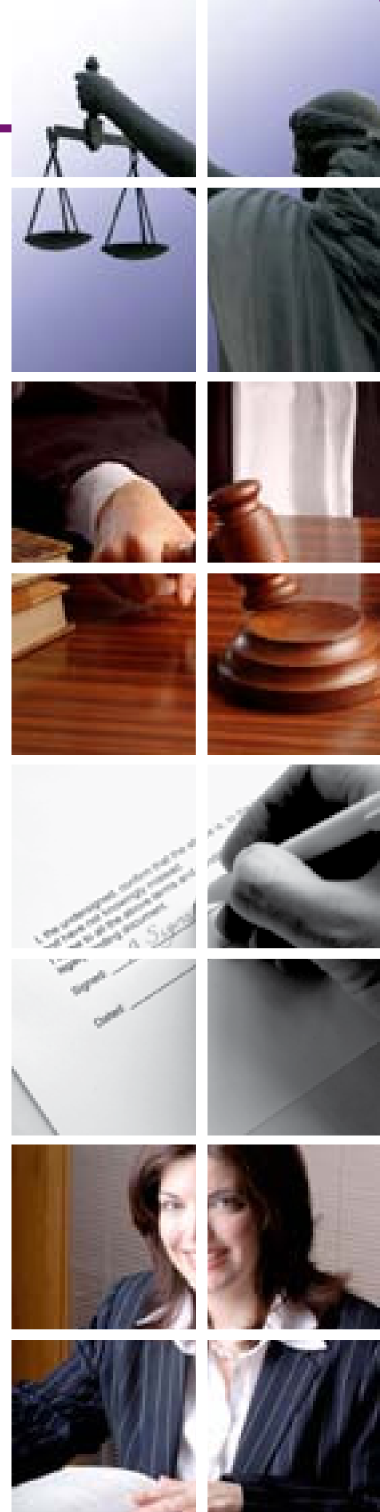
Legaldate

Volume 26 • Number 1 • March 2014

Contents



Law Making Through The Courts: How It Occurs And Is It An Effective Method Of Making Laws? 2-3

The Respective Roles Of Parliament And The Courts 2

The Common Law 2

The Hierarchy Of The Courts 2

The Doctrine Of Precedent 2

Persuasive Authority Of The Decisions Of Superior Courts 3

Examples Of Courts Creating New Laws 3

The High Court And The Constitution 3

Is The Common Law An Effective Method Of Law-Making And What Are It's Limitations? 3

Constituent Power 4-5

Further Reading 5

Legal Snapshot 6-7

Protecting Human Rights Through Parliamentary Scrutiny 6

A New System Of Parliamentary Human Rights Scrutiny 6

How The New System Operates 6

Effectiveness Of The Act 6

Conclusion 6

Further Reading 7

End Notes 7

Media Watch 7-8

One-Punch Alcohol Law Passed By NSW Parliament 7-8

The measures include 7

Labor supports legislation, sight unseen 8

Greens fear 'knee-jerk' reaction 8

Legaldate is published and distributed by:

Warringal Publications, PO Box 488, North Carlton VIC 3054

Telephone 0408 178 805 • Facsimile (03) 8678 1118

Website: www.warringalpublications.com.au

Subscription information: Full-rate $69.00 per annum • ISSN 1835-5048 • Copyright 2014

Law Making Through The Courts: How It Occurs And Is It An Effective Method Of Making Laws?

By **Professor the Hon. Alastair Nicholson** *AO*
Honorary Professorial Fellow,
Faculty of Law, University of Melbourne

The Respective Roles Of Parliament And The Courts

Most people think that the laws that govern their activities are made by parliament and simply administered by the courts. Parliamentary statutes are the most authorative sources of law and must be applied by the courts. However there are many cases where the meaning of the statute or its application to a particular fact situation is not clear and others where there is no applicable statute to the fact situation being dealt with by the court. In these circumstances it falls to the court to determine what the law is. In doing so the court has a law-making role. For many years the courts proceeded upon the fiction that they never made law, but merely stated law that already existed and to some extent this view persists today. However in a speech given in 1996, the former Chief Justice of the High Court, Sir Anthony Mason, made it clear that this was a fiction and that the reality was that courts did make law in a number of ways.[1]

The Common Law

In order to understand how this happens it is necessary to go back a little in history. Many of you will have heard the expression 'the common law' and countries like Australia, Canada, the United States and England are often referred to as 'common law countries' in contradistinction to most European countries, whose law is often described as civil law. That branch of the law is derived from Roman law where everything was codified in statute. It was further modified under the influence of Napoleon who introduced the Code Napoleon in France, which was adopted by most other European countries and their former colonies. What the expression 'the common law' means is the body of law laid down by the decisions of the courts. The concept goes back over 800 years. It originated in England and extended to its former colonies, including Australia.

