



STUDY GUIDE

Introduction

Tradition and Change in Australian Law traces the development of the Australian legal tradition from its origins in the western idea of law through to the institutions which continue that tradition in the 21st century.

The purpose of this study guide is to assist students to engage in deep learning about Australia's legal tradition as they study *Tradition and Change*. There are three levels of questions.

The first level of questions, under each heading and sub-heading of the book, aims to assist students to read with a purpose, and to maintain concentration. Answering them requires the reader to focus on the key ideas or themes in that section of the book.

The second level of questions is headed "going deeper". These questions will assist readers to consider some of the broader issues and implications which arise from the material. These questions often link up to recurring themes in the book.

The third level of questions comes at the end of each chapter in a section entitled "Reflections". These questions invite readers to think about some of the major issues which have been explored in, or which arise from, that chapter.

This study guide is suitable for individual use, small study groups or for classroom discussion.

Patrick Parkinson
October 2012



1 The Tradition of Law in Australia

[1.10] **CHARACTERISTICS OF THE AUSTRALIAN LEGAL TRADITION**

[1.20] **A received tradition**

In what respects do Australian legal institutions bear indelibly the marks of the nation's birth?

In what major ways is the modern Australian legal system different from that in the United Kingdom?

In what ways do the two countries share a common legal tradition?

In what respects do common law countries and civil law jurisdictions belong to a common legal tradition?

[1.30] **An evolved tradition**

How are the origins of the Australian legal tradition different from that in the United States?

What is the significance of this evolved tradition for Australian law and legal institutions?

[1.40] **A monocultural tradition**

What challenges are involved in adapting the Australian legal system for a multicultural society?

[1.50] **Gender and the legal tradition**

What is the significance of the fact that the tradition of law in Australia originated within a world in which men dominated public life and the role of women was seen to be in the home?



How much progress do you think has been made in making the legal tradition more responsive to the needs and concerns of women?

Going deeper . . .

Why do you think it is a benefit to the Australian legal tradition that it is not isolated from the legal tradition of other nations?

To what extent do you think the “rights” focus of American law is a reflection of its historical origins as an independent nation?

What, if any, are the values that unite Australia in a shared vision of the common good?

To what extent can Australia take account of the diverse traditions, beliefs and practices of its multicultural population without sacrificing fundamental values of the Australian legal tradition? In what ways might a policy of respect for minority cultural traditions be in tension with a commitment to universal human rights?

How can the tradition of law be used by feminists to address issues of particular importance to women?

[1.60] THE TRADITIONALITY OF LAW

In what sense is it “of the essence of law that it is traditional”?

[1.70] Origins in the past

Why is longevity a necessary aspect of tradition?

How do new statutes and regulations form part of the tradition of law?

[1.80] Present authority

Explain the idea that in law, the past is “authoritatively present”.

[1.90] Inter-generational transmission

How are traditions handed down?

What pressures are there towards conformity with tradition?

[1.100] The development of traditions

Why is it “central to the conception of a tradition that the past is never something merely to be discarded”?



How and why do legal traditions evolve?

Going deeper . . .

In what ways is law similar to religion and to the study of history? In what ways is it different in its reference back to authoritative sources?

Why is it an important principle of justice that disputes are resolved by courts on the basis of past decisions and enactments?

What alternatives are there to deciding cases by reference back in time to the past?

[1.110] TRADITION AND LEGITIMACY

[1.120] Tradition and the political order

Why is tradition important for the legitimacy of the legal and political order?

How can a country's legal tradition act as a brake on the power even of an oppressive and corrupt regime?

How might even flawed traditions have within them the capacity to bring about positive evolutionary change?

What are the reasons why it might be good not to despise traditions in the name of progress?

[1.140] The legitimacy of legal rules

Why does the law gain legitimacy from multi-generational collaboration?

In what sense does the law have a "transcendent authority"?

Going deeper . . .

Why is continuity so important to social stability?

What is the difference between legality and legitimacy?

[1.150] TRADITION AND CHANGE

In what ways does the Australian legal tradition need renewal?

REFLECTIONS

Consider the place of traditions in your family, community and religion (if any). What roles do these traditions fulfil?



What are the positive aspects of traditions?

What are the negative aspects of traditions?

In what ways do you see that the tradition of law in Australia needs to respond to the challenge of inclusion?

Further Reading

Bartlett K, "Tradition, Change and the Idea of Progress in Feminist Legal Thought" [1995] *Wisconsin LR* 303

Blackshield A, "The Legitimacy and Authority of Judges" (1987) 10 *UNSWLJ* 155

Glenn P, *Legal Traditions of the World: Sustainable Diversity in Law* (4th ed, OUP, New York, 2010)

Goldman D, *Globalisation and the Western Legal Tradition* (Cambridge UP, Cambridge, 2007)

Kronman A, "Precedent and Tradition" (1990) *Yale LJ* 1029

Krygier M, "Law as Tradition" (1986) 5 *Law and Philosophy* 237

Krygier M, "The Traditionality of Statutes" (1988) 1 *Ratio Juris* 20

Stout J, *Democracy and Tradition* (Princeton UP, Princeton NJ, 2004)

Watson A, *The Evolution of Law* (John Hopkins UP, Baltimore, 1985)



2 The Western Idea of Law

[2.20] CHARACTERISTICS OF THE WESTERN LEGAL TRADITION

[2.30] The autonomy of law

What does it mean to say that law, in western thought, is an autonomous discipline?

How is law different from other means of social ordering?

[2.50] The centrality of law

What is meant by the rule of law? With what might the rule of law be contrasted?

Why is law, in western societies, seen as a primary means of social change?

[2.60] The moral authority of law

Why does law, in western countries, have a moral, rather than merely a coercive, authority?

Going deeper . . .

Law may be autonomous in its nature, but to what extent can it have an existence independent of community norms, values and traditions and still carry authority?

What makes people obey law?

Do you think respect for law is a fragile quality in western societies?

[2.70] THE ORIGINS OF THE WESTERN LEGAL TRADITION

What were the three main formative influences on the western legal tradition?

**[2.80] The rediscovery of Roman law**

Why was it significant for the revival of Roman law in the 11th century that the political idea of a Roman empire in the West continued?

[2.90] The texts of Justinian

What was the *Corpus Juris Civilis*?

What was Justinian's purpose in collecting together the various sources of Roman law?

