The purpose of this Legal Studies Update is to provide teachers and their students with some of the recent developments that have taken place in so far as they relate to the VCE Legal Studies Study Design. In this 4th edition, these have been applied to the relevant key knowledge points from Unit 4, Area of Study 2 – plus a catch-up summary in relation to the other Areas of Study from Units 3 and 4.

Unit 4, Area of Study 2
The people, the parliament and the courts

NEW GOVERNOR-GENERAL SWORN IN

On 1 July 2019 the new governor-general, David Hurley, was sworn in at Parliament House in Canberra. The previous governor-general, Sir Peter Cosgrove, had served for the customary five years, and now Hurley will be Australia’s 27th governor-general for the next five years.

Like Cosgrove, Hurley is a former chief of the Australian defence force – three of the last four governor-generals have been retired army generals and have all been men of the same age, leading to criticisms of a lack of representative diversity. Hurley asked people to look beyond his military background, however.

Hurley has focused so far on looking to the “goodness”, diversity, and relative youth of Australian society, and pushing for more Indigenous languages to be taught in schools.

- This relates to the roles of the Crown.

SITTING DAYS IN FEDERAL PARLIAMENT

Partly because of the interruption of the federal election, in the financial year 1 July 2018 until 20 June 2019 the House of Representatives in federal parliament sat a total of 39 days. The calendar for 2019 has the House scheduled to sit for 58 days between January and December.

- This relates to the roles of the houses of parliament.

PARTY DIFFERENCE ON TAXATION POLICY

In July 2019, after winning the federal election, the Liberal-National Coalition introduced a bill which, over time, will lead to a slight flattening of the income tax system and a reduction in the tax burden for high(er) income earners relative to low(er) income earners. The tax reforms will reduce government taxation income by approximately $40 billion a year, but will make the percentage of taxation paid more ‘equal’ across different incomes. Traditionally, it is Labor party policy to implement a more progressive tax system, defined as one where higher income earners are taxed proportionally more (i.e. at a marginal higher rate) than lower income earners. A progressive tax system reduces income inequality and imposes a greater tax burden on those with the greatest capacity to pay for government services. The tax reforms introduced by the Coalition have been criticised by some groups because they effectively reduce the progressive nature of the tax system and, over time, will worsen income inequality. In addition, it is believed that the foregone government revenue will reduce the capacity of future governments to deliver essential government services. In particular, the expected cuts in government spending would harm schools, climate change action, infrastructure and other government services, and could result in lay-offs that would further reduce long-term spending because people would be unemployed.

The Morrison Government argued that tax cuts would stimulate both spending and investment, helping to lift economic growth over time. The Australian Financial Review wrote of the tax cuts that “The Morrison Government – and potentially future governments – will need to exhibit spending discipline to afford the tax cuts and avoid driving the budget into a sustained deficit.” Despite its opposition to most of the tax cuts, the Labor party ultimately gave in to political and social pressure and voted in favour of the bills when it could not convince the Government or the crossbenchers in the lower house to support its amendments. Commentators such as Van Badham, writing in The Guardian on 5 July 2019, argued that Labor ought to have fought the changes – though it did not have a majority – on principle, ‘staying true’ to its policy values even in defeat: “There is no cost to Labor now battling every parliamentary bout around the one simple, economic offer it can make to the electorate but which Liberal ideology prevents.” The Greens also opposed the law.
Leader of the Opposition, Anthony Albanese attempted to explain the vote as consistent with Labor opposition to the Liberal-National party: Labor supported the law because its “highest priority throughout this tax cut debate has been to get more money into the hands of more workers, sooner, to boost an economy which is floundering under the Liberals.” Albanese said that Labor would review its policy and the laws closer to the next election, but that will put them in the position of potentially criticising laws they voted to pass in their entirety.

Independent crossbencher Jacquie Lambie agreed to vote in favour of the Government bill in exchange for promises of funding assistance for public housing in her home state of Tasmania.

- This relates to political pressures as a factor that affects the ability of parliament to make law.
- This also relates to reasons for law reform.

**MEDEVAC REPEAL**

In February 2019 the Liberal-National Government suffered an historic defeat when the Medevac law was passed in the House of Representatives against its policy and despite its governance: it was the first loss by any government on a major vote in the lower house in decades. The Medevac provisions were supported by Labor, the Greens and crossbenchers, and provided for the transfer of sick refugees and asylum seekers from Manus Island and Nauru if two doctors agreed they had a pressing medical need. It would be a transfer for treatment only, and an independent panel of medical experts was appointed to review any transfer the minister objected to.

The Government argued that it would increase people-smuggling and that hundreds of people currently held on Manus Island and Nauru would come to mainland Australia within weeks; they also re-opened the Christmas Island detention centre, based on these arguments. These things did not happen, though.

