

9.1 Law and Society

Topic 1: Law and Justice

The Essential influences on Law

- **The concept of the rule of law:**
 - Law is a set of rules, binding on all members of society and enforceable.
 - The idea that no one person or group should be above the law has developed over the last 200 years in western democracies and has become regarding in the post WWII United Nations system as an indispensable part of achieving a healthy political climate.
 - The law is to be known and be applicable to all citizens.
 - The government should be governed by the known laws of that society as opposed to an arbitrary use of power by governments when the rule of law is absent.
 - The concept states that no person or group stands alone above the law and, in theory; no one may break it without facing punishment.
 - Also, central to this concept is that the individual is treated with dignity and respect.
 - The rule of law is a feature of democratic societies such as Australia, Britain, France, Canada, Japan, Germany, New Zealand and the United States.
 - Some countries have experienced increased application of the rule of law, such as South Africa in 1994 after the abolishment of the apartheid system.
 - The rule of law does not operate when there is anarchy.
 - Certain principles are basic to the rule of law, such as independent judiciary, natural justice, equality under the law regardless of status of position, and protection against violence and anarchy.
 - The rule of law is guaranteed by:
 - The separation of powers
 - Monitoring of police
 - Means of ensuring government acts are according to the law, such as judicial review, and other external review
 - Informal means of challenging government decisions, such as lobby groups
 - An informed public
 - Certain freedoms, such as freedom of: movement, speech, the press, assembly, religion and information are fundamental to societies where the rule of law exists.
 - Without any of these rules, the rule of law is undermined.
- **The influences:**
 - **Social**
 - Society has developed certain attitudes to antisocial behaviour over time.
 - Recent changes have been made to the law in the areas of drink-driving, terrorism, gang rape, asylum seekers, domestic violence and alcohol use.
 - The change in social attitudes will affect law makers such as parliament and judges.
 - Change usually comes about after public debate and outrage of certain issues.
 - Politicians become aware of society's views about various matters through media reports, talkback shows, protests and lobbying.
 - For example, the public outcry after the Cronulla Riots in 2005 led to the NSW Parliament passing tougher laws giving police greater powers to deal with rioters.
 - **Cultural**
 - Within society, there are many cultures, but the dominant one usually has a strong bearing on the types of laws that are enacted by its law-makers.
 - Less dominant cultures may not be entirely happy with the dominant culture in society.
 - For example, the European culture that took over all aspects of Indigenous Australian society and culture leading to the introduction of the British legal system and disappearance of customary law.
 - Multiculturalism can also affect laws such as the enactment of the *Racial Discrimination Act 1975 (Cwlth)*.
 - **Moral**
 - Morals play a major role in shaping the law in Australia.
 - Many laws are created because of the perceived immorality of certain activities.
 - Society has dominant moral views about certain issues.
 - These often change over time.
 - For example, in the past the view of wedlock, abortion, homosexuality and de facto relationships was of them being morally wrong.
 - However, societies' views on these issues have changed over time and these activities are no longer considered immoral or illegal.
 - On the other hand, many views in society have considerably tightened.
 - For example, domestic violence is no longer tolerated or ignored, nor is sexual assault or rape.
 - Society now sees these actions as wrong and they are punishable by the law.
 - Likewise, racism and genocide have been universally condemned under international law.
 - There are also changes in how society deals with breaches of the law due to different moral codes.
 - For example, capital punishment (death penalty) and corporal punishment were once widely accepted as normal punishment for serious crimes. These penalties are now no longer accepted and have been outlawed in Australia as we now regard these as an infringement on human rights. (Australia signed various international treaties)

- Euthanasia and same-sex marriages are being promoted by lobby groups that pressure for change to occur.
- **Political**
 - The democratic system has widespread support as it gives individuals and groups freedom to have their say.
 - Each political party places their emphasis on certain beliefs. (Liberal – individual choice, ALP – social justice, Greens – environmental issues)
 - They have a set of beliefs about how society should be run.
 - Lobby groups also attempt to exert political pressure on government and change of introduce laws to further their causes.
- **Economic**
 - People’s attitudes to the functioning of aspects of the economy are a significant factors influencing law.
 - Those with large amounts of money possess economic power to influence the legal system for their own benefit.
 - They use their contacts within and donation to political parties to lobby politicians.
 - They have greater access to political decision-makers and can bring economic pressure to bear to get the changes they want.