Why was Roman law relevant to the scholars of the late 11th century and beyond?

[2.100] The glossators and commentators

How did the glossators and commentators get their respective names?

Explain how a systematic exposition of Roman law emerged from the work of the glossators and commentators and why this represented a very different understanding of Roman law from that prevailing in the classical Roman era.

[2.110] The humanist scholars

What difference in perspective did the humanist scholars bring to Roman law?

[2.120] Roman law, canon law and the common law

What influence did Roman law have on the development of canon law and the common law, respectively?

[2.130] Scholasticism and legal method

What was "scholasticism", and how was this analytical technique applied to the study of Roman law?

Why was the same method of study applied to Roman law as to the Scriptures?

What impact has this method of legal reasoning had on the study of law today?

Going deeper . . .

How does this history of the study of Roman law help us to understand the origins of law's autonomy, centrality and moral authority in the western legal tradition?

**[2.140] NATURAL LAW****[2.150] Greek and Roman ideas of natural law**

Explain the different meanings given to natural law in Greek and Roman thought.

[2.170] The discordance between natural law and civil law

How did Christian writers explain the imperfections of human law in comparison with natural law?

How did Christian interpretations of the idea of natural law encourage a belief in universal moral laws discoverable by reason?

[2.180] Aquinas, eternal law and natural law

How did Aquinas define natural law? What was its relationship to human law?

How, in Aquinas' view, could natural law be discerned?

[2.190] Aquinas and civil disobedience

What is the relationship between natural law theory and the moral justification for civil disobedience or revolution?

[2.200] Natural law after Aquinas

How was Aquinas' philosophy of natural law challenged by Protestant thinkers?

How did natural law theory lead to the development of international law?

Going deeper . . .

How does this history of the idea of natural law help to understand the origins of law's autonomy, centrality and moral authority in the western legal tradition?

How is the idea of the rule of law, and specifically, that rulers are themselves subject to law, an outworking of natural law ideas?

[2.210] NATURAL RIGHTS AND THE LEGITIMACY OF GOVERNMENT**[2.220] Hobbes and the justification for autocracy**

What did Hobbes understand by natural law?



How did Hobbes justify autocracy?

[2.230] Locke and the idea of fundamental human rights

How did Locke's view of the natural condition of humankind differ from Hobbes'?

On what basis did Locke assert that people had certain natural rights?

Why did Locke argue that autocracy could not be justified?

How did Locke justify the idea of private property?

How did Locke's ideas influence the French and American revolutions?

[2.240] Rousseau and the general will

How did Rousseau's idea of the social contract differ from Locke's?

What protection is there, in Rousseau's idea of the social contract, for minority groups?

THE RISE OF LEGAL POSITIVISM

[2.250] The reaction against natural law

What were the three main critiques of natural law theory?

To what extent do you think that these criticisms are valid?

What did Bentham advocate instead as the future of legal scholarship?

[2.260] John Austin and legal positivism

Explain how John Austin defined law within the context of the British democratic system.

What distinguishes law from other species of command?

What are the weaknesses of this definition of law as applied to common law countries?

[2.270] Hart's concept of law

In what respects is law similar to other forms of social obligation?

In what respects is law different from other forms of social obligation?

What does Hart mean by the rule of recognition, and why is it important?

**[2.280] Positivism, natural law and legitimacy**

To what fundamental questions is a theory of natural law a response?

To what fundamental questions is legal positivism a response?

Going deeper . . .

Is law which imposed on a population and supported by the barrel of a gun really law?

What makes law legitimate?

What problems are there from a legal point of view in putting overthrown dictators on trial? How might natural law overcome moral objections to such trials?

REFLECTIONS

Consider the statement that “Christianity was to the formation of the western legal tradition as the womb is to human life”. Human beings do not depend upon the womb after birth. Yet to what extent can ideas of human rights and other aspects of the western legal tradition be sustained and kept viable in an age of secular humanism? From where, in a secular age, does modern law derive its moral authority?

What does it mean now, for someone to assert a human right as a counter to a law passed by a majority? Is an acceptance of the idea of natural law a necessary basis for the assertion of fundamental human rights?

Further Reading

Berman H, *Law and Revolution* (Harvard UP, Cambridge, Mass, 1983)

Berman H, *The Interaction of Law and Religion* (SCM, London, 1974)

David R, “On the Concept of ‘Western’ Law” (1983) 52 *Univ of Cincinnati LR* 126

Glenn P, *Legal Traditions of the World: Sustainable Diversity in Law* (4th ed, OUP, New York, 2010)

Goldman D, *Globalisation and the Western Legal Tradition* (Cambridge UP, Cambridge, 2007)

Goodman E, *The Origins of the Western Legal Tradition* (Federation Press, Sydney, 1995)

Kelly J M, *A Short History of Western Legal Theory* (Clarendon, Oxford, 1992)

Leiboff M and Thomas M, *Legal Theories: Contexts and Practices* (Thomson Reuters, Sydney, 2009)

Quint P, “The Border Guard Trials and the East German Past — Seven Arguments” (2000) 48 *American J Comp L* 541.

Sawer G, “The Western Conception of Law”, *International Encyclopedia of Comparative Law* (Mouton, The Hague and Mohr, Tübingen, 1975), Vol II, Ch 1



Sigmund P E, *Natural Law in Political Thought* (University Press of America, Washington DC, 1971)

Stromholm S, *A Short History of Legal Thinking in the West* (Norstedts, Stockholm, 1985)

Watkin T, *An Historical Introduction to Modern Civil Law* (Ashgate, Aldershot, 1999)

Watson A, *The Making of the Civil Law* (Harvard UP, Cambridge, Mass, 1981)



3 The Development of Common Law, Equity and Statute

[3.10] THE SIGNIFICANCE OF ENGLISH HISTORY

Why is an understanding of English history significant for understanding Australian law?

THE BIRTH OF THE COMMON LAW

[3.20] Origins

Did rights come first in the common law, or legal processes?

[3.30] Customary law before the Conquest

How were disputes typically resolved in the pre-Conquest era of English history?

[3.40] Centralisation in the Norman period

What contribution did the Norman and Angevin kings make to the development of a national system of justice in England?

What were the motivations for the monarch to be involved in issues of justice?

[3.50] Itinerant justice and the general eyre

What was the general eyre?

How was justice administered, and how were crimes investigated, between visits of the general eyre?