In July 2019 the Government, following its election win in May, introduced a bill to repeal the Medevac procedure. It passed the House of Representatives, but was referred by the Senate to the Legal and Constitutional Legislative Committee. The Committee is due to report back by 18 October 2019, so the rule cannot be fully repealed until at least then, assuming the Government gets the numbers in the Senate to pass it. Centre Alliance senator Stirling Griff has said that he is opposed to the repeal, saying “It’s very much a brave move for the Government to repeal a process that is working well and only applies to existing asylum seekers who require critical medical treatment that is not available on Nauru. It hasn’t opened the asylum seeker floodgates. It’s not a pathway to settlement, as transfers are temporary. It really is time for the Government to stop the scaremongering and show they have a humanitarian side and allow a life-saving process to continue.”
This relates to political pressures as a factor that affects the ability of parliament to make law.

This also relates to the supremacy of parliament, and reasons for law reform.

**NATIVE TITLE TEST CASE IN HCA**

In March 2019 the High Court handed down its judgment in the Timber Creek native title case – a case which, in August 2018, had caused it to sit in the Northern Territory for the first time in its history.

The Court had been asked to review the compensation payable by the Northern Territory government to the traditional owners of an area of land in the town of Timber Creek. They reduced it from $2.9m to $2.5m but, in doing so, developed precedent on the general principles for calculating native title compensation claims and confirmed the value placed by the Federal Court on the loss of ‘spiritual attachment’ to the land. The Court confirmed that a two-step process should be used when calculating native title compensation: first, the economic value of the native title rights should be calculated, followed by an estimate of the non-economic and cultural loss caused by a decrease in “connection to country.” The NT Government had argued against calculating for loss of spiritual connection. Justice James Edelman queried this in the hearing, drawing an analogy between spiritual connection and the value placed by people on “ocean views”, for instance: “Why isn’t the particular intangible value or spiritual connection of economic value?” he asked NT Solicitor-General Sonia Brownhill.

A majority of the Court did find, however, that ceremonal native title rights did not give the traditional owners the power to “prevent other persons entering or using the land or to confer permission on other persons to enter and use the land.” This means that the economic loss should be calculated at only around 50% of the freehold value of the land – down from the figure of 80% originally applied by the Federal Court.

Before this case, the provisions in the *Native Title Act 1993* regarding the calculation of native title compensation, had never been tested in the High Court.

- This relates to the doctrine of precedent as one factor affecting the ability of the courts to make law.
- This also relates to the role of the High Court in law-making, and the interpretation of statutes.

**HIGH COURT REFORMS PRECEDENT ON ‘PARENT’**

In June 2019 the High Court heard a case concerning the extent to which a sperm donor father was legally classed as a ‘parent’ and, in doing so, revisited the common law definition of the word ‘parent’.

Hannah Robert, lecturer in law at La Trobe University, and Fiona Kelly, professor of law at La Trobe University, wrote before the decision in the case was handed down that Australian family courts have traditionally defined parentage in terms of who has “begotten or borne” a child, but that donor conception, surrogacy, adoption and IVF have increasingly complicated this basic biological formula. When interpreting the term ‘parent’ in the *Family Law Act*, the traditional assumption has been that children can have a maximum of two living parents – with adoption orders changing the identity from biological parent to adoptive parent. Other areas of law, however, have evolved to include non-biological parents, depending on the social relationships between people: the Full Federal Court in 2010 said, for example, that the word ‘parent’ “is used today to signify a social relationship to another person” often featuring “intense commitment to another, expressed by acknowledging that other person as one’s own and treating him or her as one’s own.” In some international jurisdictions such as Canada, people can have more than two legal parents.

The 2019 case was an appeal from a 2017 decision of the Family Court, where two lesbian mothers had been denied permission to relocate to New Zealand because one of their daughters had been conceived using donor sperm from a friend, Robert Masson [court pseudonym]. Masson and the biological mother, Susan Parsons [court pseudonym], had agreed in 2006 to conceive a child, and he had been listed on their daughter’s birth certificate. The daughter, Billie [court pseudonym], called Masson ‘daddy’ and had a relationship with him. The Family Court found that Masson was her parent under the *Family Law Act*, and that this overrode the NSW Status of Children Act 1996 that states “If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.”

The case reached the High Court in June 2019. The Court decided to alter the previous ‘begotten or borne’ common law to a new, more ‘common sense’ definition, saying:

“The question of whether a person is a parent of a child born of an artificial conception procedure depends on whether the person is a parent of the child according to the ordinary, accepted English meaning of ‘parent’.”

Masson had a father-daughter relationship with Billie; therefore, he was her parent. He could therefore object to her being moved permanently to New Zealand, and the NSW law could not be applied.

- This relates to the doctrine of precedent as one factor affecting the ability of the courts to make law.
- This also relates to the role of the High Court in law-making, and the interpretation of statutes.

