for people living with serious substance use and mental health disorders.

LOCAL COURT

➳ The Local Court civil jurisdiction deals with civil claims up to $100,000. It deals with most criminal matters including summary offences, which are crimes such as stealing, assault and possession of drugs.

CORONERS COURT

➳ An inquest is a court hearing where the Coroner considers evidence to determine the identity of the deceased and the date, place, manner and cause of death of the deceased.

CHILDREN’S COURT

➳ The Children’s Court of New South Wales is a court within the Australian court hierarchy established pursuant to the Children’s Court Act 1987 (NSW) which deals with criminal offences committed by children aged over 10 years and
under 18 years, as well as with proceedings relating to the care and protection of children.

**FEDERAL CIRCUIT COURT**
- A court that sits in more than one place in a judicial district as a state court usually with original jurisdiction and sometimes with appellate jurisdiction, and any of the federal courts of appeals.

**FAMILY COURT**
- A court of law that hears cases involving domestic issues such as divorce and child custody.

**COURT HIERARCHY**

**LOWER COURTS**
Hear summary offenses, minor civil claims ($60,000) and committal hearings. Heard by a magistrate, no jury. Committal hearings established whether there is sufficient evidence to trial the case in a higher court (*prima facie case*).

**INTERMEDIATE COURTS:**
Hears indictable offenses and civil claims ($750,000) and has an appellate jurisdiction. Heard by a judge and in most cases, a jury.

**SUPREME COURTS:**
Hears the most serious indictable offenses and civil claims. Heard by a judge and usually a jury. Has appellate jurisdiction.

**STATUTE LAW**
- Statute law is created in parliament by a group of elected representatives.
- Australian parliament utilises a bicameral system. Law changes must be passed in both houses.

**THE LEGISLATIVE PROCESS**
- Proposed change (bill) introduced in the house of representatives, usually by cabinet minister (anyone can introduce a backbenchers bill)
- Bill is read, then discussed and amended if necessary
- Vote is taken after the third and final reading, if it passes it moves to the Senate
- Process repeats in upper house
- If passed, moves to governor or governor general for royal assent
- It is now an Act of Parliament

**DELEGATED LEGISLATION**
- Made by non-parliamentary bodies
  - Government agencies/ministers/councils and Government-General
- Given power through an enabling act
- Concerns less important matters
A Regulation, An ordinance or a By-Law
INTERNATIONAL LAW

To be able to distinguish between domestic and international law.

**SOURCES OF DOMESTIC LAW**

- Common Law
- Statute Law
- The Constitution
- ATSI Customary Law

**Domestic Law applies to**

- Everyone in the country (the ‘rule of law’ applies); except for ATSI Peoples’ Customary Law (which does not apply to many people at all)

**People Follow Domestic Law because** -

- We have police who enforce the law (State AND Federal Police, with the power to arrest), and courts will make sure that people get punished if the law has been broken.

**SOURCES OF INTERNATIONAL LAW**

- United Nations
- Individual treaties between countries

**International Law applies to**

- Applies to everyone (and nobody, there is no international police force)

**People Follow International Law because** -

- Countries have the option to follow most international law; they have the option to be taken to court; the option to be part of a treaty or not – Countries follow it because they want to look good for the rest of the world.

**STATE SOVEREIGNTY**

- Every nation is equal, in that it has a right to control itself and make its own decisions without outside interference.

- No nation can be forced to sign a treaty (even if it's something like banning the use of landmines in areas where kids play, or cluster bombs in residential areas). No nation can be forced to join the UN. No nation can be forced to go to court (the International Court of Justice). Nations have a choice.

- International law is (mostly) voluntary.

**When state sovereignty doesn’t apply:**

- Countries don’t get to choose whether or not they want to be bound by (“have to follow”) jus cogens – international customary law that is so common and important that it is above all other national and international law

  - example Genocide is never ok, even if a government hasn’t signed any international agreements saying they won’t commit genocide.

- Since 2005, under the Responsibility to Protect (R2P), countries are seen to give up their right to sovereignty if they are not willing to protect their own people.
example The Libyan government was attacking its own people in 2011. The UN Security Council voted that Libya had given up its right to sovereignty and allowed for an invasion to save the unarmed citizens from being massacred.