[3.60] The establishment of central courts

Why were central courts of justice established at Westminster?



What was the original function of a jury?

[3.70] The writ system

What was the nature and purpose of the writ?

Explain the connection between the writ system and the development of the common law.

[3.80] Pleadings and the emergence of substantive law

How did the process of pleading lead to the development of legal rules?

[3.90] Subsequent development of the common law

What were legal fictions, and why were they useful?

[3.100] Reform of common law procedures

What is the role of pleadings in the modern law?

Going deeper . . .

Explain how the system of justice in Britain developed as an entity autonomous from the executive power of the monarchy.

Compare the original function of the jury with its present-day function. Is it essential to a fair trial that the jury should come to their role with little or no knowledge of the matter?

Common law rights grew out of the remedies available to obtain justice. What impact might this still have on patterns of common law reasoning and on the nature of law in common law countries?

THE DEVELOPMENT OF EQUITY

[3.110] The need for equity

Why did equity need to develop?

[3.120] The Chancellor's jurisdiction

What was the role of conscience in deciding cases in equity?

In what ways did equity “temper and mitigate the rigour of the law”?

**[3.130] The relationship between equity and the common law**

How was it established that equitable rules prevail over common law rules?

Explain why equity is merely a supplementary jurisdiction.

[3.140] The development of equitable principles

What was the origin of the trust?

What led to the systematisation of equity as a body of principle?

[3.150] The fusion of the administration of law and equity

What were the reasons for the enactment of the *Judicature Acts* of 1873 and 1875?

What effect did the *Judicature Acts* have on the relationship between common law and equity?

Going deeper . . .

Are equitable principles, in one form or another, a necessary feature of all developed legal systems?

Consider the relationship between law and morality as seen in the development of equitable principle. Must a system of justice necessarily incorporate an element of judging people according to the morality of their actions, as well as the formal legality of those actions?

[3.160] THE DOCTRINE OF PRECEDENT

What is the doctrine of precedent?

How was it aided by the development of an official law reporting system?

Explain the distinction between *ratio decidendi* and *obiter dicta*.

Going deeper . . .

Why is adherence to precedent a necessary feature of a just legal system?

[3.170] STATUTE LAW

How did Parliament emerge as a law-making body?

Going deeper . . .

Explain the connection between the idea of law as a science, legal positivism and the



emergence of statute as the dominant form of law-making (see also Chapter 2).

[3.180] OTHER COURTS AND SYSTEMS OF LAW

[3.190] The ecclesiastical courts and canon law

Over what issues did the ecclesiastical courts have jurisdiction?

[3.200] Prerogative courts

What was the Court of Star Chamber?

Explain the historical role of the Privy Council.

[3.210] THE SOURCES OF LAW IN AUSTRALIA

Why is discussion of the sources of law in Australia complicated by the federal structure?

REFLECTIONS

Consider the significance of the common law as a tradition in the light of the benefits of traditions considered in Chapter 1.

What is the enduring role of common law and equity in an age of statutes?

Further Reading

Baker J H, *An Introduction to English Legal History* (4th ed, Butterworths, London, 2002)

Evans M and Jack I, *Sources of English Legal and Constitutional History* (Butterworths, Sydney, 1984)

Helmholz R H, *Canon Law and the Law of England* (Hambledon, London, 1987)

Hudson J, *The Formation of the English Common Law* (Longman, Harlow, 1996)

Maitland F W, *Equity — A Course of Lectures* (2nd ed, Brunyate J (ed), Cambridge UP, Cambridge, 1936)

Milsom S F C, "Law and Fact in Legal Development" (1967) 17 Univ of Toronto LJ 1

Milsom S F C, *Historical Foundations of the Common Law* (2nd ed, Butterworths, London, 1981)

Milson S F C, *A Natural History of the Common Law* (Columbia UP, New York, 2003)

Plucknett T F T and Barton J L (eds), "St German's Doctor and Student", 91 *Selden Society* (1974)

Van Caenegem R C, *The Birth of the English Common Law* (2nd ed, Cambridge UP,



Cambridge, 1988)



4 Constitutional Law and the Westminster System of Government

[4.20] ROYAL AUTHORITY IN THE FEUDAL ERA

What limits were there to monarchical power in theory and in practice in the feudal era?

Explain the differences between the descending and ascending theories of government.

How did the concept of the “rule of law” emerge from this body of political theory?

[4.40] THE GROWTH OF PARLIAMENTARY AUTHORITY

How was the constitutional order revolutionised by the events of Henry VIII’s reign?

Why did Parliament gain in influence during the reign of Henry VIII? (See also [3.170].)

[4.50] THE CONSTITUTIONAL CONFLICTS OF THE 17TH CENTURY

[4.60] The common law and Parliament

What claims did Coke and other judges make for the authority of the common law in relation to statutes?

How might Coke’s ideas be better understood in the context of contemporary ideas of natural law?

[4.70] The common law and the Crown

What assertion did Coke make about the limitations of monarchical power?

How did Coke’s claims mark out law as an autonomous discipline?

**[4.80] Crown and Parliament**

How did the conflict between Crown and Parliament reflect the descending and ascending theories of government?

[4.100] The Long Parliament and the English civil war

What conflicts led to the civil war?

[4.110] Constitutional experimentation in the Commonwealth

How did the experience of these years demonstrate the need for checks and balances within a constitutional order?

[4.120] Constitutional monarchy after the Restoration

Explain the checks and balances in the constitutional order after the Restoration.

What were the main areas of tension between Crown and Parliament?

[4.130] The revolution of 1688

By what authority did William and Mary take the throne?

Going deeper . . .

The conflict between the common law and Parliament may be understood in terms of two rival claims to authority: the authority which comes from tradition, and the authority which comes from Parliamentary majority. Compare and contrast these two bases of authority.

Should the power of a majority be in some way limited by the need to respect the fundamental values and traditions of the community?

How does this history demonstrate both the maintenance and evolution of constitutional traditions?

THE NEW CONSTITUTIONAL ORDER**[4.140] The Bill of Rights and the Act of Settlement**

Explain the significance of the Bill of Rights and the *Act of Settlement*.

How did the *Act of Settlement* strengthen the authority of Parliament and of the judiciary?

**[4.150] Executive and legislature**

What factors led to the development of the idea that Ministers need to be members of Parliament?

[4.160] The emergence of Cabinet

Why did Cabinets displace the Privy Council as the key decision-making forum of executive government?