**DEFAMATION PRECEDENT SET**

A persuasive precedent has been set in Victoria by the Supreme Court of New South Wales in relation to what constitutes ‘publication’ under defamation law. Dylan Voller was previously held in juvenile custody under unacceptable conditions and subjected to abusive treatment by the state; his was one case investigated by the royal commission into children in custody. In the press coverage his case received, many abusive and defamatory comments were left by members of the public on Internet stories by publications such as The Sydney Morning Herald, The
Australian and Sky News Australia. Voller sued them for this content on their pages, even though their journalists had not written the comments.

The media defendants argued that they were not ‘publishers’ of the material because the comments had been written by members of the public, but, in June 2019, Justice Rothman of the New South Wales Supreme Court disagreed because of the level of control they had over the content on their pages. A publisher does not need to be the author of the material, but they do need to be responsible in some significant way for its communication and dissemination. For instance, almost a century ago an English court held the owners of a golf club responsible for a defamatory notice pinned to their noticeboard because they knew of it and could have prevented it being displayed. A New Zealand court recently held that the host of a Facebook page was responsible for defamatory comments if they knew about them and failed to remove them in a ‘reasonable’ timeframe.

In Voller’s case, it was material that the owners of the media pages exercised control over the comments on their pages and did vet and delete some of them. They chose not to dedicate staff to properly read all posted comments, but the Court said that choosing to have this more profitable business model did not excuse them of responsibility. The media companies benefit from social engagement, so this means they might need to spend money managing that engagement, too. Justice Rothman said that a defendant “cannot escape the likely consequences of its action by turning a blind eye to it.”

- This relates to the doctrine of precedent as one factor affecting the ability of the courts to make law.

DOLI INCAPAX REFORM

On Wednesday 26 June 2019 the Law Council of Australia formally requested that the government lift the age of criminal responsibility to 14 and remove the principle of doli incapax. The weekend prior to the request, the directors of all Australian state and territory law councils had met and unanimously resolved to change Law Council policy.

In relation to the age of criminal responsibility, Law Council President Arthur Moses SC said: “Research-based evidence on brain development supports a higher age as children are not sufficiently able to reflect before acting or comprehend the consequences of a criminal action. Children belong in their communities with their families and guardians, not in detention. Imprisonment should be a last resort when it comes to children, not a first step.” He pointed out that children were not even able to open a Facebook account until they turned 13.

In relation to the current doli incapax principle applied from the age of 10, he said that it currently caused delays and miscarriages of justice, and “has proven extremely difficult to apply in court,” with children being held in custody for long periods before the presumption could be effectively tested in court. Raising the age of criminal responsibility would remove the need for the doli incapax principle to apply. Moses said: “Raising the age of minimum criminal responsibility is not being soft on crime: it means adopting a just, proportionate approach. The evidence clearly shows those detained as children are often imprisoned as adults. This is not the trajectory we want for vulnerable children or the best way to keep our communities safe. Children must be protected, not criminalised, and prison should never be a rite of passage.”

In the last week of July 2019 the Senate voted against this change. The Greens, One Nation and Labor were outvoted by the Liberal-National Coalition, Centre Alliance, Jacqui Lambie and Cory Bernardi.

- This relates to reasons for law reform.
- This also relates to the ability of individuals to influence law reform.

RECENT PROTESTS AND DEMONSTRATIONS

On 10 April 2019 around 100,000 workers and union members marched in what was called a “peaceful assembly” for increased wages and job security, organised by the Australian Council of Trade Unions. The Change the Rules rally began at Trades Hall in Carlton, and progressed down Swanston St and along Bourke St to Parliament House. Premier Daniel Andrews marched with protestors. The ACTU said that the federal government had presided over the biggest drop in living standards in 30 years, and rallies were organised in 14 cities across the country. Trades Hall secretary Luke Hilakari wrote on Twitter:

Feet on the street tomorrow! If you want a better working life, then now is the time to go out and get it. Not just for us but for every generation that comes after.

The Monday prior, vegan activists had also shut down parts of the city, but their protest was criticised more strongly in part because the Change the Rules rally had been coordinated with police and avoided peak hour traffic. In the animal rights rally, between 100 and 200 people gathered in the middle of the intersection of Flinders St and Swanston St to raise awareness over a documentary on Australia’s meat industry. Thirty-nine people were arrested, including three teenagers, for obstructing a roadway and resisting police. Other animal rights protests were coordinated around the country, targeting abattoirs in regions including Pakenham and Bacchus Marsh in Victoria – nine protestors were arrested in New South Wales for chaining themselves to abattoir machinery. Premier Andrews said of the later working conditions rally: “I won’t be chaining myself to anything, and I think that protest will have had conversations with authorities about how working people can make their point without completely disrupting the city.”

