



LEGAL FUNDAMENTALS IN AUSTRALIA

Activity Centre: Unit 4 AOS 2

SECTION A

Question 1

It means that parliament is the primary and most powerful law-maker, and that it has the power to override law made by other law-making bodies. For instance, if parliament disagrees with a common law rule established in precedent, it can legislate to abrogate that rule.

Question 2

Examples of reasons for statutory interpretation:

- *Courts may need to interpret legislation if a word used in the act was not defined at the time of drafting. For instance, in the case of Kevin and Jennifer the word 'marriage' was not defined in the Marriage Act 1961, so the Family Court needed to set precedent on the meaning of marriage. According to the second reading speech from the passage of the bill this was desired from the beginning, as the minister recognised that social institutions evolve over time.*
- *Technological advances may not have been foreseen by the drafters of the act, so the judge may need to decide whether they ought to be included within the meaning and application of the law. For example, in Brislan's Case the High Court needed to decide whether the phrase "telegraphic, telephonic and other like services" should in practice include radio.*

Examples of reasons for parliamentary reform:

- *Technology may change so that the law does not cover new possibilities, and there is the chance that technological advances may be used to get around the law and harm people. For example, the increased use of cameraphones and cameras that could be easily hidden made it easier for people to infringe the privacy of others, so upskirting laws needed to be introduced to stop unauthorised intimate photos being taken. These were added to the Summary Offences Act in 2007.*
- *Laws may need to change for protection of the community, because a new way for people to be harmed has arisen. Sometimes these ways are entirely unforeseen and not covered by any law; other times they are gaps within the law caused by something already in contemplation being done in more dangerous or harmful ways. An example is the growing threat of airplane terrorism, which required new laws governing airport security including the introduction of body scanning.*
- *Economic changes in society such as working hours, booms and recessions may require new laws to deal with them. For example, the recent global financial crisis required many governments to pass laws designed to improve the security of the financial system or kick-start spending in the economy, such as the stimulus payments. These required laws to be passed, because they required parliament to authorise the spending of government money outside the budget.*

Question 3

The operation of s109 places a restriction in practice on the state parliaments with respect to the concurrent powers. Whilst states can pass laws in areas of concurrent power, such as marriage and trade, any state law that is inconsistent with Commonwealth law may be invalid to the extent of its inconsistency. This happened as a result of the McBain case – the more discriminatory state law was invalid.

The separation of powers restricts parliaments from passing laws that give the powers of one body to a body from a different branch. An example of this would be a law that gives an executive body a judicial role, such as what the High Court decided had happened with the former executive branch Military Tribunal.

Question 4

The VLRC investigates matters in need of law reform in the state, with the goal of informing the Victorian government and parliament on public opinion, the current effectiveness of the law, and the pros and cons of various options for change. Most matters are referred to it by the state attorney-general, although the Commission can self-refer minor matters. In 2014, for instance, the Commission was asked to inquire into the role of victims of crime in the criminal justice system. Once a matter is referred, the Commission will investigate the area by doing things such as publishing a public consultation paper to inform the public and requesting submissions from interested parties, and will conduct public meetings and commission experts to provide advice. The Commission only has the power to make recommendations, though – in 2016 their final report was submitted to the attorney-general and tabled in parliament, recommending changes such as amending the Victorian Charter of Rights and Responsibilities to include the rights of victims.

Question 5

Example points elaborated through case examples include:

- *Courts will be prevented from altering a precedent in the future if the common law is codified by parliament and protected in legislation. When the Commonwealth Parliament under Prime Minister Howard codified the definition of the word ‘marriage’ in 2004 and protected the common law definition of marriage to include ‘the union of one man and one woman’, the courts were prevented from evolving this definition over time and changing the law without parliament altering the Marriage Act 1961 first.*
- *Courts are prevented from enforcing law that they have made through precedent if the parliament abrogates that law. For instance, when the Victorian County Court applied a persuasive precedent in 1985 that gave a man immunity for rape if the victim was his wife, the state parliament abrogated the defence because of public outcry and it could no longer be applied in cases.*