**SOURCES OF INTERNATIONAL LAW**

Customary international law (jus cogens): Develops from long standing ethics and customs which become recognised by the international community. Does not become official in a nation state until it is accepted as necessary by said nation state (opinio juris sive necessitatis).

**THE INTERNATIONAL COURT OF JUSTICE (ICJ)**

- Doesn’t have the same doctrine of precedent in international law.
- The decisions of the Court are not binding on future cases.
- The Court still refers to its past decisions and its past ‘advisory opinions’ to support its explanation of a present case.

**INSTRUMENTS (TREATIES+DECLARATIONS)**

- Treaties are mutual, written bilateral/multilateral agreements, governed by international law, which govern interactions within and between nation states. Not legally binding until ratified.
- Declarations are written documentation of opinions or facts, not legally binding. May develop into treaty later.
- Conventions are a general agreement between nations.

**LEGAL DECISIONS**

- Main international court is the International Court of Justice (ICJ), the judicial arm of the UN hears treaty disputes, and decisions may be the basis for future treaties. It isn’t compulsory to use previous cases.
- Tribunals were used before the formation of the International Criminal Court (ICC) in 2002.

**THE TREATY PROCESS**

Australia implements the process above to enforce treaties it has signed. Often, existing domestic laws are sufficient. Treaties also influence the development of common law.

**EXAMPLES:**

- Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)
- Sex Discrimination Act (1984)

**INTERGOVERNMENTAL ORGANISATIONS**

Intergovernmental organisations are organised groups of nation states which work towards a mutual goal. Examples include International Labour Org. (ILO) or Interpol.
Examples

» The European Union (EU) + Council of Europe (CoE)
» The Organisation of American States (OAS)
» The African Union (AU)
» Arab League
» Association of Southeast Asian Nations (ASEAN)
» NATO (you’ll learn more about this if you do World Order)

Three Steps for an IGO

○ Create the IGO
○ Outline an instrument
○ A court

Non-governmental organisations: organisations with no government affiliation. They lobby and provide information to the public. Examples include St Vincent De Paul’s and Amnesty International. NGO’s do not take sides but can only report abuse. They can’t deal consequences. They are able to expose issues. NGO’s aren’t a source of international law because they have no legal authority.

Examples

» Salvation Army
» Red Cross
» Project Compassion
» Amnesty

The United Nations

Established in 1945 by Charter of the United Nations 193 members, headed by UN Secretary General Ban Ki Moon “To maintain global peace and security, and to develop friendly relations among nation states based on respect for equal rights.”

The Constitution

Constitution - A set of rules governing the running of a nation state
Legislation - Commonwealth of Australia Constitution Act 1900 (UK)
The Constitution is not a regular law. It is a special law that defines the power of our lawmakers – but that power is limited. A reflection of society’s values.
Chapter I - The Parliament
Chapter II - The executive government
Chapter III - The Judicature
Chapter V - The states
Chapter VI - New states
Chapter VIII - Alteration of the constitution

Section Example -

s 116: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.
**Division of Powers**

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<th><strong>Concurrent</strong></th>
<th><strong>Exclusive</strong></th>
<th><strong>Residual</strong></th>
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</thead>
<tbody>
<tr>
<td>Areas in which federal government can create laws. Outlines in Section 51</td>
<td>Areas in which state may create laws as well as federal, also outlined in Section 51</td>
<td>Powers exclusive to federal parliament, outlined in Section 52.</td>
<td>Powers maintained only by the states, detailed in state constitutions.</td>
</tr>
</tbody>
</table>

**Note:** where conflicting, federal laws always override state law.

**Exclusive Powers**

Examples -
- s.90: Customs
- s.114: Military forces
- s.115: Currency

**Residual Powers**

Examples -
- Insurance
- Banking
- s.51 powers

**Concurrent**

Examples -
- Transport
- Education
- Local Government

**Separation of Powers**

Separation of powers is essential to an effective democracy - ensures that no section of the law is corrupt by maintaining independence between legal areas.

The three branches of government outlined in the doctrine:
- **Legislature** - lawmakers (parliament)
- **Executive** - ministers and departments which administer laws (cabinet)
- **Judiciary** - courts which apply law

Each branch is supposed to keep the others from abusing power.