In July, climate change activists Extinction Rebellion held protests in Brisbane’s CBD and, so as to not disrupt traffic, they only stopped traffic for 10 minutes at a time before clearing the road for 3 minutes and giving out vegan biscuits to motorists. A spokesperson for the group said that “Respectful civil disobedience has been shown to be the most effective form of demanding change.” A member of the public was reported as saying “They’re sending a good message to the world […] but they could have had a peaceful protest in the square. If they think they’re achieving something by holding people up, good luck to them, but at the end of the day people are just going to be late for work.”

Lecturer in Criminal Justice at Charles Sturt University, Piero Moraro, warned on 9 April 2019 against excessive criticism of the animal rights protests – Prime Minister Scott Morrison, for instance, called protestors “green-collared criminals” and said their conduct was “shameful” and “un-Australian”. Mr Moraro said that ‘peaceful’ protest was increasingly being conflated with non-disruptive protest, even though disruptive protests can be entirely peaceful. He said that:
This relates to the ability of individuals to influence law reform. They think the right to protest does not imply the right to cause others to remain stranded on their way to work. From this standpoint, the activists’ disruptive conduct constituted an act of violence and, as such, was incompatible with the principles of civil disobedience.

But this reasoning is misguided and dangerous. It’s dangerous because it risks neutralising the potential of civil disobedience as a form of dissent. When the government claims that only non-disruptive protests are ‘civil’, it’s also implying that those who seek to go beyond mere symbolic actions, and to have some impact on others through their protest, are censored as ‘criminal’ and uncivil.

Moraro referred to the theory of ‘repressive tolerance’, put forward by sociologist Herbert Marcuse, to suggest that persuading people that ‘good’ protests don’t cause any disruption actually neutralises dissent because it ensures that only protests that are least likely to have any impact are the only ones approved of by the public. He said of the animal rights rally:

“After many non-disruptive protests that led to no answer from the government, the activists resorted to a disruptive act to force society to face the moral issue of animal treatment in the food industry. This was necessary to ensure their view, for once, was not ignored by the public.”

Moraro argued that the validity of the protest came down to whether people were ultimately being hurt or coerced by it, instead of requested or motivated; and whether the reason for the protest was itself a civil one, or whether it showed intolerance or disrespect for segments of society.

Hugh de Kretser, executive director of the Human Rights Law Centre, wrote in March 2019 that:

“Protest helped to win the eight-hour working day, to protect the Franklin and the Daintree, and advance Aboriginal land rights. Protest helped to secure women’s right to vote, to stop our involvement in the Vietnam War and end of the criminalisation of homosexuality. Protest continues to play a key role in highlighting the cruelty of our refugee policies, in protecting workers’ rights, in stopping coal seam gas exploration and so much more.”

He wrote that protests are particularly important for people whose interests were ignored by mainstream politics or whose future depended on the decisions of policymakers they didn’t have the ability to vote for, but that Australia had a history of governments trying to suppress protests.

- This relates to the ability of individuals to influence law reform.
- This also relates to reasons for law reform.

**LAWS TO RAISE NEWSTART**

The current rate of Newstart unemployment benefits is $555.70 per fortnight for a single person without children, which totals around $40 per day. This is meant to cover all rent, bills and expenses while a person is unemployed. Data from the Department of Social Services shows that the average time people receive Newstart is 156 weeks, or three years; long-term unemployment is a problem, particularly in the age group of over-55-year-olds, and income that is too low to sustain people can make that time longer by making it difficult for them to look for work or retrain.

On Monday 22 July 201 Rachel Siewert, the Greens’ spokesperson for Indigenous Issues, Family, Ageing and Community Services, and Mental Health, introduced a private members bill into the Senate to increase the amount of Newstart by $75 per week. This was the fifth bill on the topic she has introduced in her 14 years in parliament. She said in a media article on 18 July:

“Private member’s bills can be powerful, which is one of the reasons the major parties are expending so much energy trying to justify why they can’t support my bill instead of acknowledging that people on Newstart deserve more support.”

She noted that changes to petrol sniffing fuels and same-sex marriage were the result of private member’s bills, too.

On 23 July 2019 the first Liberal senator publicly backed the increase, going against his party’s formal policy. WA Senator Dean Smith said that he supported an increase, but that he would still not vote against party lines because that would be a “political stunt.” Former Nationals leader Barnaby Joyce has supported an increase, along with One Nation leader Pauline Hanson. Liberal senator Wendy Askew represented the Government’s position, saying during debate on Monday 22 July that “the best form of welfare is a job.” Labor revised its position on Newstart, and decided to support an increase – previously it had merely asked for a review.

The bill requests the Government to increase payments by $75 per week. It stops short of implementing that increase directly, because the Senate cannot commence bills that appropriate government money. The bill was rejected by the Senate, but on Thursday 25 July the Greens joined with Labor to launch a committee inquiry into Newstart rates. The Senate also passed a ‘motion’ from the Greens to request the Government to increase Newstart. Acting CEO of the Australian Council of Social Service Jacqueline Phillips said “Rather than trying to avoid the issue, the government should listen to the clear calls from the community, business sector and economists, for an increase to Newstart, which would reduce poverty, stimulate the economy and create jobs.”