[4.170] THE EMERGENCE OF PARTY POLITICAL GOVERNMENT

What factors led to the emergence of party political government, replacing the tradition of Ministers being appointed by the monarch?

[4.180] CONSTITUTIONAL PRINCIPLES OF THE WESTMINSTER SYSTEM**[4.190] The rule of law**

What is meant by the rule of law? With what kinds of rule is it to be contrasted?

Can an unjust and oppressive government still observe the rule of law?

[4.210] Due process of law

What is meant by due process of law?

[4.220] The separation of powers

Why is it important for there to be a separation of powers between the executive, legislative and judicial branches of government?

Is this principle violated if individuals hold office in more than one branch of government?

Going deeper . . .

Does the mandatory and automatic internment of asylum seekers on arrival in Australia satisfy the requirements of due process of law?

What checks and balances are there in the Westminster system of government? Are these adequate?

REFLECTIONS



Consider again the three major characteristics of the Western legal tradition considered in Chapter 2 — autonomy, centrality and moral authority. Examine how these principles were developed and reinforced through the conflicts described in this chapter.

Examine the tensions between Crown, Parliament and the courts during the period described in this Chapter. What creative role can tension play in leadership of a nation?

Further Reading

- Berman H, *Law and Revolution* (Harvard UP, Cambridge Mass, 1983)
- Evans M and Jack I, *Sources of English Legal and Constitutional History* (Butterworths, Sydney, 1984)
- Helmholz R, “Bonham’s Case, Judicial Review, and the Law of Nature” (2009) 1 *Journal of Legal Analysis* 235
- Hughes P L and Fries R F (eds), *Crown and Parliament in Tudor-Stuart England* (Putnam, New York, 1959)
- Keir D L, *The Constitutional History of Modern Britain Since 1485* (9th ed, Adam & Charles Black, London, 1969)
- Kelly J, *A Short History of Western Legal Theory* (Clarendon Press, Oxford, 1992)
- Twomey A, “Fundamental Common Law Principles as Limitations Upon Legislative Power” (2009) 9 *Oxford University Commonwealth Law Journal* 47
- Tanner J R, *English Constitutional Conflicts of the Seventeenth Century 1603–1689* (Cambridge UP, Cambridge, 1962)



5 Government and Law in Colonial Australia

THE COLONISATION OF AUSTRALIA

[5.10] The establishment of a penal colony in New South Wales

How was justice tempered with mercy in 18th century England?

Why was it deemed necessary to start a penal colony in New South Wales?

[5.20] The Aboriginal peoples and the myth of the empty continent

Explain, in the light of 18th century ideas of international law and the right to ownership of property, why the British did not recognise the Aboriginal peoples as having ownership of land.

What factors caused the decimation and displacement of Aboriginal peoples?

Why was no recognition given to Aboriginal laws and customs by the legal system of the British settlers?

[5.50] The abolition of the doctrine of terra nullius

What was the significance of the High Court's decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1?

How does native title differ in character from property ownership in the western legal tradition?

Going deeper . . .

If the basis on which the British could ignore Aboriginal land rights is that in their small numbers Aboriginal people could not occupy a vast country, did the British have any better right in 1788 to claim sovereignty over half the continent?



FROM AUTOCRATIC RULE TO RESPONSIBLE GOVERNMENT

[5.60] The convict colony

How were the legal institutions created in the early years of the colony affected by the fact that it was a colony under military command?

[5.70] The Governor's authority and the rule of law

How did Macquarie's pragmatism as Governor conflict with legal standards as interpreted by the Judge-Advocate, Ellis Bent?

What were the pressures that led to the development of a more sophisticated legal infrastructure?

[5.80] The reforms of 1823

What elements of the modern legal and governmental system can be traced back to the 1823 Act?

[5.90] The development of popular representation

How did the legislation of 1828 and 1842 respectively expand the participation of citizens in the governance of the colony?

[5.100] The emergence of responsible government

What is meant by "responsible government"?

What new autonomy was given to the Australian colonies after 1850?

Going deeper . . .

How was the notion of the rule of law demonstrated in the fledgling colony?

What checks and balances were in place in the early years of the colony as a restraint upon absolute power?

ENGLISH LAW IN AUSTRALIA

[5.110] The reception of English law

Why was the 1828 legislation significant for clarifying the status of English law in the colonies?

**[5.120] The relationship between colonial and English legislation**

What was the effect of the *Colonial Laws Validity Act 1865*?

REFLECTIONS

To what extent were the constitutional principles of the rule of law and the separation of powers observed in the first 30 years of the colony?

Further Reading

- Attwood B & Foster S G (eds), *Frontier Conflict: The Australian Experience* (National Museum of Australia, Canberra, 2003)
- Bennett J M and Castles A C, *A Sourcebook of Australian Legal History* (Law Book Co, Sydney, 1979)
- Castles A C, *An Australian Legal History* (Law Book Co, Sydney, 1982)
- Clendinnen I, *Dancing with Strangers* (Text, Melbourne, 2003)
- Finn P, *Law and Government in Colonial Australia* (Oxford UP, Melbourne, 1987)
- Hirst J, *Freedom on the Fatal Shore: Australia's First Colony* (Black Inc, Melbourne, 2008)
- Kercher B, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, Sydney, 1995)
- McMinn W G, *A Constitutional History of Australia* (Oxford UP, Melbourne, 1979)
- Melbourne A C V, *Early Constitutional Development in Australia* (2nd ed, Joyce R B (ed), University of Queensland Press, St Lucia, 1963)
- Neal D, *The Rule of Law in a Penal Colony* (Cambridge UP, Cambridge, 1991)
- Reynolds H, *The Law of the Land* (3rd ed, Penguin, Melbourne, 2003)
- Reynolds H, *Dispossession: Black Australians and White Invaders* (Allen & Unwin, Sydney, 1989)
- Woods G D, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press, Sydney, 2002)



6 Australian Federation and the Path to a Republic

THE MOVEMENT TOWARDS FEDERATION

[6.10] The beginnings of the federal idea

What factors, in the second half of the 19th century, made federation desirable? What were the main obstacles in the way of federation?

[6.20] The constitutional conventions

Why was the American model of federation seen by leaders of the federation movement as an attractive model for the Australian colonies?

How was the model which emerged in the 1891 Convention a combination of the Westminster and Washington models of governance?

