

T-Mac's Legal Studies

Revision Booklet 2012

SAMPLE

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PART B: Summary notes

Unit 3 AOS 1 – Parliament and the citizen

Key knowledge

- the principles of the Australian parliamentary system:
 - representative government;
 - responsible government; and
 - the principle of separation of power;
- the structure of the Victorian and Commonwealth Parliaments;
- the roles played by the Crown and the Houses of Parliament in law-making;
- the legislative process for the progress of a bill through Parliament;
- reasons laws may need to change, using examples to illustrate;
- the role of the Victorian Law Reform Commission
- the means by which individuals and groups influence legislative change, including petitions, demonstrations and use of the media;
- strengths and weaknesses of law-making through Parliament.

Key skills

- define key legal terminology and use it appropriately;
- discuss, interpret and analyse legal information and data;
- explain the principles and structures of the Australian parliamentary system;
- use contemporary examples to explain the influences on legislative change;
- evaluate the effectiveness of methods used by individuals and groups to influence change in the law;
- critically evaluate the law-making processes of parliament.

Legislative Power

Legislative power is the power to make laws. It resides with Parliament, however because the government controls the lower house, they are able to control what legislation is introduced.

Executive Power

Executive power refers to the power to administer laws and manage the “business of government”. The Constitution places executive power with the Governor-General, however in practice it is carried out by the government.

Judicial Power

Judicial power is given to courts and tribunals to enforce the law and settle disputes. This power is kept independent and separate from the other two powers.

Reasons for the separation of powers

- Protects the stability of government and the freedom of the people
- Provides independence between the bodies that make the law and enforce the law
- Provides a check on the power of parliament to ensure that it does not go outside its area of power

Express Rights

The Commonwealth Constitution clearly sets out five express rights. These express rights are entrenched in the Constitution. They can only be removed or amended by changing the Constitution using the referendum procedure established by S128.

The five express rights are:

Freedom of religion

Freedom of religion is an express right. The Commonwealth Constitution provides that the Commonwealth Parliament cannot pass a law which:

- establishes a state religion (that is, declares a particular religion as the official national religion)
- imposes any religious observance
- prohibits the free exercise of any religion (that is, prevents people from practising their religion)
- requires a religious test as a requirement for holding any Commonwealth office.

Free interstate trade and commerce

Under S92 of the Constitution, interstate trade and commerce shall be free. This right prevents parliament from treating interstate trade differently from trade within a state. It provides freedom of movement between states, without burden or hindrance. For example, it restricts the imposition of taxes on goods moving from one state to another.

Discrimination on the basis of state

Under S117 of the Constitution, it is unlawful for state and Commonwealth governments to discriminate against someone on the basis of the state in which that person resides.

Acquisition of property on just terms

Under S51(xxxi) the Commonwealth must provide just terms when acquiring property (that is, the Commonwealth must pay fair compensation for property that is compulsorily acquired). An independent valuer will decide on what is just terms, this may not be suitable to the seller who is forced to sell his or her property. The Commonwealth is only able to acquire property for a purpose or area for which it has the power to make laws, for example, airports and national parks.

Trial by jury for indictable Commonwealth offences

Under S80 of the Constitution, there must be a jury trial for indictable Commonwealth offences. However, this is a very limited right as most indictable offences are crimes under state law, and S80 only applies to Commonwealth offences.

Ways of treating previous precedent

Judges may not always have to follow a previous precedent and in some cases, may be free to create new precedents. Apart from following a binding precedent, there are four other ways that judges can treat previous decisions. They are:

Distinguishing a previous precedent

If there is a binding precedent from a superior court, the judge may find some material fact in the case presently being considered that is different from the facts of the previous case and can therefore decide that the court is not bound to follow the previous decision. This is known as distinguishing a previous decision.

Overruling a precedent (in a separate case)

When a superior court decides not to follow an earlier precedent of a lower court in a different case, it can overrule the previous precedent. This means a new case in a higher court creates a new precedent that makes the previous precedent inapplicable. It can do this because it is not bound by precedents created in lower courts.