- This relates to reasons for law reform.
- This also relates to political pressures as one factor that affects the ability of parliament to make law.
In April 2019 the Commonwealth Parliament passed the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill to criminalise the behaviour of platforms who allowed extremely offensive, violent material to remain on their web platforms and sites. The Bill was introduced by the Liberal-National Coalition, but was also supported by Labor. The federal attorney-general, Christian Porter, said he believed the law was a “world first”: it was passed in response to the Christchurch attack, in which the perpetrator livestreamed his assault and it was shared on social media such as Twitter even though most commercial television stations would not show it.

Content service providers and Internet hosting services can now be prosecuted for failing to notify Australian federal police about the existence of material showing “abhorrent violent conduct”, or failing to remove it in an ‘expeditious’ manner. The eSafety Commissioner can also notify social media companies that their platform is hosting this material, giving them an obligation to act quickly to take it down. The law defines “abhorrent violent material” as anything that shows murder, torture, rape, kidnap, or terrorist acts.

The law has been criticised for failing to give a specific timeframe for what removal would be considered “reasonable” or “expeditious”, but Porter said that would be up to a jury to decide based on the individual circumstances of the case. In his opinion, he said, “every Australian would agree it was totally unreasonable that it [the Christchurch material] should exist on their site for well over an hour without them taking any action whatsoever.” The law has also been criticised for failing to clarify who in a company would be the person prosecuted and why.

In May 2019 government bodies such as the Family Court and Victoria Legal Aid (‘VLA’) announced a government-funded scheme to support the cross-examination ban. From 10 September 2019 all cross-examination in family law matters will be conducted by a legal representative if the party has personally been accused (or found guilty of) family violence against the witness or party being questioned. This examination may be done by a privately-retained lawyer; however, if the alleged perpetrator is self-represented, the Commonwealth Family Violence and Cross-examination of Parties Scheme will be administered by VLA to provide a state-funded representative to conduct the questioning. The Commonwealth has committed $7m over three years to fund the Scheme.

The Family Court’s website in June 2019 read:

>This will remove the fear of being directly cross-examined by their perpetrator as a factor in a woman’s decision whether to settle a matter, and encourage women who have experienced family violence to pursue their legal entitlements. The provision of legal assistance will also support the expeditious resolution of family law matters, assisting women to recover from abusive relationships and obtain economic security for themselves and their children sooner.

- This relates to reasons for law reform.

**SCHOOL MOBILE PHONE BAN**

From 2020 all state schools in Victoria will have total mobile phone bans from the start of school until final bell. In case of emergencies, parents and guardians will have to call the school, and the school will contact the student or bring them to the office – otherwise, the only exceptions will be students with health conditions that need to be monitored through the phone, or where teachers have instructed students to bring phones for a particular activity.

The Digital Industry Group, representing Google, Facebook, Twitter, Amazon and Verizon Media, said the bill was passed without proper consultation, and that the obligations on companies to ‘police’ content created by users was unreasonable. Labor promised to review the legislation if it was elected in May 2019, but this simply added the law to a list of already-enacted laws passed without due consideration and given Labor’s support in Parliament in the meantime. Sunita Bose, managing director of the Group, said “This ‘pass it now, change it later’ approach to legislation, such as we saw with the encryption law, creates immediate uncertainty for Australia’s technology industry.”

President of the Law Council of Australia, Arthur Moses, said that legislation ought never to be passed as a “knee-jerk reaction to a tragic event” because of the unintended consequences that often flow from changes in the law. The first paragraph of the explanatory memorandum distributed by the Attorney-General referred to the Christchurch attacks and the second paragraph explained that the Bill would “ensure that online platforms cannot be exploited and weaponised by perpetrators of violence.”

- This relates to reasons for law reform.

- This also relates to political pressures as one factor that affects the ability of parliament to make law.
State education minister James Merlino said that the move was a response to cyber-bullying, and increasing reports of distractions in class caused by students using their phones. Child psychologist Michael Carr-Gregg agreed, saying:

“All schools have a legal obligation to provide a safe environment in which to learn. This significant policy initiative is designed to ensure the wellbeing of young people while at school, free of distraction and potential cyber-bullying.”

In 2018 Victorian premier Daniel Andrews had dismissed the idea of a statewide ban and had said that individual schools would be left to make their own policy on phones, but he changed his mind in 2019. Since the Liberal party had proposed a ban before the last state election, former Liberal leader Matthew Guy tweeted that “policy imitation is the greatest form of flattery.”

Public response has been divided, with some people arguing that schools should teach students to use phones the ‘right’ way instead of banning them.