Separation of powers is essential to an effective democracy - ensures that no section of the law is corrupt by maintaining independence between legal areas.

The Division of powers shows how power is divided between the State and Commonwealth jurisdictions. The Separation of powers shows how we separate our legal institutions ensure that nobody has absolute power.

**Case Study Example**

**NBNB v Minister for Immigration and Border Protection (2014)**
There were 5 asylum seekers who were found to be genuine refugees from Afghanistan. They were held in detention, but they were convicted of crimes while in detention (e.g. damaging property in the detention centre, so they wouldn’t have committed these crimes if they weren’t in detention in the first place).

The previous Labor Immigration Minister used s.501(6)(aa)(i) of the Migration Act to deny them protection visas (so, a decision made by the executive branch of the government, supported by legislation made by the legislative branch).

Then the Judicial branch of the government (i.e. the Federal Court) overruled that decision because they were denied procedural fairness and it went against our international obligations to not detain people indefinitely.

Federal Court overturns asylum seeker protection visa decision, ABC News (2014)

**CLASSIFICATION OF LAW**

**PUBLIC LAW**

Public law is the branch of law governing the relationships between individuals and the state, and the structure and operation of said government.

**CRIMINAL LAW**

- The body of law under which acts are punishable by state
- Maintains public safety, as criminal acts violate the moral order of society
- Constantly reviewed to reflect modern society

NSW - Crimes Act 1900

**ADMINISTRATIVE LAW**

- Deals with powers and decisions of government bodies
- Individuals can seek review of government divisions:
  - **Internal**: a decision made is reviewed by the same agency
  - **External**: an external party reviews the decision
  - **Judicial**: a court hears and reviews the legality of a decision

**CONSTITUTIONAL LAW**

- Focuses on rules governing the separation of powers
- Concerns constitutional validity of government actions
- Related to the division of powers
- Also deals with constitutional breaches in the legal system

**CATEGORIES OF CRIME**

- Preliminary offences, eg. attempted attack
- Offence against the person, eg. assault, murder, battery
- Offence against the sovereign, eg. treason, overthrowing the government
- Public order offences, eg. swearing, urinating
- Economic offences, eg. fraud, white collar, piracy
Driving offences
Drug offences

**PRIVATE LAW**

Private (civil) law is the branch of law governing relationships between individuals and organisations. Aims to protect the private rights outlined in statute and common law.

**CONTRACT LAW**

- Recognition of legally binding agreements
- Aims to compensate the plaintiff through damages paid by the defendant
- Injunctions may also be sought
- Most complex body of civil law

**TORT LAW**

- Civil wrongs, an action which breaches the rights of another
- No prior legal relationship required
- Aim is to compensate the plaintiff

Examples include negligence and nuisance

**PROPERTY LAW**

- Concerns any commercially valuable entity, such as land, stock, goods or intellectual property
- Deals with legal rights of possession

Criminal or civil court

**COMMON LAW AND CIVIL LAW**

**COMMON LAW**

- Statute law and Common law Judges can create new law if parliament hasn’t made a statute law in a certain area
- Precedents (decisions in previous cases) can be binding (the judge has to follow them)
- Adversarial system of trial

**Advantages -**

- Because judges don’t have to win any popularity contests, they can “do the right thing” without worrying about not getting re-elected (like the members of parliament do).
- This means that judges can decide to create law when parliament didn’t really want to.

**CIVIL LAW**

- Statute law only (which is in their ‘codes’)
- Precedents are not binding
- Inquisitorial system of trial

**Advantages -**
They’re more democratic because the parliament is in charge (you don’t just have 7 judges making massive changes to the law).

**Civil Law System**

**Canada’s Criminal Code**

The Canadian judge can only make decisions based on what is here in the criminal code (statute law only – no looking at previous decisions). The judge’s job is to decide if this case fits into this category.

**Common Law System**

**Crimes Act 1900 (NSW)**

A judge in NSW will look at the Statute Law first. But because we have a common law system, the judge can look at previous cases to see if a judge has created a precedent that people under duress can use that as a defence. For such a threat to be effective it must be continuing and be seen to be continuing and such threat will not be continuing and effective if the accused has a reasonable opportunity to render the threat ineffective: R v Williamson [1972] 2 NSWLR 281 at 283, 300.