To understand how this works it is also necessary to briefly discuss the hierarchy of the courts and the doctrine of precedent.

The Hierarchy Of The Courts

In the Australian context the High Court of Australia is the highest court. Beneath it sit the appellate divisions of the state and territory Supreme Courts, the Federal Court and Family Court, which are all at the same level. Below them again sit the decisions of single judges of those courts. All of these courts are generically described as the superior courts.

At the next level down are the District and County Courts of the states and territories and the Federal Circuit Courts. Below them are the Magistrates Courts of the states and territories. The decisions of these courts, although they bind the parties to the case are not considered to be authoritative in a law-making sense. They are not usually reported in law reports.

The Doctrine Of Precedent

It is from the decisions of the superior courts that the common law evolves. The significant decisions of all of these courts are to be found in the law reports and are used as precedents. This means that any decision of these courts on an issue of what the principles of law are in a particular area is regarded as an authority, which must be applied by all courts below them unless or until it is overruled by a higher court in the hierarchy or replaced by statute law passed by parliament. The principles laid down in decisions of the High Court must be followed by all other courts in Australia.

This does not mean that everything said in the judgments of the superior courts must be applied. Quite obviously a minority dissenting judgment must be approached with great care and the principles set out in such a judgment can only be applied if, and insofar as, they accord with the reasoning of the majority. Also, judges in the course of delivering a judgment will sometimes express opinions about aspects of a matter that are not strictly part of the principles underlying the decision. These remarks are often helpful but do not have any binding effect on the judgments of judges lower down the hierarchy. They are described as being 'obiter dicta', which is a Latin expression literally meaning 'said by the way' or 'statements in passing'.

Persuasive Authority Of The Decisions Of Superior Courts Outside The Hierarchy

As well as binding decisions, reference can be made to decisions of other superior courts outside the hierarchy as a guide to the law. For example in Australia, state Supreme Courts can and often do consider decisions of the Supreme Courts of other states and territories or superior courts of other countries such as England or New Zealand in deciding what the law is. These are often described as 'persuasive authorities' in circumstances where they are being followed by a judge of a court which is not bound by them.

In this way the common law operates to fill in gaps in the law and develops a degree of cohesion that extends across state and national boundaries.

STUDENT ACTIVITIES

1. Explain the fiction referred to by Sir Anthony Mason.
2. How is a hierarchy of courts relevant to law-making by the courts?
3. Explain the operation of the doctrine of precedent.
4. What are obiter dicta?
5. Explain the difference between persuasive and binding precedent.

Examples Of Courts Creating New Laws

An example of the way that this happens is to be found in the decision of the High Court in *Mabo's* case.[2] Prior to that decision a series of superior court decisions had held that before the arrival of the first fleet no law existed in Australia, which was described as '*terra nullius*'. This was an arrogant view that was profoundly offensive to Aboriginal people.

The majority of the High Court in *Mabo* rejected that view and held that the complex laws relating to land ownership in the Torres Strait prior to white settlement continued to apply to land that had not been alienated by the Crown. That decision, although it related to land in the Torres Strait, was clearly intended by the High Court to apply to all Aboriginal land in that category.

It was a landmark decision of enormous importance to the development of the law in Australia and it has untested implications that will no doubt be determined in subsequent cases.

For example the question is still open as to whether the decision extends beyond land law to other laws of the Aboriginal people such as the traditional adoption of children practiced by Torres Strait Islanders. This has not hitherto been regarded as forming part of the law of Australia but the Supreme Court of British Columbia has applied the *Mabo* principle to the recognition of similar native adoption practices.[3] This is also a good example of how the common law in Canada enables a court to apply a decision of an Australian court in deciding the law of Canada.