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**VLRC CONTEMPT OF COURT INQUIRY**

In October 2018 the Victorian Law Reform Commission was asked to conduct an inquiry into the law relating to contempt of court. It is a broad review, covering all types of contempt of court, including contempt by publication, juror contempt, and contempt by ‘scandalising’ the court – which includes making extreme public criticisms or calling the courts into disrepute. The review was commissioned following recommendations by former Supreme Court Justice Frank Vincent in his 2017 review of the Open Courts Act 2013 (Vic).

The terms of reference asked the Commission to consider matters such as how the law could most appropriately deal with disruptive behaviour in the courtroom, how it could ensure that jurors make decisions based solely on the evidence put before them at trial, how to protect witnesses from interference and harassment, and how to protect public confidence in the courts amidst criticism and even false allegations against judges.

In May 2019 the Commission published its Consultation Paper for public comment; it closed for public submissions on 28 June 2019. The final report of recommendations to parliament is due by 31 December 2019.


- This relates to reasons for law reform.

**ROYAL COMMISSION INTO AGED CARE**

In September 2018 the federal government announced a royal commission into aged care, following a number of media reports uncovering abuse and neglect in facilities. The ABC’s Four Corners programme, for instance, looked at the treatment of elderly residents in aged care homes across a two-part series at the same time as the commission was being established. The Combined Pensioners and Superannuants Association had been calling for a commission for at least six months prior, saying that it had reached the level of a “national crisis”.

In 2017 and 2018 the Senate conducted an inquiry into aged care accreditation standards, prompted by a whistleblower at Oakden nursing home in the north of Adelaide disclosing a decade of mistreatment: abuse included overprescription of antipsychotic medication, unexplained injuries in elderly residents, indecent and sexual assault by carers, and one patient being bashed to death by another. The Senate was told that a “toxic” culture of secrecy and turning a blind eye had encouraged cover-ups, and the problem was found to be more widespread than previously thought. Since then, authorities have forcibly closed one aged care facility a month across the country.

The commission reference covers residential, home and community aged care, including home support packages and meal delivery as well as live-in facilities. It will directly affect approximately 1.3 million Australians who use the services each year. Commissioners have been asked to provide an interim report by 31 October 2019, and the final report is currently due by 30 April 2020.

The Commission’s website address is: [https://agedcare.royalcommission.gov.au/Pages/default.aspx](https://agedcare.royalcommission.gov.au/Pages/default.aspx)

- This relates to the role of one royal commission and its ability to influence law reform.
DISABILITY ROYAL COMMISSION

When the federal royal commission into aged care was announced, Greens senator Jordon Steele-John urged the Government to expand the terms of reference to include the treatment of people with a disability who were living in institutional and residential settings. On 18 September he read aloud the names of Australians who have died in their homes and care facilities as a result of mistreatment, neglect and abuse by disability carers: of the 34 people, more than one was aged under 10. Many had been found dead, covered in faeces, beaten, and even sexually assaulted before their deaths.

After reading the list, Steele-John said:

“These are the names that don’t get spoken. These are the human beings, these are the loved ones, the mothers, the fathers, the sons, the partners who need justice, who demand justice, whose lives are worth living, in whose memory I tonight wear a white flower and whose passing fills me with an iron-clad determination.”

Steele-John is 23 years old and himself has cerebral palsy – he uses a wheelchair, and is the first senator in the history of federal parliament to serve with a disability. When giving his maiden speech in Parliament in 2017, he said he would use his role to be “a tireless champion for fundamental change in the way that society thinks about people with a disability.”

Prime Minister Scott Morrison rejected Steele-John’s request, arguing that:

“It’s a very focused inquiry; it’s important that we keep the focus of the inquiries. If they become an inquiry into everything, they become too broad. I want to ensure that this inquiry remains very focused so it can give us some very clear direction.”

In 2015 a Senate inquiry had recommended a royal commission into the disability sector, but it had not been acted on by government.

In 2019 the Government ran out the clock in the lower house to avoid voting on a motion begun by Steele-John in the Senate, to establish a disability commission, but then in April 2019 it announced terms of reference for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability (‘the Disability Royal Commission’). A total sum of $379.1m has been allocated over five years to the Attorney-General’s Department to run the Commission, provide legal assistance to witnesses and to represent the Commonwealth in Commission proceedings, and $148.8m has been allocated over three years to the Department of Social Services, the National Disability Insurance Agency and the National Disability Insurance Scheme Quality and Safeguards Commission to provide counseling services and support to people with a disability if they need it in connection with their participation in the inquiry.

The Commission has been asked to look into matters including what governments, institutions and the community should do to prevent people with disability from experiencing violence, abuse, neglect and exploitation, and what can be done to prevent this harm and encourage better reporting and responses to it. It has also been given a broader social remit, as it has been asked to report on what should be done to promote a more inclusive society, supportive of the independence and rights of people with disability.

- This relates to the role of one royal commission and its ability to influence law reform.