**Legal Personal**

**Judge/Magistrate:**

» Preside over court cases ensuring proper procedure is followed
» Magistrate decides verdict and suitable punishment
» Judges adjudicate, instruct the jury and determine admissible evidence
» Judges decide on punishment, and verdict if no jury

**Judges Associate:**

» Clerk, assists the judge where appropriate

**Tipstaff:**

» Assists the judge with organisation and procedural matters

**Barristers/Solicitors:**

» Solicitor generally do not appear in courts, but assist barristers behind the scenes
» Both are specialised in certain areas
» During trials, barristers present their clients case, and advise them on the likely outcome of the trial

**Witness:**

» An individual who gives evidence in a case, who must swear an oath to speak truthfully

**Court Officer:**

» Organises court lists and calls witnesses
» Ensures smooth running of the trial, essentially an ‘errand runner’
» Looks after the courtroom
» Also assists judge where necessary and answers questions from jurors
REPORTER:
» All court proceedings are recorded and transcribed

CORRECTIVE SERVICES OFFICER:
» Guards and escorts the accused

JURY:
» A panel of randomly selected citizens whom consider evidence and decide a verdict
» 12 in criminal cases, jury of 4 in some civil cases
» Chosen from electoral roll
» Can be challenged by either prosecution or defence

LAW REFORM

WHAT IS LAW REFORM?
Law reform is adaptations/modifications made to legislation and laws to reflect modern society. The modern, globalised and technologically advanced world evolves extremely quickly, and the law occasionally lags behind. Law reform should encourage improvements within society, for the majority of society. Current law is not working.

CONDITIONS WHICH GIVE RISE TO LAW REFORM -

Changing Social Values -
Social Values - Ethical standards which guide an individual’s view of their society, and found beliefs of right and wrong. These change as society evolves over time. Heavily influences by individual values, which may be different to those of greater society.

Public Morality - Standards of behaviour generally agreed upon by the community. Judicial decisions are used as indicators of shifting social values.

CASE STUDY EXAMPLE -
The recognition of same sex relationships

1999: The NSW government passed the Property (Relationships) Legislation Amendment Act 1999 so same-sex couples are counted as de facto couples

2008: The Commonwealth government passed the Family Law Amendment (De Facto Financial and Other Measures) Act 2008 to allow separating same-sex de facto couples the ability to have their case heard in the Family Court.

2012: Two bills (one from Labor, one from the Greens) were introduced into Commonwealth parliament. There was an inquiry into whether the bills should be passed. Despite strong public support, neither passed due to the Liberal Party.

2013: The A.C.T’s Marriage Equality (Same Sex) Act 2013 was found to be invalid by the High Court in Commonwealth v A.C.T. (2013). The High Court says that the Commonwealth gov. is the only one able to make same sex marriage legal.

NEW CONCEPTS OF JUSTICE -
» As society evolves, its views of justice may change.
A prime example is the abolishment of capital punishment in Australia. Australians believed justice constituted rehabilitation rather than pure retribution.

As views of what justice should achieve are changed, legislation is reformed.

**NEW TECHNOLOGY**

Technological innovations bring with them the requirement for law reforms to how the technology is used.

Reform can be obvious and blatant, such as road laws corresponding with the development of the motor vehicle.

Reform can also be subtle. (EG - the invention of life support technology required the reform of the definition of legally dead)

A prime example is new birthing technologies, which brought new laws distinguishing biological versus family obligations and responsibilities associated with the donation of genetic material.

**WHY IS REFORM NECESSARY?**

Law reform is necessary so that laws fulfill their role of providing stability and reflecting modern society.

If law reform was not introduced, laws would become increasingly irrelevant in an ever changing world.

Conducting law reform ensures that it remains enforceable and relevant.

**NATIVE TITLE**

**TERRA NULLIUS**

Captain Cook declared the land terra nullius

A right given to explorers

‘Doctrine of Reception’

State legislation: Aboriginal Land Rights Act (1983) NSW

Declared on british colonization, legally eliminated any indigenous claims to Australian land

Need for law reform identified in the 20th century

Why was it an obstacle?