How did the 1897–1898 Conventions resolve the major controversies remaining about the federal structure?

What further changes needed to be made after the 1898 referenda?

Going deeper . . .

Why did early attempts to move towards Federation fail to gather momentum?

THE FEDERAL CONSTITUTION

[6.50] The Commonwealth of Australia Constitution Act 1900

How did the federal Constitution, as enacted, allocate legislative power between the Commonwealth and the States? To what extent did the Commonwealth have exclusive powers over certain aspects of national life?

How did the Constitution resolve the potential problem of intractable conflict between the House of Representatives and the Senate in relation to legislation?



What were the major powers given to the Governor-General by the Constitution?

What limitations were put in place concerning appeals to the Privy Council?

To what extent did the Constitution guarantee human rights?

How easy is it to amend the Constitution?

[6.70] **The 19th century Constitution**

Has the balance of political power between the larger and smaller States in the Commonwealth proved to be a significant issue in Australian politics?

Explain how the constitutional crisis of 1975 had its origin in the manner the Constitution was drafted.

[6.80] **The federal-State balance**

What factors in the text of the Constitution have led to the expansion of the power of the Commonwealth in the years since federation?

How has this expansion been aided and abetted by the High Court?

In what way has *Williams v Commonwealth* (2012) 86 ALJR 713 placed constraints upon federal spending power?

Going deeper . . .

What strategies could be adopted to ensure that a new constitution is not encased in a cultural time capsule?

Why do you think the Australian population has been resistant to a constitutional charter of rights?

What are the advantages and disadvantages of relying on convention to ensure that the Governor-General's role is little more than ceremonial, despite the extraordinary powers given to him or her in the Constitution?

[6.110] **ESTABLISHING LEGISLATIVE INDEPENDENCE FROM THE UNITED KINGDOM**

How did Britain give Australia, and other parts of the British Empire, greater autonomy in the years after 1900?

[6.120] **The Commonwealth and the Statute of Westminster**

What were the effects of the Balfour Declaration for the practical independence of the



Dominions?

What changes were made by the *Statute of Westminster*?

Why were the States not willing to participate in the Imperial Conference of 1930?

Why was the federal Parliament reluctant to adopt the *Statute of Westminster*?

[6.130] **The Australia Acts**

What were the effects of the *Australia Acts* for the independence of the Commonwealth of Australia and its constituent States?

[6.140] **AUSTRALIAN COURTS AND ENGLISH PRECEDENTS**

Why have Australian courts been deferential to English authority in the past?

Why did the High Court of Australia begin to diverge from the law as stated by the House of Lords?

What was the effect of the final abolition of appeals to the Privy Council on the relationship between Australian and English precedents?

Why do decisions of the House of Lords prior to the final abolition of appeals to the Privy Council have a special status?

[6.170] **AUSTRALIA AS A REPUBLIC?**

Summarise the arguments for and against a move to become a republic.

What does it mean to say that Australia is already a “crowned republic”?

How would altering the Constitution of the Commonwealth of Australia, to enact a republic, alter the position of the Queen in relation to the States?

What are the problems in having a President of the Republic of Australia elected directly?

How could a republican constitution provide for the dismissal of a President without having the potential for causing political instability?

REFLECTIONS

What problems arise for the future of governance in Australia from having a 19th century Constitution?

Should the federal Constitution, or a Parliamentary enactment, seek to codify the conventions which apply to the work of the Governor-General?



Is the monarchy an indispensable feature of the Australian legal and political tradition?

Further Reading

- Aroney N, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge UP, Cambridge, 2009)
- Carney G, *The Constitutional Systems of the Australian States and Territories* (Cambridge UP, Melbourne, 2006)
- Hirst J, *The Sentimental Nation: The Making of the Australian Commonwealth* (OUP, Melbourne, 2000)
- Irving H, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge UP, Melbourne, 1997; updated ed, 1999)
- Kercher B, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, Sydney, 1995).
- La Nauze J A, *The Making of the Australian Constitution* (Melbourne UP, Melbourne, 1972)
- McMinn W G, *A Constitutional History of Australia* (OUP, Melbourne, 1979)
- Quick J and Garran R, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, Sydney, 1901)
- Twomey A, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, Sydney, 2006)
- Twomey A, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, Sydney, 2006)



7 The Court System in the Australian Federation

[7.10] THE MOSAIC OF COURTS IN THE AUSTRALIAN FEDERATION

Why did the establishment of a federation make the court system more complex?

Where did the federal Parliament vest federal jurisdiction in the first 75 years after federation?

THE HIERARCHY OF COURTS IN THE STATES AND TERRITORIES

[7.20] The dominance of the English model

In what ways was the court system in England transposed into colonial New South Wales?

How did the system in New South Wales diverge from the English model?

[7.30] The preservation of a distinct equity jurisdiction

Why was it implicit, if not explicit, that equity should be administered separately from the common law in the Supreme Court of New South Wales?

What was the effect of the *Judicature Acts* in England on how common law claims and issues involving equity were dealt with by the courts?

[7.40] The modern jurisdiction of Supreme Courts

How is the jurisdiction of the Supreme Courts of each State and Territory connected to the jurisdiction of the Westminster courts?

What is meant by saying that the Supreme Court has an “inherent” power?



What is meant by saying that the Supreme Court is a superior court of record?

Can cases be transferred between courts?

[7.50] The jurisdiction of intermediate trial courts and courts of summary jurisdiction

How is the workload of cases distributed between the Supreme Courts and lower courts?

[7.60] The appellate system in State courts

What differences are there between having a Full Court to hear civil law appeals, and having a specialist court of appeal?

What are the advantages and disadvantages of each?

Going deeper . . .

Consider the role tradition played in the development of the court system in Australia. What advantages would there have been in transporting the familiar system of courts and processes to the fledgling colony? To what extent did adherence to tradition have the effect of stifling imaginative change?

Why might the administration of equity through a separate division of the Supreme Court have had the effect of promoting specialist knowledge of equitable principles in New South Wales?

[7.70] THE HIGH COURT OF AUSTRALIA

What are the sources of the High Court's original jurisdiction?

What is the "diversity jurisdiction"?

What is the process for hearing special leave applications?

[7.90] THE FEDERAL COURT OF AUSTRALIA

Does the Federal Court deal with all issues of federal law?

What did the *Boilermakers' Case* (*R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254) decide?

What are its consequences for industrial law?