Question 6

Example points include:

- *An individual will be denied the ability to influence reform through the courts if they are denied standing in the matter to bring a case. For example, Bob Brown was almost denied standing to challenge the Tasmanian anti-protest laws when the charges against him were dropped. This would have prevented him from asking the High Court to consider questions such as whether a freedom to physically protest was included in the constitutional freedom of political communication.*
- *Individuals lack influence on their own, but can use the process of organising things such as petitions to gather support and have more influence overall. Petitions encourage a feeling of community and participation. Studies of petitions and political engagement show that they “foster a sense of unity and purpose within a community which is then publicly demonstrated when the petition is presented to the House.”*

- *Every individual on the electoral roll can vote. A representative government is one where the people elect representatives to govern in parliament on their behalf, and those members of parliament will usually reflect the needs and values of the majority. If the majority is unhappy with their performance the representatives will generally be voted out at the next election. The ability to vote is therefore one of the most direct ways of giving input to the legislative process – in 2014, for instance, the Greens only won by 277 votes in Prahran, the smallest electoral district in the state, so every vote counted.*

SECTION B

Question 1

- Judicial conservatism means the reluctance of judges to ‘change’ the law, whereas judicial activism refers to the willingness of judges to consider the need for ‘changes’ in the law.. As Justice Kirby says, judicial conservatism can also be called ‘strict legalism, because it commits to an idea of following the law rather than changing it; this is why judicial activism is different, because it is also called ‘judicial creativity’ and is about being willing to go out into new areas and create new common law to deal with them. Following the Clarence precedent since 1888 could be seen as an example of judicial conservatism.*
 - The primary effect of statutory interpretation is that words that were initially unclear or outdated are given a more informative or up-to-date meaning. This is in principle a benefit to society, because it enables people in society to better govern their behaviour and know when their rights have been infringed, and it allows parties to legal disputes to more easily predict the outcomes of their cases. The specific way in which the wording is clarified or updated can be problematic, however. In the Tasmanian Dams Case, for instance, the meaning of “external affairs” in the Constitution was broadened to the point that the High Court commented it allowed for the “virtually limitless expansion” of the Commonwealth’s powers – this has had the effect of destabilising the federal balance and marginalising the states. The effect of broadening will not always be negative, however: in Aubrey v The Queen the Court widens the meaning of “inflict harm”, but the effect of this seems to be a positive one, to hold people accountable for the different ways in which they can deliberately hurt others.*
- c. Examples of arguments include:**

Note that not every argument made by students has to use the source material. These examples do use it, but an equally acceptable answer will spread its references throughout and will not necessarily have a reference for every point.

- *The ability to alter the meaning of the words in legislation allows the courts to extend the relevance and lifespan of parliament’s law, making sure it continues to be appropriate to social attitudes and contemporary circumstances. This is what the Court did in the case of Aubrey v The Queen, for instance: it determined that the 1888 definition of the word “inflict” failed to reflect the values of society because it allowed someone to cause deliberate harm and escape an offence as long as they harmed internally not externally. ‘Inflicting harm’ didn’t include infecting someone. The doctrine of precedent allowed the Court to do this, because we have empowered the higher courts to overrule the common law – particularly if they determine it was decided wrongly from the beginning. In this case it was the High Court, and since they are the highest court they have the power to overrule any precedent, even their own.*
- *Precedent can sometimes be so flexible that it allows the courts to alter the law in ways that are undesirable or create uncertainty. Statutory interpretation, for instance, can only occur retrospectively. That is after a dispute regarding interpretation has arisen and the case has been brought before the court for adjudication. But statutory interpretation is an example of the doctrine of precedent giving the courts a law-making role. This kind of retrospective law-making can be criticised for being against the principle of natural justice because people don’t know what the law is when they are acting, just like happened to Aubrey when the definition of the word “inflict” was changed.*