Another example of the law-making role of the courts is the case of *Marion*.[4] That was a case considering whether the consent of the Family Court was required before performing a sterilisation operation upon an intellectually disabled girl. One family court judge had previously decided that parental consent was all that was needed, another had disagreed and held that the court's consent was required. The judge was entitled to do so because he was not bound by the decision of another single judge of the same court. This left the law in some confusion and in the case of *Marion* the trial judge referred the issue to the Full Court of the Family Court for an authoritative decision. However that Court was unable to reach agreement and the matter was referred to the High Court of Australia which, by a majority, found that the consent of the Family Court was required. In doing so the High Court considered cases decided in overseas courts and in particular decisions of English superior courts to the same effect. It was not bound by them but was entitled to take them into account in making its own decision.

STUDENT ACTIVITIES

6. Explain how the Mabo case is an example of law-making by the courts.
7. How might the law created in the Mabo case still be developing?
8. Why did the trial judge in the Marion case refer the case to the Full Court of the Family Court?
9. What did the High Court of Australia finally decide in this case? How is this decision creating precedent to be followed by future courts?

The High Court And The Constitution

The High Court has an additional law-making role in the sense that it is the final arbiter of the meaning of the Australian Constitution. Parliament's authority to pass laws derives from the Constitution and the High Court can, and frequently has, declared that legislation has been passed in breach of the Constitution and set it aside.

An example of this was legislation that declared that the Communist Party of Australia was an illegal organisation and that its property should be seized.[5] The Commonwealth argued the defence power contained in the Constitution gave it the power to make this law. This was challenged in the High Court, which by a majority declared that the legislation was unconstitutional and set it aside.[6]

The importance of this case was described by former High Court justice Michael Kirby as follows:

> *'[The Communist party case] is a decision that I have a personal reason to remember quite vividly. It was, in my view, Dixon J's wisest and finest judicial hour. It is appropriate that we in Australia (and perhaps our friends elsewhere) should remember the case at a moment, such as the present, when unrestrained voices are raised urging us to cast aside our traditional liberties in response to the perceived threat of terrorism'.*[7]

In another landmark case, the High Court found that although the Constitution was silent on the issue, it contained a limited implied right of freedom of speech in Australia relating to political communication. This was again an important decision.[8]

Is The Common Law An Effective Method Of Law-Making And What Are It's Limitations?

While the common law provides the function of providing a legal remedy where the meaning of statute law is unclear or ambiguous, it also provides a remedy where there is no guidance to the existing law and certainty as to what the law is. It is true that this is law-making by unelected persons, namely the judges, but arguably the courts and the judiciary have been set up by parliament to perform this function and it is always open to parliament to change the law if it is dissatisfied with any judicial decision.

While the common law is effective it has limitations. One is that it requires a particular case to be brought before the courts before they can make a decision. Thus courts cannot initiate change in the law in the absence of such a case, nor can they give advisory opinions as to what the law is.

Another problem is that the cost of litigation can be great and is not open to many to engage in it without legal aid. If they receive aid they run the risk of paying the other side's legal costs if they lose. It is little consolation to have made a contribution to the development of the law if the result bankrupts you. Also governments of all political colours have greatly reduced the availability of legal aid in recent years, effectively excluding many people from the courts.

For the common law to operate effectively it requires highly skilled lawyers whose function is to study and examine what precedents apply to a particular situation and present argument to the courts as to which pervious decisions are relevant and authorative and to distinguish those who are not. If such quality representation is not available and people go unrepresented in court, as often happens today, the burden upon the judge to arrive at the correct decision is extremely heavy.

With these limitations the common law system has stood the test of time over hundreds of years and will continue to do so.