**[7.100] THE FAMILY COURT OF AUSTRALIA**

Does the Family Court of Australia hear trials of family law matters throughout Australia?

Who decides appeals from trial judges in the Family Court?

In what ways did the establishment of a Family Court represent a departure from tradition?

[7.110] THE FEDERAL CIRCUIT COURT

What are the main areas of jurisdiction for the Court?

Why do you think the creation of such a trial court, in addition to the Family Court and Federal Court, may have been considered necessary?

[7.120] INVESTING FEDERAL JURISDICTION IN STATE COURTS

Can State courts deal with any matter arising under federal law?

Why, in the *Kable* case (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51), did the High Court hold the *Community Protection Act 1994* (NSW) to be invalid?

Going deeper . . .

Are there any circumstances in which violent offenders should be kept in prison beyond the term for which they have been sentenced?

[7.130] THE CROSS-VESTING SCHEME AND ITS DEMISE

What did the cross-vesting scheme involve?

Why did the High Court hold in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 that federal courts could not validly cross-vest State jurisdiction?

What aspects of the cross-vesting legislation survive *Re Wakim*?

Going deeper . . .

What amendment to the federal Constitution would be required to ensure that the cross-vesting scheme, as originally designed, is constitutionally valid?

[7.150] THE COURTS AND TRADITION

What limitations are there on judges taking an active role in the management and



conduct of a case in the Australian legal tradition?

Explain the significance of the High Court's decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

What are the advantages of tribunals?

Going deeper . . .

Do you think the adversarial system of justice is unsuitable for certain kinds of case? If so, list them and give reasons why.

If judges engage in mediation, do you think this compromises their objectivity in terms of giving judgment in the same case?

REFLECTIONS

What could be done to make the mosaic of courts in the Australian Federation more simple?

What would be the advantages and disadvantages of having one national court system under the authority of the federal Government?

Further Reading

Black M, "Such Other Federal Courts as the Parliament Creates: 100 Years of Evolution" (2004) 30 *Monash University Law Review* 1

Castles A, *An Australian Legal History* (Law Book Co, Sydney, 1982)

Crawford J and Opeskin B, *Australian Courts of Law* (4th ed, OUP, Melbourne, 2004)

Opeskin B and Wheeler F (eds), *The Australian Federal Judicial System* (Melbourne UP, 2000)

Zines L, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, Federation Press, Sydney, 2002)



8 Tradition and Change in Legal Reasoning

[8.10] LEGAL REASONING AND THE SEPARATION OF POWERS

What have been the two major challenges to the traditional view that Parliament makes laws while the judicial role is confined to declaring it?

Why is an activist role for judges in changing the law in tension with the constitutional doctrines of the separation of powers and the rule of law (see Chapter 4)?

[8.20] LAW AS SCIENCE: THE TRADITION OF LEGAL REASONING

How did the idea of law as a science develop from a belief in natural law?

Going deeper . . .

Compare the civil law system of codes with the common law method of incremental development through case law interpretation. What are the advantages and disadvantages of each?

[8.30] SYSTEMATISATION IN THE COMMON LAW

How was the practical study of the common law in England different from the study of law in continental Europe?

[8.40] Legal science in the common law world

How was the common law systematised by 19th century jurists? On what basis did they select “leading cases”?

[8.50] The notion of legal correctness

What does it mean to say that one decision is “correct” while another is wrongly decided?



What is black-letter law?

What connection is there between the traditional methodology of legal reasoning and the scholastic method?

Going deeper . . .

In your reading of law texts so far, what criteria do you think the writers have used for selecting the cases which are presented to you as authoritative precedents?

[8.60] LEGAL FORMALISM AND THE DECLARATORY THEORY OF LAW

What is legal formalism?

[8.70] Legal formalism and the doctrine of precedent

What differences have there been between the strictness of the doctrine of precedent in England and Australia?

Why, in Australia, is a less strict approach taken to the doctrine of precedent in constitutional matters?

[8.80] Legal formalism and the law's evolution

What is syllogistic reasoning?

What role do principles and maxims play in the law?

What role does international law play in the interpretation and development of the common law?

Going deeper . . .

Why is legal formalism connected to a strict doctrine of precedent?

In the traditional view of legal reasoning in the common law, how is change related to the past?

[8.100] LEGAL REALISM AND THE CHALLENGE TO TRADITION

Explain Holmes' "bad man" view of the law. Why does this offer a different perspective on the study of the law?

**[8.110] The legal realist movement**

What was the legal realist movement and why was it significant?

Does an acceptance of the validity of legal realist critiques mean that the law is inherently unpredictable?

[8.120] Legal realism in Australia

What was Sir Owen Dixon's response to the realists?

What choices did Professor Julius Stone say that judges had in determining the ratio decidendi of *Donoghue v Stevenson*?

[8.130] The demise of the declaratory theory

Given an acceptance that judges make law, what factors has the High Court given which would justify a choice to overrule an earlier decision?

[8.140] The declaratory theory and the problem of retrospectivity

How can the problem of retrospectivity be dealt with if judges change the law?

Why are there particular issues about retrospective changes to the law in criminal cases?

What are the main arguments for, and against, the correctness of the decision in *PGA v The Queen* (2012) 86 ALJR 641? Which view do you prefer, and why?

Going deeper . . .

What connection, if any, is there between the demise of the declaratory theory of adjudication and the growing divergence between English and Australian versions of the common law (see Chapter 6)?

Consider the quotation (at [8.140]) from the decision of Brennan CJ, McHugh, Gummow and Kirby JJ in *Ha v New South Wales* (1997) 189 CLR 465. Is this a restatement of the declaratory theory of legal reasoning?

[8.150] JUDICIAL LAW MAKING AND THE NEED FOR LEGITIMACY

Why is the debate about the limits of the law-making role of judges one about legitimacy?

How does Justice Heydon define judicial activism?

Why did the High Court in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179



CLR 520 decide that *Rylands v Fletcher* (1868) LR 3 HL 330 should no longer be seen as a distinct basis of tortious liability in Australian law?

How did the “discovery” of a broad principle underlying the different kinds of estoppel allow the Mahers to win in the case of *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387?

What are the dangers of judicial activism?

How might an acceptance of the judicial task as being a collective one rather than an individual one act as a corrective to judicial activism?

Going deeper . . .

Is the term “judicial activism” just a pejorative term for a view of the law with which one disagrees, or does it have a more objective content than this, according to Justice Heydon’s definition?