Nature of Law

- **Development of law as a reflection of past and present society:**
 - Historical influences affect the legal system.
 - Australia’s legal system is to large degree a product of its colonial past.
 - The principles, practices and personnel involved in the law have been retained from the past.
 - The doctrine of precedent is a principle from the past that is used in our legal system.
 - The names, roles and clothing of personnel: magistrates, judges, barristers, solicitors originate from our British links.
 - Even the language, such as addressing the judge as ‘Your Honour’ is a product of the past.
 - Many of these aspects are resistant to change, which can unease people or confuse them when they have to use our legal system.
 - The law system also reflects present society.
 - There have been increasing attempts to make the court system more accessible and less threatening for the people who have to use it.
 - Alternatives to the courtroom have also been developed such as mediation and counselling.
- **Legal Systems:**
 - **Customary law**
 - The first type of law to develop in all societies.
 - The principles and procedures that have developed through general usage according to the customs of the people.
 - Customs arose to deal with problems in the most harmonious way.
 - Over time, the customs developed into rules and laws.
 - Three areas where customary law has had an impact on the Australian legal system are:
 - Aboriginal and Torres Strait Islander customary law
 - English customary law
 - International customary law
 - Originally, customary law was not written down but simply existed through word of mouth, being passed down by generation to generation (ATSI customary law)
 - **Common law**
 - The system of law developed by England and is used in Australia, Canada, New Zealand and the United States.
 - The law developed by judges by decisions in court and through the doctrine of precedent.
 - This system of law enables the law to respond to changes in society, because judges can distinguish (revise, overrule, disregard) cases which they feel are no longer relevant to the precedent.
 - These statements become precedents which are recorded in case law records.
 - These civil law countries have an adversarial system of trial where each side of the case present to the judge.
 - **Civil law**
 - The system of law developed by Russia and related social republics who use a Soviet system of law.
 - Used in Europe, Japan and Latin America.
 - The primary feature of civil law is that laws are written into a collection, codified and not determine, as in common law, by judges.
 - These civil law countries have an inquisitorial system of trial where the judge plays a more active role of investigation.
- **Doctrine of natural justice:**
 - Natural justice is the idea that people should be equal before the law and that logical reasoning should be applied to ensure fair processes are followed in both civil and criminal proceedings.
 - The term ‘natural justice’ can be used interchangeably with the term ‘procedural justice’.
 - Two basic principles are that defendants have the right to have their say and a right to a fair and impartial hearing.
 - Natural justice also implies that the defendant:
 - is presumed innocent until proven guilty
 - has the right to know what the charge is
 - is guaranteed freedom from bias
 - has the opportunity to question and challenge and statement prejudicial to their defence
 - can hear everything that the other side places before the decision maker.
- **The purpose of different types of law:**
 - **Domestic and international law**