---

1 The Hon Sir Anthony Mason, *The Judge as a Law-maker* (1996) http://www.austlii.edu.au/au/journals/JCULRev/1996/2.pdf (accessed 5/03/14

2 Mabo v Queensland (No 2) ('Mabo case') [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)

3 Casimel v Insurance Corp of British Columbia, 1993 CanLII 1258 (BC C.A.)

4 *Secretary of the Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218*

5 *The Communist Party Dissolution Act* 1950 (Cth)

6 The Australian Communist Party v The Commonwealth (1951) 83 CLR 1.

7 The Hon. Michael Kirby AC '*Judicial Activism: 'Power Without Responsibility? No, Appropriate Activism Conforming to Duty'*. (2006) Melbourne University Law Review 3, 576

8 *Lange v Australian Broadcasting Corporation (1997)* 189 CLR 520

Constituent Power

Citizens can have a powerful impact on parliament's decisions, writes Greens Deputy Leader and Federal Member for Melbourne

Adam Bandt MP

Constituent power—the power of people to influence the way society is arranged and the decisions of its governing structures—is a diverse and yet constant force through human history.

Constituent power can be channelled through processes and procedures or it can be overwhelming and ungovernable, transforming and overturning the legal structures of the society.

There is no doubt though that constituent power, or 'people power', is a constant source of creativity and production of law and decision by governments. Constituent power is the motor of history.

Perhaps a good starting point for understanding the power of constituents is the classic form of expressing constituent power—the petition.

One of the most important petitions in Australian history is the Yirrkala bark petition. In 1963 the Yolngu people of the Gove Peninsula signed a petition in response to the exploration of mining companies in the area. The petition was tabled in the Commonwealth Parliament. It precipitated inquiries and a legal case that eventually led directly to the Whitlam Government beginning to recognise Aboriginal land rights in northern Australia.[i]

Petitions, a signed document setting out the grievances of the people to the established power, have a long pedigree. In ancient Imperial China petitions were sent to the *Tongzheng si* or Office of Transmission who then read the list of concerns to the Emperor.[ii]

Petitions can be a spark or a catalyst for action and can be an important moment in social movements. Here in my electorate of Melbourne the famous 'Monster Petition', a petition of Victorians collected in 1891, was 260 metres long and 200mm wide, written on paper, and sewn into a giant roll.[iii] The 30,000 signatures were a powerful rebuttal to the claim that there was little support for women being able to vote. It was a major contributor to the eventual success of the suffragettes who finally won voting rights for women in Victoria in 1908.

Nowadays, petitions are more likely to be online and hosted by groups like GetUp or change.org. Parliament, still stuck in the processes of the eighteenth and nineteenth centuries, when the 'modern' rules for petitions developed, still doesn't have an official procedure for accepting online petitions. However, many members of parliament, including me, will often get leave to table online petitions while making a speech.

STUDENT ACTIVITIES

1. What is constituent power?
2. How can constituent power be expressed?
3. When was the Yirrkala Bark petition?
4. How did this petition eventually lead to the Whitlam Government recognising Aboriginal land rights?
5. What is a petition and how was it used in the Ming Dynasty of China?
6. What was the petition of 1891 trying to achieve?
7. How have petitions changed in the present time? Do you think this method of creating a petition may be more successful?
8. To what extent do you think petitions can influence a change in the law?

Petitions are just one of the many ways the 'demonstration' of the grievances of the people affect the law and decisions of governments. Writing letters, demonstrations and protests are other ways the will of the people is represented in-between elections. With the seven days a week, twenty-four hours a day, media cycle feeding and affecting public opinion, opinion which is regularly measured through polls, symbolic actions of various kinds can have a direct impact on the government. These kinds of actions, when reported or transmitted to the public, can change public opinion and influence the actions of government.

Recent decades have seen many examples of protest shifting public opinion. My party grew through the demonstrations and blockades on the Franklin River led by former Greens leader Bob Brown. The 'No Dam' movement contributed to the change of government and secured a promise of Commonwealth intervention to protect the Tasmanian wilderness.[iv]

Civil disobedience actions, with many arrests, were a feature of the anti-Vietnam movement, the anti-nuclear movement and more recently the movement of farmers against coal seam gas which, along with many others, have had a direct impact on government policy.

This shift from the symbolic to more direct forms of protest and their effects is probably most profound in the actions of workers organised in unions. Various forms of industrial action can bring about pressure in workplaces, businesses and other sectors in the economy.

Through industrial action, workers acting collectively seek not only to influence their employers' decisions about wages and working conditions, but also often government policy.