ROYAL COMMISSION INTO THE MANAGEMENT OF POLICE INFORMANTS

In December 2018 the Victorian Government announced a state royal commission into policing, following the discovery that a defence lawyer – later named as Nicola Gobbo – had been used as a police informer. The High Court spoke harshly in one judgment over the ways in which this compromised the principles of justice and the right to a fair hearing. They condemned Victoria Police equally, saying:

“Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will.”

Twenty jailed offenders received letters from the Director of Public Prosecutions about aspects of their convictions being potentially compromised by the breach.

At the time it was argued that the inquiry should receive very broad terms of reference, because it is the first major inquiry into policing in Victoria in 35 years – the first since the Neesham Inquiry from 1982-1984. The more recent Fitzgerald Inquiry in Queensland (1987-1989) and the Wood Royal Commission in New South Wales (1995-1997) both found, however, that policing malpractice and corruption were not isolated, individual acts; rather, that they stemmed from systemic problems that needed to be addressed on a larger scale. Both of these inquiries began with narrow terms of reference, but had their scope widened once the extent of the problems became clear.

The Victorian Royal Commission into the Management of Police Informants has similarly been given a fairly narrow reference, and all the evidence heard so far has related to the interactions between Gobbo and Victoria Police. As of 19 June 2019 the Commission had held 22 days of hearings, examined 32 witnesses, received 131 public submissions and contacted over 130 individuals and agencies with expertise in relevant...
Library, available at the Commission website.

The Greens criticised the Committee for ignoring the number of submissions in favour of the proposal, and instead favouring opposing submissions by groups such as the Australian Christian Lobby and the Federal Young Liberals. The Greens said, “more often than not, by the time young people reach the age of 16 or 17 they are making a significant contribution to Australian society and similarly are able to recognise the impacts government decisions have upon their lives. It follows, therefore, that 16 and 17 year olds should be able to have their say at the ballot box.”

After this, it is possible that the Commissioner requests the Government to expand the terms of reference, depending on the findings.

• This relates to the role of one royal commission and its ability to influence law reform.

**BANKING ROYAL COMMISSION**

The banking royal commission headed by former High Court justice Kenneth Hayne was called a “game-changer” in 2018, and in March 2019 the federal government announced the extent of its pre-election budget response. In the budget its pledged included $400m in additional funding to the Australian Securities and Investment Commission (‘ASIC’) to oversee the banks, an additional $150m to the Australian Prudential Regulation Authority (‘APRA’), and $35m, to the Federal Court in anticipation of cases brought by the regulator based on findings from the royal commission. The Federal Court was projected to appoint two new judges and eleven registry staff, and build new facilities.

In all, the Government pledged to “take action” on all 76 of the recommendations directed at it in the Final Report. In addition to extra funding being allocated to existing bodies, it committed to establishing an industry-funded compensation scheme for consumers and small businesses; establishing an independent financial regulator oversight authority to assess and report on the effectiveness of ASIC and APRA; and paying compensation owed to consumers and small businesses from old unpaid external dispute resolution determinations (totaling $30.7m as of 2019-20).

• This relates to the role of one royal commission and its ability to influence law reform.

**INQUIRY INTO LOWERING THE VOTING AGE**

On 25 June 2018 the Senate referred the Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018 to the Joint Standing Committee on Electoral Matters. It was a private members bill introduced by Greens senator Jordon Steele-John. The Committee was to look into whether the voting age should be lowered from 18 to 16 years – voluntary voting between the ages of 16 and 18 – and the voter registration age lowered to 14.

The Committee conducted four public hearings in capital cities, and received public submissions until 10 August 2018 – 97 submissions were received in total. The Committee heard from the Youth Parliament, for instance, that “Receiving enroll to vote information at the age of 14 will encourage more young people to have conversations about voting at an earlier age, where there are, for a majority of young people, stronger connections to family and the community.”

The Committee rejected all proposed changes, and the Bill lapsed on 1 July 2019. In its advisory report, published in March 2019, it said: “The Committee also noted that many young people it spoke to suggested reform of civics education was needed; it agreed.

The Greens criticised the Committee for ignoring the number of submissions in favour of the proposal, and instead favouring opposing submissions by groups such as the Australian Christian Lobby and the Federal Young Liberals. The Greens said, “more often than not, by the time young people reach the age of 16 or 17 they are making a significant contribution to Australian society and similarly are able to recognise the impacts government decisions have upon their lives. It follows, therefore, that 16 and 17 year olds should be able to have their say at the ballot box.”

• This relates to the role of one parliamentary committee and its ability to influence law reform.