- Domestic law applies within only nation states or countries and varies between different nations such as taxation.
- Australia's domestic legal system includes the federal government and governments (including the parliaments, courts and cabinets) of the 6 states and two territories and the many local councils around Australia.
- When parliament passes a law it is known as an act of parliament, statute law.
- International law applies to nations and regulates the conduct between them (International Crime Court).
- International law is made through treaties, conventions, declarations, UN resolutions and case law.
- Domestic law operates within the boundaries of the country of the country (jurisdiction).
- The main function for domestic law include:
 - Protection of citizens from violence
 - Punishment and reform of citizens who violate the law
 - Protection of economic rights
 - Assistance in the resolution of industrial disputes
 - Prevention of unlawful discrimination
 - National defence and the protection of the sovereignty of the state
- **Public and private law**
 - Public law is law that affects everyone.
 - It deals with the law-making capacity of governments and with disputes between the State and its citizens.
 - Public law includes constitutional law, administrative law, industrial law and criminal law.
 - Private law deals with disputes between private individuals and does not involve the community. It has developed over time in the common law system in response to actions of private citizens.
 - Private law consists of contract law, torts, family law and property law.
- **Civil and criminal law**
 - Civil law involves disputes between private individuals and institutions.
 - The burden of proof lies with the plaintiff and standard of proof is on the balance of probabilities.
 - Criminal law consists of harmful actions or failures to act that are committed against the whole community.
 - Punishment is determined by the State.
 - The burden of proof lies with the prosecution and standard of proof is beyond reasonable doubt.
- **Contract law**
 - Agreements between two parties.
 - Law in this area covers all sorts of agreements between parties, such as buying a car or taking out a loan.
 - Regulation of business and commerce is substantially based on contract law.
- **Tort law**
 - A tort is a civil action that causes another person harm or discomfort and could have been predicted or avoided.
 - Aims to give compensation to the injured party, usually in the form of money.
 - Applied when someone is suing someone else.
- **Property law**
 - Deals with the ownership of real property.
 - Real property is land and anything else on it, such as a house.
 - Encompasses matters relating to renting; that is, matters between property owners and tenants.
- **Aboriginal and Torres Strait Islander customary law**
 - Developed over thousands of years and passed down orally and often intermixed with stories of the Dreaming.
 - This type of law started to fade away after the arrival of Europeans in 1788 and their disruption of the way of life on Indigenous Australians.
 - Incorporates tradition, ritual and kinship.
 - Some limited recognition of ATSI customary law in Australian criminal law and land rights.

Nature of Justice

- **Concepts of:**
 - **Access**
 - A persons access to the legal system is dependent upon:
 - their knowledge of the law and ability to gain information
 - how accessible legal representation is (Legal Aid)
 - whether matters are heard by courts without undue delay.
 - The law is complex and difficult for most people to understand. A trained lawyer must deal with all legal matters. People are not fully aware of their rights and responsibilities in legal matters, and therefore, either rely on lawyers in many cases do nothing. Minors are generally given Legal Aid support if required.
 - **Equity**
 - Equity is a correction of justice where the law does not take individual circumstances into account. One key principle of equality is that a person's intentions are often more important than their actions. For example gaoling a child for stealing gum.
 - **Fairness**
 - 'Fairness' refers to a desire to see all people treated as equal, but 'equality' does not necessarily lead to fairness. The legal system attempts to achieve justice. This means that the law must be unbiased and must treat everyone in the same way. Cases are determined according to the fairest outcome rather than the most correct legal outcome.
 - **Equality**

- Justice is the equal treatment of all people. The law is meant to treat people equally, but in reality the law is not truly equitable. Different people have different degrees of access to the legal system (wealthy people, educated people and influential lobby groups).
- **Human Rights**
 - Human Rights are said to be fundamental and inalienable. This means that every person is entitled to them and no government has the right to take them away. Principles can be seen today in the nature of constitutional law, which defines the limits to the power of the state. More recent declarations such as the Universal Declaration of Human Rights place a greater emphasis on governments serving citizens through the provision of welfare, education and health. Human Rights are essential if justice is to be achieved.
- **Institutionalized Inequality**
 - When an idea or concept becomes widely accepted in society it is often said to be institutionalized. Society's acceptance of this issue reinforces inequality for a disadvantaged group. For example the poor educational experiences for Indigenous Australians. Equality makes the law treat everyone equal, however equality doesn't occur.