The Green Bans put in place in 1970s by the Builders Laborers Federation, the forerunner of today's CFMEU, led to important areas of Sydney such as the famous Sydney rocks being saved from the bulldozers. Jack Mundey, now a long time Greens Party member, also led the building workers in putting bans on construction that would have destroyed bush land along the harbor. The direct conflict with the then Liberal State Government was an important shift in Sydney's attitude towards heritage protection.[v]

One of the most important ways social movements affect government policy is to have governments thrown out of office. Former Prime Minister John Howard was defeated at the 2007 election, even losing his own seat, largely on the back of a concerted campaign by the union movement who door knocked, phoned and organised the community to protest against his hated WorkChoices laws. Petitions, demonstrations, public forums and house meetings, as well as big budget advertising, were all important tools in the unions 'Your rights at work' campaign.

Here in Melbourne we used similar methods to win the seat of Melbourne at the 2010 election. This led to talks on the formation of government with Julia Gillard's Labor and resulted in some of the most far-reaching clean energy laws in the world.

The ultimate impact constituent power can have on a society is the transformation or revamping of the very basis of the government and legal structures that underpin it, fundamentally changing the constitution and the political foundation of the society.

In Australia we have a process for transforming or amending the constitution via a referendum where the people vote on changing the balance of powers or scope of the state's capacity to make decisions.

The most recent attempt to change the constitution, removing the Queen as the head of state and becoming a republic, failed. Soon we are likely to be asked to decide on changing references to Indigenous people in the Constitution, to recognise the country's traditional owners and first peoples.

STUDENT ACTIVITIES

9. In what other ways can the people try to influence a change in the law?
10. Why is it important for governments to be responsive to ground-swells of protests?
11. Explain actions by the people that have influenced a change in the law.
12. How did unions influence changes in the law in the 1970s and in 2007?
13. How can a referendum change the balance of power between the states and the Commonwealth?
14. To what extent have constitutional referendums been successful in the past?

These ways of deciding the political and legal arrangements in society are relatively well ordered.

But in many societies political schisms or economic and social conflict becomes so profound it is unable to be contained within the existing constituted arrangements. It is then that constituent power can have its most profound impacts on the law and political decision as the constituted power is turned upside down or overthrown. Constituent power is no longer channelled through the existing frameworks. It becomes revolutionary.

We saw this most recently in the Middle East, in places like Egypt, where consistent power expressed on the streets led to the fall of the Egyptian regime and a process for the drawing up of a new constitution.[vi] This is just the latest in countless examples throughout history, including the English Revolution (1640-1660) American Revolution (1765-1783), which laid down the template of our own constitution, where constituent power busts up the old ways of organising power and decision making in society and then a new legal arrangement or constitution is put in place.

Most often the new constituted power then becomes solidified and before long people see it as the way we have always done things. A new rule of law is created. Constituents, the people, then begin again to affect and influence the new power. Petitioning, protesting, making their voices heard and history continues.

Of course one never knows when a simple petition might lead to a revolution or a simple protest might lead to an uprising and most often they do not. The process of give and take, of political accommodation and refusal, the countless expressions of anger or dissatisfaction expressed daily by citizens and people in Australia and around the world are constantly shaping the decisions of government and the law in small ways or sometimes ground shaking ways. It is never easy to predict which it will be.

One thing is certain: constituent power will continue to be expressed and continue to construct the society in which we live.

STUDENT ACTIVITIES

15. How can constituent power lead to a revolution?
16. How can a revolution lead to a new legal arrangement?
17. Investigate the Yirrkala bark petition.
    a. Explain why this petition was signed and how it was hoping to influence a change in the law.
    b. What actions actions did the Yirrkala people take?
    c. What did these actions lead to?
18. 'Constituent power can be channeled through processes and procedures or it can be overwhelming and ungovernable, transforming and overturning the legal structures of the society.' Discuss.

i Journey goes full circle from Bark Petition to Blue Mud Bay, Australian Broadcasting Corporation. Retrieved, March 12 2014 http://www.abc.net.au/news/2008-08-14/journey-goes-full-circle-from-bark-petition-to/475920

ii Hucker, Charles O. (December 1958). "Governmental Organization of The Ming Dynasty" Harvard Journal of Asiatic Studies (Harvard Journal of Asiatic Studies, Vol. 21) 21: 1–66.