When a precedent is overruled, the new ratio decidendi from the latest case has the effect of becoming the precedent to be followed in the future.

Reversing a precedent (on appeal, in the same case)

When a case is taken on appeal to a higher court, the superior court may change the decision of the lower court, thereby reversing the earlier decision (precedent) in the same case. The new precedent created by the superior court is then the one to be followed in future cases.

Disapproving a precedent

Judges can express their disapproval of a precedent (saying they do not agree with it). This is generally done through *obiter dictum*. Judges may choose to follow a precedent (either because they are bound by it, or for the sake of consistency, but state why they disagree with the decision in obiter). This creates a persuasive precedent that may be influential in later cases, or may alert parliament to the need to change the law.

When a previous decision (precedent) has been made in a court at the **same level** in the court hierarchy, the present court is not bound to follow the earlier decision (although for the sake of consistency it usually will). If the later case does not follow the earlier precedent, the judge may create a new precedent. Both the precedent created in the earlier case that has been disapproved and the precedent created in the present case remain in force until another case is taken to a higher court, which can overrule the previous decisions and create a new precedent.

Damages

Damages are a sum of money granted to the plaintiff, to be paid by the defendant, in satisfaction of a claim made by the plaintiff. Different types of damages can be sought, including compensatory, exemplary, nominal and contemptuous damages. It is compensation for the infringement of their right and is the most common remedy sought.

Compensatory damages

The purpose of compensatory damages is to restore plaintiff to original position. This might not be possible if there is physical injury.

Compensatory damages can be:

- Specific damages (precise monetary value)
- General damages (general estimate of loss)
- Aggravated damages (pain and suffering)

Nominal damages

The purpose of nominal damages is to make a legal point. The plaintiff seeks a small amount of money to make a point about legally being in the right. They are common in defamation cases.

Contemptuous damages

The purpose of contemptuous damages is to show contempt for plaintiff's claim – that the plaintiff may be legally right, but not morally. Again, they are common in defamation cases.

Exemplary (punitive) damages

The purpose of exemplary damages is to punish and deter the defendant. They are the only civil remedy that seeks to punish the defendant in some way. Exemplary damages are used where conduct is wanton or malicious or violent or cruel or insolent or in scornful disregard of the plaintiff's rights.

Inquisitorial system

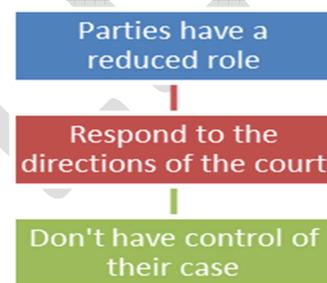
The inquisitorial system (also called the investigatory system) is a system of trial where the court is actively involved in determining the facts and conduct of a trial. It has its origins in the basis of 2000-year-old Roman law, and variations of this system are used in many European, Asian and South American countries. Its main role is to find out the truth of an issue.

The inquisitorial system is based on the idea that the effective operation of the legal system is of benefit to society as a whole and that it is the responsibility of the state to ensure all relevant information is examined and that the truth is reached.

Features of the inquisitorial system

Role of the parties

Due to the judge having control of the case in the inquisitorial system, the parties have a greatly reduced role. They are required to respond to the directions of the court. While this may reduce the effects of some inequities between parties, it places control of their case in the hands of a third party.



Role of the judge

One essential feature of the inquisitorial system is that the judge takes a more active role in the case. This includes:

- investigating cases
- defining the issues to be resolved
- gathering evidence (together with the police).

The judge's objective is to find the truth of the matter. At trial, the judge is actively involved in calling and questioning witnesses. Further, judges are not restricted to the issues at question in the trial. The judge may raise other matters of law or fact, even those that have been conceded by the parties, or ones the parties could perceive as not relevant to their case.