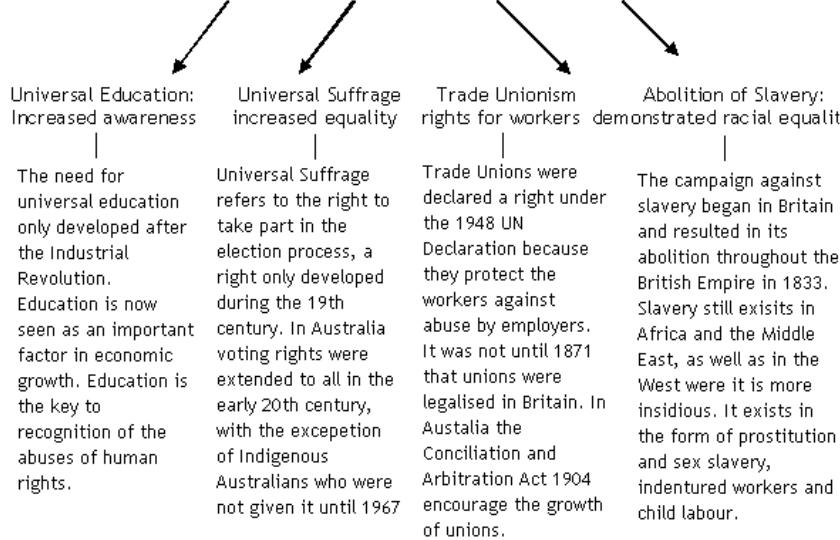
Topic 2: Human Rights

Rights

- **The nature and development of concepts of human rights:**
 - **State sovereignty**
 - Sovereignty is the ultimate law-making power.
 - A state is an organisation that governs a particular piece of the earth's surface.
 - State Sovereignty is the concept that an organisation has ultimate law-making power over a part of the earth's surface.
 - There are 193 'organisations' that possess law-making power, run their own affairs and not accountable to any higher authority.
 - These are known as countries of the world, nation states or just states (not the same as the states that make up a country).
 - A nation is a people that share a common heritage and common interests and sometimes a common race.
 - A nation state may lose its sovereignty, such as has occurred in 2003 when Saddam Hussein was deposed.
 - **'Natural law' doctrine**
 - Natural law states that law should be based on a reasoned analysis of what is obvious to rational human beings in the natural order of things.
 - Under this theory valid laws can only be those laws that "ought to be".
 - Based on reason analysis of what can be considered "good" and "bad".
 - This doctrine holds that laws should provide the greatest happiness to the greatest number, and is reflected in the utilitarianism concept of law.
 - Accordingly laws should be looked at as to how much "pleasure" they can provide for the society, as opposed to how much pain the law will cause.
 - Laws against a particular group, such as Asians, during the era of the White Australia policy, are seen as "bad" laws.
 - **Historic constitutional documents**
 - ❖ **Magna Carta (1215)**
 - Limited King John of England's power in a number of ways:
 - promised that there would not be interference in the life of the Church
 - no new taxes imposed without agreement
 - no free man would be imprisoned without a trial
 - all free men could travel anywhere they wished
 - towns would keep all the privileges that they had build up over the years
 - ❖ **Habeas Corpus Act 1679 (UK)**
 - Declared that the lawfulness of detention must be tested quickly by the courts.
 - People could not be held indefinitely without being charged or facing trial.
 - ❖ **English Bill of Rights (1688)**
 - Forbade the king to raise an army or to levy taxes without the consent of parliament.
 - Guaranteed freedom of speech for those who spoke in parliament and that no-one would be imprisoned without trial.
 - This document ensured parliament could function without royal interference. It brought about an important and permanent transfer of power from monarchy to the Parliament.
 - ❖ **US Declaration of Independence (1776)**
 - Declaration of war against British Government.
 - Thomas Jefferson stated "all men are created equal"
 - Rights are seen to exist because we all think and feel them, we do not have to be told that we have them.
 - ❖ **US Constitution (1789)**
 - Created federal union of existing thirteen states.
 - Created the separation of powers, to prevent any branch of government from becoming too powerful.
 - ❖ **US Bill of Rights (1791)**
 - Began as 10 amendments to the US Constitution, to protect the rights of the individual.
 - Include: rights to freedom of assembly, speech religion and the press.
 - Since 1791 another seventeen amendments have been added to the constitution.