iii Women's Sufferage Petition, Parliament House Victoria. Retrieved, March 12 2014 http://www.parliament.vic.gov.au/about/the-history-of-parliament/womens-suffrage-petition

iv Franklin dam still controversial 30 years on, Australian Broadcasting Corporation. Retrieved, March 12 2014, http://www.abc.net.au/news/2012-12-14/environmental-anniversary/4427336

v Burgmann, M (December 2012) "The Green Bans That Saved Sydney". New Matilda, Retrieved, March 12 2014 https://newmatilda.com/2011/07/19/green-bans-saved-sydney

vi Kanalley, C (30 January 2011) "Egypt Revolution 2011: A Complete Guide To The Unrest". Huffington Post, Retrieved, March 12 2014 http://www.huffingtonpost.com/2011/01/30/egypt-revolution-2011_n_816026.html

Further Reading

Museum of Australian Democracy, Commonwealth of Australia – Yirrkala bark petition: http://foundingdocs.gov.au/item-did-104.html

Protecting Human Rights Through Parliamentary Scrutiny

Hugh de Kretser and **Ashlea Hawkins**
Human Rights Law Centre www.hrlc.org.au

In 2011, a new two-stage system of human rights scrutiny was introduced into the Commonwealth Parliament. The new system involves compulsory statements as to whether new legislation is compatible with human rights as well as oversight by the new Joint Parliamentary Committee on Human Rights. The system provides greater transparency and focus on human rights issues in Commonwealth Parliament but is limited in its impact by its self-regulatory nature.

A New System Of Parliamentary Human Rights Scrutiny

Australia is a party to all of the key international human rights treaties. However, these treaties do not automatically become part of Australian domestic law. Australia is the only Western democracy without a national human rights act or charter (although both Victoria and the ACT have charters) and Australian law only provides incomplete protection of human rights.

In 2010, the Rudd Government rejected the recommendation of the National Human Rights Consultation for a national human rights act.[1] However, the Government did act on its recommendations to improve parliamentary scrutiny of human rights. The Commonwealth Parliament implemented these recommendations when it passed the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (the Act) that introduced the new system of human rights scrutiny.

How The New System Operates

Under the new system, a member of parliament who introduces a bill must present a statement assessing whether the bill is compatible with human rights. Human rights are defined by reference to the seven key international human rights treaties listed in the Act.

Statements of compatibility are expected to provide information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how the provisions may impact on human rights.

The Parliamentary Human Rights Committee then provides oversight with a secondary compatibility review. It can also examine legislation already passed and any other matters referred to it by the Attorney-General.

Statements of compatibility seek to enhance parliamentary debate by clarifying the human rights implications of proposed legislation. They are also intended to focus the attention of Ministers and public servants on human rights issues in policy and legislative development.

The scrutiny process adds greater transparency around human rights issues, in turn increasing political pressure to act in accordance with international human rights obligations.

However, statements of compatibility do not themselves create legal rights or entitlements and the Commonwealth Parliament can still pass a bill even though it is incompatible with human rights. Further, the new scrutiny process is exclusively focussed on Commonwealth Parliament. The new system does not create any new role for courts to assess and invalidate legislation that breaches human rights.

STUDENT ACTIVITIES

1. What did the two-stages of human rights scrutiny involve?
2. Which state/territory has human rights' charters in Australia?
3. Look up the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and answer the questions.
   a. What is the function of the 2Parliamentary Joint Committee on Human Rights?
   b. What are compatibility statements and when are they used?
4. Can Commonwealth legislation be passed by the Commonwealth Parliament if parts of it are not compatible with human rights? Explain.

Effectiveness Of The Act

The new system of human rights scrutiny is a positive development that increases the likelihood of new legislation being compatible with human rights.

However, the self-regulatory nature of the system is an inherent weakness, particularly where issues concern minority groups, where there is less political interest in complying with human rights. The quality of statements of compatibility has varied and while the Committee has generally taken its role seriously, its impact has been limited.