**REVIEW QUESTIONS**

1. Explain why political pressures might lead the Opposition to vote against the Government.
2. Explain why political pressures led the Labor party to support the Government’s tax cuts in July 2019.
3. Explain how political pressures led the Government to introduce a Medevac repeal.
4. How does the Medevac repeal illustrate the supremacy of parliament?
5. Explain how the native title test case was an instance of statutory interpretation.
6. Discuss the restrictions that the doctrine of precedent places on courts as law-makers, using the ‘parent’ test case to illustrate your answer.
7. Discuss whether the defamation precedent is more likely to be considered a case of judicial activism or judicial conservatism.
8. Explain the reason why the reform to doli incapax and the age of criminal responsibility was recommended.
9. Using the examples of protests and rallies given in the Update, find three arguments in favour of the effectiveness of protests and three arguments against the effectiveness of protests.
10. What is a private member’s bill?
11. Why do most private members bills begin in the upper house?
12. Why does Rachel Siewert’s Newstart proposal require the support of so many crossbenchers and the Opposition?
13. Explain the reason why the reform to the distribution or hosting of ‘abhorrent material’ was initiated.
14. Explain the reason why the reform to family law cross-examination was needed.
15. Explain the reason why the reform to the use of mobile phones in public schools was needed.
16. Outline the role played by the VLRC in law reform. Illustrate your answer with either the Committals inquiry or the Contempt of Court inquiry.
17. Describe the role played by a royal commission or parliamentary committee in law reform. Illustrate your answer with one of the aged care commission, the disability commission, the police informants commission, the banking commission or the committee inquiry into lowering the voting age.
APPLICATION EXERCISE

Since the final examination is so very close, this last application exercise will take the form of practice examination questions. All of the questions are examination-style, so they should be answered with the quality of detail you would provide in the examination.

Each mark should have approximately 1.5 minutes of writing time allocated to it.

Try to do the exam in the time allocated and without your notes, allowing approximately 3-5 lines per mark across the 35 marks below.

All questions here have been chosen because they allow you to use material from this Update.

Good luck!

**Question 1**
Discuss how the role of the Senate can assist with parliament’s ability to make effective law. (4 marks)

**Question 2**
Using one example of a recent inquiry to illustrate your answer, explain the role of the Victorian Law Reform Commission in influencing law reform and comment on the extent to which its influence is likely to be successful. (6 marks)

**Question 3**
Using one recent example to illustrate your answer, explain the role played by either one parliamentary committee or one royal commission in influencing parliament to change the law. (4 marks)

**Question 4**
Discuss the ability of courts to use the doctrine of precedent to develop and change the law. (6 marks)

**Question 5** (15 marks)
What many found despicable in this protest was the disruption of public traffic. They think the right to protest does not imply the right to cause others to remain stranded on their way to work. From this standpoint, the activists’ disruptive conduct constituted an act of violence and, as such, was incompatible with the principles of civil disobedience.

But this reasoning is misguided and dangerous. It’s dangerous because it risks neutralising the potential of civil disobedience as a form of dissent. When the government claims that only non-disruptive protests are ‘civil’, it’s also implying that those who seek to go beyond mere symbolic actions, and to have some impact on others through their protest, are censored as ‘criminal’ and uncivil.

### Question 1

**a.** Using examples to illustrate your answer, explain two reasons why laws may need to change. (4 marks)

**b.** Comment on the extent to which political pressures affect the ability of parliament to change the law. (3 marks)

**c.** Evaluate the ability of individuals to influence parliament to change the law. To what extent do members of the public have more or less ability to influence law reform that formal bodies authorised by government? (8 marks)

### Memorable Quotations

“**It’s very much a brave move for the Government to repeal a process that is working well and only applies to existing asylum seekers who require critical medical treatment that is not available on Nauru. It hasn’t opened the asylum seeker floodgates. It’s not a pathway to settlement, as transfers are temporary. It really is time for the Government to stop the scaremongering and show they have a humanitarian side and allow a life-saving process to continue.”**

Stirling Griff, Centre Alliance senator, regarding the Medevac transfer process, July 2019

“**The question of whether a person is a parent of a child born of an artificial conception procedure depends on whether the person is a parent of the child according to the ordinary, accepted English meaning of ‘parent.”**

High Court judgment, June 2019

“**Research-based evidence on brain development supports a higher age as children are not sufficiently able to reflect before acting or comprehend the consequences of a criminal action.”**

Arthur Moses SC, President of the Law Council, regarding doli incapax changes, June 2019

“I**won’t be chaining myself to anything, and I think that protest will have had conversations with authorities about how working people can make their point without completely disrupting the city.”

Daniel Andrews, Premier of Victoria, April 2019

“**Private member’s bills can be powerful, which is one of the reasons the major parties are expending so much energy trying to justify why they can’t support my bill instead of acknowledging that people on Newstart deserve more support.”**

Rachel Siewert, Greens senator, July 2019

“**More often than not, by the time young people reach the age of 16 or 17 they are making a significant contribution to Australian society and similarly are able to recognise the impacts government decisions have upon their lives. It follows, therefore, that 16 and 17 year olds should be able to have their say at the ballot box.”**

Greens media release, 29 March 2019