Is it possible in practice, to distinguish judicial activism from the activity of developing and changing the law in the work of appellate judging?

[8.170] LEGAL REASONING AND THE DIALOGUE BETWEEN PAST AND PRESENT

What factors other than logic give stability and predictability to the law?

In what ways does legal reasoning involve a dialogue between the past and the present?

REFLECTIONS

If the law changes as a result of a choice made by the judges to depart from previously accepted doctrines or established authorities, are they in fact altering existing rights and obligations?

Consider the difference between holding that a previous case was wrongly decided and holding that a decision, although correctly decided at the time, should no longer represent the law. Can the latter be reconciled with the exercise of judicial power?

In legal education, people often applaud the judge who seeks to change the law to promote values or causes they support. Would you regard a judicial decision as having the same legitimacy if it advanced a cause you disliked?

Further Reading

Cross R, and Harris J, *Precedent in English Law* (4th ed, Clarendon Press, Oxford, 1991)

Dixon O, “Concerning Judicial Method” (1956) 29 ALJ 468



- Duxbury N, *The Nature and Authority of Precedent* (Cambridge UP, Cambridge, 2008)
- Farrar J, *Legal Reasoning* (Thomson Reuters, Sydney, 2010)
- Heydon, D, “Judicial Activism and the Death of the Rule of Law” (2003) XLVII (1) *Quadrant* 9 (also at (2003) 23 Aust Bar Rev 210)
- Kirby M, “Judicial Activism? A Riposte to the Counter-Reformation” (2004) 24 Aust Bar Rev 1
- Kronman A, “Precedent and Tradition” (1990) Yale LJ 1029
- Llewellyn K, *The Bramble Bush* (1930) (1960 ed, Oceana, New York)
- Schauer F, “Precedent” (1987) 39 Stanford LR 571
- Stone J, *Legal System and Lawyers’ Reasonings* (Maitland, Sydney, 1964)



9 Interpreting Statutes

THE NEED FOR INTERPRETATION

[9.20] The imprecision of language

What are the differences between statutory interpretation and common law reasoning?

Why is language an imprecise means of communication?

What factors in everyday speech help to mitigate those difficulties?

[9.30] The problem of interpreting statutes

Why is legislation different from other forms of communication? Why do these differences make statutory interpretation more complex than interpreting other forms of communication?

[9.40] Types of ambiguity

Explain what is meant by semantic ambiguity, syntactical ambiguity and contextual ambiguity.

How do Parliamentary counsel seek to reduce the level of ambiguity?

[9.50] THE INTENTION OF THE LEGISLATURE

What are the problems in seeking to determine “the intention of the legislature”?

Do the High Court’s explanations in *Zheng v Cai* (2009) 239 CLR 446 at 455-456 and *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 help to give a more coherent meaning to the notion of legislative intention?

[9.60] THE TRADITION OF STATUTORY INTERPRETATION

Why are statutes drafted with such specificity in the common law tradition?



Why is it better to talk in terms of principles of statutory interpretation, rather than rules?

Explain the literal rule, the golden rule, and the mischief rule. On this traditional approach to legal reasoning, when is it permissible to depart from a literal reading of the statutory provision?

[9.70] THE MODERN APPROACH TO STATUTORY INTERPRETATION

Why have the literal rule, the golden rule, and the mischief rule fallen into disfavour?

[9.80] Re-interpreting the traditional rules

What criticisms did Mason and Wilson JJ make in *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 of the traditional view about literal interpretation?

[9.90] The ascendancy of the purposive approach

What now is the role of literal interpretation in the construction of statutes?

What, according to Gleeson CJ, are the limitations of the purposive approach?

[9.100] THE USE OF EXTRINSIC MATERIALS

Why might recourse to extrinsic materials be desirable?

In what respects has the common law now developed a broader approach to the use of extrinsic materials than provided for by statute?

Going deeper . . .

Lord Steyn has written: “In the Westminster Parliament, exchanges sometimes take place late at night in nearly empty chambers whilst places of liquid refreshment are open. Sometimes there is a party political debate with whips on. The questions are often difficult but political warfare sometimes leaves little time for reflection. These are not ideal conditions for the making of authoritative statements about the meaning of a clause in a bill” (Johan Steyn, “The Intractable Problem of the Interpretation of Legal Texts” (2003) 25 *Sydney Law Review* 5 at 13).

Would you want to make it a rule that nothing said in the course of Parliamentary debates should be relied upon in interpreting the provisions of a statute? Argue the case for and against such a proposition.

**[9.130] STATUTORY INTERPRETATION AND HUMAN RIGHTS**

What is the principle of legality?

What rights are considered fundamental at common law?

How does the *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) differ from the *Human Rights Act 1998* in Britain in terms of the duty of judges to read statutes in the light of the human rights legislation?

Would it be within constitutional power for the federal parliament to enact a Human Rights Act which gives to the court the power to declare that a provision in a statute is incompatible with human rights?

[9.140] THE DYNAMIC NATURE OF STATUTORY INTERPRETATION

How are judges meant to apply statutes to the development of new technologies which could not have been in the contemplation of the Parliament at the time the Act was passed?

In what other ways may the circumstances have materially changed since an Act was passed?

Going deeper . . .

How does the process of statutory interpretation involve a dialogue between the past and the present?

REFLECTIONS

How can judges resolve the tension between deference to the intentions of Parliament and the need to apply statutes to contemporary circumstances and disputes?

When might it be appropriate for the courts to leave it to Parliament to amend a statute when a case raises its possible application to circumstances that could not have been within Parliament's contemplation?

Further Reading

Barnes J, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law" Part One (1994) 22 *Federal Law Review* 116; Part Two (1995) 23 *Federal Law Review* 77

Corcoran S, "Theories of Statutory Interpretation", in Corcoran S and Bottomley S (eds), *Interpreting Statutes* (Federation Press, Sydney, 2005), p 8

Cross R, *Statutory Interpretation* (3rd ed by Bell J and Engle G, Butterworths, London,



1995)

Eskridge W and Frickey P, “Statutory Interpretation as Practical Reasoning” (1990) 42 *Stanford LR* 321

Gummow W, *Change and Continuity* (OUP, Oxford, 1999)

Pearce D and Geddes R, *Statutory Interpretation in Australia* (7th ed, LexisNexis, Sydney, 2011)

Spigelman J, *Statutory Interpretation and Human Rights* (University of Queensland Press, Brisbane, 2008)

Steyn J, “The Intractable Problem of the Interpretation of Legal Texts” (2003) 25 *Sydney Law Review* 5

Stubbs M, “From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation” (2006) 34 *Federal Law Review* 103



10 The Challenge of Inclusion

[10.20] A LEGAL SYSTEM FOR ALL

What does it mean for the tradition of law in Australia to be “owned” by the people?