For example, the statement of compatibility for proposed legislation around security assessments of asylum seekers declared the legislation to be compatible with human rights despite the fact that it undermined fundamental rights.[3] Similarly, a 2013 Committee report that found that the offshore processing of asylum seekers carried a significant risk of being incompatible with human rights, did not result in any changes to the legislation and appears to have had little political impact.[4]

On a more positive note, the Committee's reports[5] that criticised legislation that reduced welfare payments to single parents did make an important contribution to public debate about the measures, even if it did not result in the legislation being deferred or amended.[v]

Conclusion

The new system of parliamentary scrutiny of human rights is a welcome development that increases the chances of legislation complying with human rights as well as providing greater transparency around rights issues. However, in the absence of a stronger role for the courts, the self-regulatory nature of the new system significantly undermines its potential impact.

Protecting Human Rights Through Parliamentary Scrutiny (cont'd)

STUDENT ACTIVITIES

5. Explain one of the problems with compatibility statements. Give an example.
6. Give an example of how compatibility statements resulted in a fairer law.
7. Former Attorney-General Nicola Roxon said there was no need for a bill of rights since the passing of the Act. Do you agree with this statement? Explain.

Further Reading

Williams, G. and Burton, L 2013 'Australia's Exclusive Parliamentary Model of Rights Protection', Statute Law Review, Vol 34, no. 1, p. 62.

Human Rights Law Centre Submission, 'Parliamentary Scrutiny and the Promotion and Protection of Human Rights: Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010' http://www.hrlrc.org.au/files/Human-Rights-Parliamentary-Scrutiny-Bill-Inquiry-HRLRC-Submission-Oct-2010.pdf

Parliamentary Joint Committee on Human Rights. Parliament of Australia, Practice Note 1 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Practice_Notes/practicenote1/index

End Notes

1 Australian Government, Attorney-General's Department, 'National Human Rights Consultation Report'. http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx

2 Attachment A, Explanatory Memorandum, Migration Amendment Bill 2013 (Cth) http://www.comlaw.gov.au/Details/C2013B00234/Explanatory%20Memorandum/Text

3 Parliamentary Joint Committee on Human Rights, Parliament of Australia, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny Act 2011: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/92013/~/media/Committees/Senate/committee/humanrights_ctte/reports/2013/9_2013/pdf/report.ashx

4 Parliamentary Joint Committee on Human Rights, Parliament of Australia, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny Act 2011: Interim Report – Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2012/42012/index

Parliamentary Joint Committee on Human Rights, Parliament of Australia, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny Act 2011: Social Security Legislation Amendment (Fair Incentives to Work) Act http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/52013/index

5 Dan Harrison, 'Push to Delay Cut in Parent Payment', Sydney Morning Herald (online), 24 August 2012 http://www.smh.com.au/federal-politics/political-news/push-to-delay-cut-in-parent-payment-20120823-24p3t.html

AAP, 'Single Mums to Rally Over Payment Cuts, The Telegraph News (online), 7 October 2012 http://www.dailytelegraph.com.au/single-mums-to-rally-over-payment-cuts/story-e6freuz0-1226489025709

Patricia Karvelas, 'Single Parent Cuts 'Breach' Human Rights, The Australian (online), 21 March 2013 http://www.theaustralian.com.au/national-affairs/call-to-reverse-single-parent-cuts/story-fn59niix-1226602000832

Media Watch

By **Margaret Beazer**

One-Punch Alcohol Laws Passed By NSW Parliament

31 January 2014, ABC News

Legislation to tackle alcohol-fuelled violence, including a controversial law for deadly one-punch assaults, has been passed by the New South Wales Parliament.

The Lower House approved the bill at lunchtime yesterday and the Upper House voted in favour shortly before 7pm (AEDT).

Among the initiatives are mandatory eight-year prison terms for anyone who fatally punches someone while under the influence of drugs or alcohol.

The legislation also includes a new precinct in central Sydney where bars and clubs will be subject to strict new conditions, including lock-outs.

The Government announced the measures last week, in response to pressure over the death of Daniel Christie from a single punch at Kings Cross.

The measures include:

- Eight-year minimum sentencing for alcohol or drug-fuelled assaults ending in death.
- Serious assault maximum penalty increased by two years, with mandatory minimum sentences.
- On the spot fines for disorderly behaviour increased from $200 to $1,100.
- Police have powers to immediately ban 'troublemakers' from CBD/Kings Cross.
- Penalty for possession of steroids increased from two to 25 years.
- CBD/Kings Cross venues to have 1:30am lockouts with drinks stopping at 3:00am.
- Bottle shops across NSW to close at 10:00pm.