- *Because the doctrine of precedent is based on the principle of stare decisis it has a naturally conservative inclination, and operates on the assumption that the law should always stay the same as it was before, following the decisions of previous courts, unless there is an overwhelming reason to change it. This is one reason why only the highest courts are given the power to change the law – to maintain this stability. This is what Justice Kirby is referring to when he discusses “strict legalism” and quotes Sir Owen Dixon. Dixon is saying that courts should always strive for legalism and following the existing law, because the courts are not the primary law-makers and should remain uninvolved and neutral.*

Question 2

a. Example points could include:

Note that not every argument made by students has to use the source material. These examples do use it, but an equally acceptable answer will spread its references throughout and will not necessarily have a reference for every point.

- *One political pressure is the need of a member of parliament to project a favourable image in the media and community. This will often involve publicly supporting the ideas that they perceive to be the most popular, saying what they think people want to hear, and tearing down the opposition in a combative way rather than working collaboratively with them. In the source material we can see that the Government has supported the recommendation for a royal commission, and this might be because public support was perceived for the commission – the Prime Minister notes that they engaged in public consultation.*
 - *Party membership is important to getting votes: many people will vote for the party they support rather than the individual person. Members of parties will therefore feel a pressure to support the policies of their party, to keep that public affiliation, and frontbenchers have an obligation in the major parties to do this, or else they risk being ejected from their position. It makes sense, therefore, that the Prime Minister and the Minister for Families and Social Services put out a joint media release on this, and it will ultimately help the passage of any bill at the end of the royal commission if all members of the government party vote together in favour of it.*
- b. *A parliamentary committee is a group of parliamentarians who are appointed to conduct special research into an issue or area of legislation. They are given ‘terms of reference’ by either or both houses that set out the scope of the inquiry and any deadlines along the way, and their investigations must stay within their terms of reference. Standing committees and select committees tend to undertake more comprehensive research and inquiry, which is why the issue of violence, abuse and neglect perpetrated on people with a disability was referred to the Senate Community Affairs References Committee, because they will do things such as publishing a call for submissions and consulting with government departments and even inspecting facilities in person – such as existing hospitals and care homes. The final goal of the committee is to prepare a report with its findings and recommendations that the government will hopefully support and include in proposed legislation. Here, one of the recommendations was for the government to establish a royal commission, which it ultimately did: this may lead to eventual reform.*

c. Examples of fully-worked arguments include:

- *There will sometimes be a tension between the representative following her or his own opinion or party line, and the representative following majority opinion in her or his electorate or the state or country as a whole. In theory, members of parliament will usually reflect the needs and values of the majority, and if the majority is unhappy with their performance the representatives will generally be voted out at the next election – this theory says that the representative function of parliament will influence it to pass laws that the majority support. But in practice this is not what always happens. The majority seemed to support the royal commission into the abuse and neglect of people with disabilities, and the sources show how this was eventually implemented – but the majority also supported changing the law to allow*

for same sex marriage, and this was delayed and prevented for years because the Coalition remained steadfastly against it.

- *Even though parliament will be influenced in its law-making by the needs and values of the people it represents, it is virtually impossible to make laws that match the views and beliefs of all members of our community, given the diversity of beliefs, backgrounds and experiences. It may be a practical impossibility for parliament to represent everyone, or even a clear majority. Even on a topic seemingly so uncontroversial as abuse and neglect of vulnerable groups being bad will not produce one clear opinion on what should be done about it and whose responsibility it is to act; here, parliament can try to be representative, but it will end up failing to please everyone.*
- *A petition provides direct contact between the individuals or groups seeking change in the law and those responsible for making the law, because the petition is usually sent to a specific law-maker or to a standing committee on petitions. Petitions can therefore be an easy way for the representative nature of parliament to influence its law-making, because they must contain a clear request for parliament to act or legislate in a stated way, and they are tabled directly in parliament by the very people whom parliament represents.*