[10.30] Reconciliation with Aboriginal and Torres Strait Islander peoples

Explain the role of law in the tragedy of the “stolen children”.

What major issues need to be addressed to make progress towards reconciliation?

[10.40] Multiculturalism and the legal tradition

What are the five dimensions of multiculturalism in a legal system?

What problems are involved in having separate laws for particular groups?

Going deeper . . .

To what extent have the issues in terms of gender equality changed over the last 40 years? What issues remain the same?

Why might apologies from government leaders for the past behaviour of majorities be important in the process of reconciliation with an ill-treated minority?

Can governments legitimately apologise for the conduct of previous governments or former generations?

Give examples of the recognition of different minority beliefs and practices which would not be in conflict with mainstream values as expressed in the law.

Give examples of situations where the recognition of minority beliefs and practices would compromise fundamental mainstream values and understandings of human rights.

**[10.50] ACCESS TO JUSTICE: MAKING LEGAL RIGHTS EFFECTIVE**

Why is access to justice essential in fulfilling the promise of legal rights?

In what ways can reforming the law actually be an excuse for inaction?

[10.60] Bargaining in the shadow of the law

What does it mean to bargain in the shadow of the law?

In what ways do courts send “messages” that allow people to bargain in the law’s shadow?

[10.70] Pathways to justice

Why are legal remedies easier to pursue with some kinds of claim than with others?

Going deeper . . .

Why is access to justice an important aspect of the rule of law?

Should the Australian population have fewer rights and more means to enforce them?

OBSTACLES TO THE ENFORCEMENT OF RIGHTS**[10.80] Access to information**

Why is lack of information about legal rights an obstacle? Why is it not sufficient that Australia has a large number of lawyers in private practice?

[10.90] Cost

How are costs normally assessed?

What criticisms have been made of charging clients by the hour?

What issues arise in the management of trials when litigants represent themselves?

Going deeper . . .

Why do you think it is that people turn to lawyers for some kinds of legal claim much more than others?

What are the alternatives to charging clients by the hour?

What financial risks do people take when they embark on litigation?

**[10.95] IMPROVING ACCESS TO JUSTICE****[10.100] Providing information and advice**

What sources of information and advice are available to the general public in Australia?

[10.110] Reducing legal costs

What reforms have been made to the legal system in order to reduce costs and to give litigants advance information about likely costs?

What are the advantages and disadvantages of unbundled legal services for:

- (a) clients; and
- (b) lawyers?

[10.120] Contingency fees

What kinds of contingency fee arrangements are allowed in Australia?

In what ways could the right to charge contingency fees be abused? What safeguards could be put in place to limit the scope for abuse?

[10.130] Legal Aid

How is legal aid organised in Australia?

What limitations are there on gaining access to legal aid and on the funds which are made available for each case?

[10.140] Legislation as a social justice strategy

What problems are associated with the creation of private legal rights, enforceable through the courts, as a social justice strategy?

What other regulatory mechanisms could be utilised?

Going deeper . . .

Compare the contingency fee arrangements allowed in Australia with the American practice of charging clients a percentage of the money recovered. Do contingency fees promote speculative litigation?

More legal aid is often presented as the answer to unmet legal need. What other strategies could be adopted, alone or together, to help meet this need?

**[10.150] LEGAL SERVICES FOR THE DISADVANTAGED****[10.160] Aboriginal and Torres Strait Islander Legal Services**

What is the main workload of Aboriginal and Torres Strait Islander Legal Services?

[10.170] Community legal centres

What are the main roles of community legal centres?

How is their purpose different from Legal Aid Commissions?

[10.180] DISPUTE RESOLUTION PROCESSES

What is meant by alternative dispute resolution? What is it meant to be an alternative to?

How has alternative dispute resolution become part of the case management processes of the courts?

What are the advantages and disadvantages of mediation?

Going deeper . . .

What kinds of disputes cannot or should not be compromised?

Is compulsory referral to mediation ever appropriate?

[10.200] ACCESS TO JUSTICE AND THE PROBLEM OF CENTRIPETAL LAW

What is meant by centripetal and centrifugal law?

How does centripetal law add to the problems of providing access to justice?

[10.210] CONCLUSION: THE FUTURE OF TRADITION

What role do traditions play in the legitimisation of legal institutions?

Why is it that traditions can outlast the disappearance of those conditions that were essential for their development?

Why is remembering and valuing the past an important pathway on the road to constructive change?



REFLECTIONS

Imagine a society in which the law protected the rights of all equally, and had overcome all difficulties with navigating the court system which might be associated with age, gender, race or culture. Imagine too that courts were free and all legal representation publicly funded on a model analogous to Medicare. Would this be a legal heaven or its opposite? What disadvantages might flow from such ready access to justice?

In the light of your answer, consider what criteria you would use to determine that there is an optimal level of access to justice in Australia.

What will it require for the Australian legal tradition to meet the challenge of inclusion in the 21st century?

Further Reading

- Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Commonwealth of Australia, 2009)
- Astor H and Chinkin C, *Dispute Resolution in Australia* (2nd ed, LexisNexis, Sydney, 2002)
- Australian Law Reform Commission, *Managing Justice* (Sydney, 2000)
- Australian Law Reform Commission, Report No 57, *Multiculturalism and the Law* (Sydney, 1992)
- Coumarelos C, Wei Z and Zhou A, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Law And Justice Foundation Of New South Wales, Sydney, 2006).
- Galanter M, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1981) 19 *Journal Of Legal Pluralism & Unofficial Law* 1
- Human Rights and Equal Opportunity Commission, *Bringing Them Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families* (Sydney, 1997)
- Noone M and Tomsen S, *Lawyers in Conflict: Australian Lawyers and Legal Aid* (Federation Press, Sydney, 2006).
- Sackville R, "From Access to Justice to Managing Justice: The Transformation of the Judicial Role" (2002) 12 *Journal of Judicial Administration* 5