Media Watch

By **Margaret Beazer**

One-Punch Alcohol Laws Passed By NSW Parliament

31 January 2014, ABC News

Politicians were forced to cancel their holidays for the special sitting of State Parliament.

Premier Barry O'Farrell told Parliament during the debate that action is needed because the courts have not been prepared to hand out the sentences that people expect.

'Much of this is indeed pioneering legislation,' he said.

'It has to be to address an issue that, if the status quo was to remain, would continue to see too many innocent victims either killed or seriously injured.

'If we have to come back and revisit this, if we have to fine tune, we will because we are determined to put in place an effective regime.'

Labor supports legislation, sight unseen

The Opposition voted with the Government, despite several Labor MPs raising concerns about mandatory sentencing.

However before the debate began Opposition Leader John Robertson complained that he had not seen any details of the legislation.

'We will support the Government's one-punch laws,' Mr Robertson said.

'The Government had to be dragged kicking and screaming to do something about alcohol-fuelled violence.

'We haven't seen the legislation on all those other issues. We're awaiting the detail of all that.

'I have to say it's very disappointing that we're still waiting, on such an important issue, to see the legislation the Government will introduce.'

Greens fear 'knee-jerk' reaction

Greens MP John Kaye says the measures are a 'knee-jerk' reaction.

'We don't believe there's evidence to justify what they're doing,' he said.

'We don't believe we can justify imposing on responsible late night venue goers measures that are probably going to fail.'

The Greens believe the real issues are being ignored.

'The dangerous promotions of deep discounting of alcohol, the failure to enforce responsible service of alcohol in venues and excessive liquor outlet density,' Dr Kaye said.

But Premier O'Farrell says the legislation puts punishment for one-punch attacks in line with community expectations.

'The concern I have is that the judiciary has not been doing their job,' he said.

'So successive parliaments have been giving our courts substantial penalties to hand out, and yet over the past four years, the penalty for manslaughter has been on average less than four years.

'That is clearly out of step with the community.'

The Premier said on Wednesday that he wanted the legislation passed by Friday.

'We're in the hands of the Legislative Council, but my message to all members of the Legislative Council is that the community's demanded tough action,' Mr O'Farrell said.

'These are tough measures and I would encourage them to give them the priority that they deserve.

'We want to have, in particular, the one-punch, the death by assault legislation, in place and operational by this weekend.'

Other laws for serious violent assaults are set to be looked at next month.

Meanwhile, commercial television networks have begun broadcasting a campaign against one-punch assaults funded by professional boxer Danny Green.

The State Government struck a deal with the seven networks to show the ad depicting Green intervening before one man punches another.

It will air until the Government's own community awareness and media campaigns begin.

Green paid for the advertisement out of his own pocket two years ago, after a fatal assault in his hometown of Perth.

To see the full article please go to: http://www.abc.net.au/news/2014-01-30/one-punch-alcohol-laws-pass-in-nsw-lower-house/5227078

Permission sought at time of publication.

STUDENT ACTIVITIES

1. What problem is the new legislation trying to overcome?
2. Who is likely to have tried to influence the NSW Government to initiate changes in the law in this area?
3. List the stages a bill must pass through in parliament before it can become law.
4. Describe three changes in the law that are included in this new legislation.
5. Why do you think mandatory sentencing is a concern to some people?
6. What problems do The Greens see with this new legislation?
7. Look up the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) on the Internet on the Parliament of NSW website. See if you can find the Second Reading Speech. Explain what Premier O'Farrell said was the main reason for this change in the law.
8. When did this bill receive Royal Assent?
9. In Victoria the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic.) created two new offences, 'causing serious injury intentionally in circumstances of gross violence' and 'causing serious injury recklessly in circumstances of gross violence'. The definition of gross violence includes planning in advance or being in the company of two or more people when the injury was caused. How do you think this differs from the NSW legislation?

Warringal Publications — producers of excellent resources for teachers and students. For further information on the Updates series and study guides call (03) 0408 178805, or log on to www.warringalpublications.com.au

General Editor: Margaret Beazer, Education Consultant and Legal Studies Writer
Student Activities Writer: Margaret Beazer
Managing Editor: Denise Michie