Even Aboriginal people who didn’t run into white people for another hundred years had no idea that they were British now, and their land was Crown Land (owned by the government). So, terra nullius was an obstacle to Aboriginal land ownership, but the fact that Cook didn’t follow the legal requirements of terra nullius meant that claiming native title was possible 204 years later! Though it would have been better for them to have freehold title.

**CASE STUDY - KEY**

**Mabo (No. 1) (1988)**

The Meriam People (led by Eddie Mabo) wanted to claim ownership of the land they already lived on (the Murray Islands). The Queensland government went out of its way to stop them. It passed the QLD Coast Islands Declaratory Act 1985
Mabo II Case (1992)
High Court abolished idea of ‘terra nullius’ and recognises native title for the first time


The 1992 Mabo decision led to the Native Title Act (1993) which created a framework that recognises Aboriginal and Torres Strait Islander peoples have rights to, and interests in, certain land because of their traditional laws and customs.

The Wik Decision (pastoral leases) and Yorta Yorta decision
The Wik Peoples v The State of Queensland and Ors; the Thayorre People v The State of Queensland and Ors (1996)
About ¾ of all the land in Queensland is not really owned by farmers and people raising animals like cattle. It is LEASED (like renting a house, but from the government). This type of land leasing is called pastoral leasing. The land is owned by the Crown (government) but leased by farmers, pastoralists and miners. Most of it is empty most of the time, so a lot of it seems like nobody is there and nobody owns it.

LAW REFORM IN ACTION

MILPERRA MASSACRE FACT FILE
The Milperra Massacre, Milperra bikie shootout or Father’s Day Massacre was a firearm battle between rival motorcycle gang members on 2 September 1984, in Milperra, a south-western suburb of Sydney, New South Wales. The shootout had its roots in an intense rivalry that developed after a group of Comancheros broke away and formed the first Bandidos Motorcycle Club chapter in Australia. Seven people were killed and twenty-eight injured when the two groups clashed at Milperra. The event was a catalyst for significant changes to gun laws in New South Wales.

IMPORTANT LEGISLATION:
- Crimes Legislation Amendment (Gangs) Act 2006 (NSW)
- Serious and Organised Crime (Control) Act 2008 (SA)
- Criminal Organisation Act 2009 (Qld)
- Crimes (Criminal Organisations Control) Act 2009 (NSW)
- Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010 (Cth)
- Crimes (Criminal Organisation Control) Act 2012 (NSW)
- HCA 24 Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW)
- Vicious Lawless Association Disestablishment Act 2013 (Qld)
- Tattoo Parlours Act 2013 (Qld)
- Criminal Law (Criminal Organisations Disruption) and Other Legislation
Amendment Act 2013 (Qld) Bail Amendment Act 2014 (NSW) Statutes Amendment (Serious and Organised crime) Act 2015 (SA)

IDENTIFY LEGAL ISSUES:
- In 2009, 29 year old Anthony Zervas was killed at Sydney Airport as a result of a brutal bashing. The incident involved an attack by members of the Sydney based Comanchero motorcycle club against members of Hells Angels. The man was returning from Melbourne before he was brutally bashed with a metal bollard and stabbed several times in the chest and abdomen. In 2011, Mahmoud

KEY STATISTICS:
- The ACIC estimates that there are over 40 active OMCGs in Australia, with approximately 6000 'patched' members

LEGAL AND NON-LEGAL RESPONSES:
- In 2009, the Australian Crime Commission, a federal statutory body, now known as the Australian Criminal Intelligence Commission (ACIC), which investigates and combats serious crime, stated that OMCGs represent a 'real and present danger to the Australian community'.

ELEMENTS OF BIKIE GANGS:

Organised crime
Organised crime can be defined as illegal activities organised by groups of criminals, most commonly for the purpose of generating financial profit. Throughout history, organised crime has been a main focus for criminals as a source of profit. Most common these forms of criminal activity are;
- Drug manufacture and distributions
- Extortion and money laundering
- Prostitution
- People smuggling
- Environmental crimes
- Counterfeiting of money
- Digital piracy
- Illegal book making and gambling

IDENTIFY
Identity is important to OMCGs. Many motorcycle clubs have unique patches on the back of their members vests. These patches feature the club’s logo, name and often the initials MC, together with the club’s local branch or chapter. These patches form the ‘club’s colours.’ Sometimes in order for a member to earn a club’s patch, the club might require a vote and swearing of allegiance to the club, or the performance of tasks. For a member to lose its colours, for example to the police or a rival gang, might result in a penalty.

CONTEMPORARY ISSUES
### Incident: Violent murder at Sydney airport.

**Changing Social Values:** The public has moved towards valuing security / safety over individual rights. There has been growing acceptance of the idea that being part of a particular group can, in itself, be unacceptable. 

**Failure of existing laws:** The law already banned murder, but the murder was seen as a result of bikie gang culture (so that had to be banned).

### New Concepts of Justice:

Premier Barry O’Farrell believed that young people were being victimised and that some people who should be getting bail are being denied it due to the current Bail Act.

**Failure of existing law:** The “one shot at bail” section (s. 22A) was leading to growing remand populations.

### Incident: R v Singh (2012) – 6 years for killing wife.

**Changing Social Values:** The provocation defence reflects OLD social values (e.g. Women can be “asking for it” when it comes to violence; men can lose control and commit “crimes of passion”).

**Failure of existing laws:** Cases like Ramage, Singh and Won highlighted problems. Victoria already removed the defence too.

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### Effectiveness of Law Reform in Achieving Just Outcomes

<table>
<thead>
<tr>
<th>Parliament</th>
<th>NSW parliament passed the Crimes (Criminal Organisations Control) Act 2009.</th>
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<tbody>
<tr>
<td>Courts</td>
<td>The High Court found the NSW law to be unconstitutional in the case of Wainohu v NSW (2011).</td>
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<tr>
<td>Parliament</td>
<td>NSW parliament then passed the Crimes Amendment (Consorting and Organised Crime) Act 2012.</td>
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**Parliament (past):** The Bail Act was amended by parliament 85 times in just 32 years, usually to make it more difficult for people to get bail. The most controversial was the inclusion of s. 22A (the “one shot at bail” section). NSW ended up with the toughest bail laws in Australia (which was the opposite of the original law).

**Parliament (present):** The government passed the Bail Act 2013, which ignored some of the most serious problems with the previous law, but did make the process simpler. It won’t stop the problems that caused the review in the first place (injustice for those applying and overcrowding).

**Courts:** Verdicts where juries accepted the provocation defence included R v Ramage (2004), R v Singh (2012) and R v Won (2012).

**Parliaments - VIC:** The Victorian parliament removed the defence in 2005.

**NSW:** The parliamentary committee made their recommendations to parliament in 2013. The government used the Crimes Amendment (Provocation) Bill 2013 to change the defence to ‘extreme’ provocation (ruling out non-violent sexual advances – the deceased’s actions have to be indictable offences themselves).
ALCOHOL AND VIOLENCE

Liquor Amendment (Kings Cross Plan of Management) Act 2012 (NSW)
(a) to prescribe additional licence conditions in respect of licensed premises in
the Kings
1. Cross precinct (being the area described in Schedule 2 to the Liquor Act
2007).
(b) to provide that premises in the Kings Cross precinct are to be regarded as a
small venue only if the premises are not authorised to trade beyond 2 am on any
day of the week (small venues have a patron capacity of no more than 60 and are
exempt from some of the additional licence conditions and from the liquor licence
and development consent freeze that applies to premises in the Kings Cross
precinct).
(c) to require persons who carry out supervisory duties in relation to the
responsible service of alcohol on licensed premises in the Kings Cross precinct to
hold a RSA competency card.

Law Enforcement (Powers and Responsibilities) Amendment (Kings Cross and
Railway Drug Detection) Act 2012 (NSW)
LEPRA consolidates and restates the law relating to police and other law
enforcement officers’ powers and responsibilities giving effect to the
consolidation process envisaged by the Royal Commission into the NSW Police
Service.

Liquor Amendment Act 2014 (NSW)
An Act to amend the Liquor Act 2007 and the Liquor Regulation 2008 to enable
certain areas to be declared to be prescribed precincts in which licensed
premises are subject to regulatory conditions; to enable periodic licence fees to
be levied; and for other purposes.

Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014
(NSW)
An Act to amend the Crimes Act 1900, the Law Enforcement (Powers and
Responsibilities) Act 2002, the Crimes (Sentencing Procedure) Act 1999 and other
legislation relating to assaults and intoxication and to other matters.