- Many rights enshrined in US Bill of Rights involved principles from previous documents, so it is seen as a significant landmark in the development of human rights.
- ❖ *French Constitution (1791)*
 - Proclaimed the Declaration of the Rights of Man.
- ❖ *Treaty of Versailles (1919)*
 - Established the League of Nations, to focus on the prevention of war and the collective right to peace.
- ❖ *Universal Declaration of Human Rights (1948)*
 - Brought Human Rights to centre stage after formation of UN.
 - Known as UDHR, adopted 10 December 1948, NGOs were involved in drafting the document.
 - Not made into a treaty, making it soft law and gained wide acceptance by the international community.
 - Has become part of international customary law.
- ❖ *Genocide Convention (1948)*
 - Adopted 1948, came into force 1951.
 - Genocide was made a crime after the horrors of Nazism were exposed at the end of WWII.
 - First piece of hard law drawn up by UN.
 - Effective in securing nearly universal condemnation of genocide, but failed to motivate politicians to take concrete measures to ensure it was not repeated in the future.
- ❖ *The Twin Covenants (1966)*
 - A treaty that was based on the UDHR and obliged nation states to guarantee human rights in their domestic legislation.
 - Covenants drafted in 1966, but did not come into force until 1976.
 - International Covenant on Civil and Political Rights (ICCPR)
 - Covers rights such as equality between men and women, the right to life, freedom of movement, fair trial and right to be presumed innocent until proven guilty.
 - Torture and slavery outlawed and prisoners must be treated with respect.
 - International Covenant on Economic, Social and Cultural Rights (ICESCR)
 - Every person has the right to just conditions and fair wages at work, right to an adequate standard of living, as well as the right to join trade unions.
 - The right to education is guaranteed, primary education should be compulsory and free for all.
- ***Movement for slavery abolition***
 - Slaves were used extensively in ancient times.
 - It was a system in which individuals had no personal rights.
 - They could be bought and sold and were often physically, emotionally and sexually abused.
 - Britain and other colonial powers took slavery for granted until late 18th century where there were growing awareness of natural rights and political liberty.
 - *Emancipation Act 1833*, abolishes slavery throughout British colonies
 - 13th amendment of the US Constitution outlawed slavery in 1865
 - Slavery Convention of 1926 was negotiated
 - New supplementary convention on Abolition of Slavery in 1965
 - Slavery banned under Article 4 of the Universal Declaration of Human Rights
- ***Trade unionism***
 - One outcome of the Industrial Revolution which began in 18th century Britain was the emergence of trade unions.
 - They are associations of employees that were created to protect the rights of workers.
 - Trade union holds enormous collective power; where single employees have very limited power but many workers together combined in a single cause have a great deal of power.
 - Universal Declaration of human rights, Article 23 (4) states 'everyone has the right to form and to join trade unions for the protection of his or her rights'.
- ***Universal suffrage***
 - Suffrage refers to the right to vote. In the past voting was only opened to male and the wealthy people.
 - By the 1890s there were women's suffrage societies in all Australian colonies. South Australia became the first jurisdiction in Australia to grant women the right to vote in 1894.
 - Voting rights for Federal Parliament were won in 1902. British women were not entitled to vote until 1928. However ATSIs did not have the right to vote until 1962.
 - Right to vote is now protected under Article 21 (3) of the Universal Declaration of Human Rights
- ***Universal education***
 - The concept of universal education is the right of all to a basic education.
 - Any kind of formal education was rare in most nations before the 19th century.
 - People of all social classes recognised education as a means of ensuring the future of their children.
 - Australian colonies made several Acts that made education free and compulsory for all. However the standards of education in developing countries remain poor today.
 - The United Nations has invested large amounts of money to improve the level of basic education throughout the world.
 - The right to education is protected under Article 26(1) of the Universal Declaration of Human Rights

Key Events in Creating Modern Human Rights



○ **Distinguishing between moral, customary and legal rights**

➤ **Moral rights**

- Moral behaviour may simply define as that which is good. E.g. it is usually regarded as highly immoral to deliberately kill another human being.
- The individual has a moral right to life.
- Here the laws agree and protect the moral rights of individuals. However, the law may also force citizens to perform duties that violate their notions of moral conduct.
- E.g. Young men were conscripted to serve in the armed forces during Vietnam War. Many people regarded this as immoral because it forced young men to join the army.

➤ **Customary rights**

- Customary rights are those widely accepted in the community. When a custom affect matters of importance, it may become law.

➤ **Legal rights**

- Legal rights are those which are afforded to people by the legal system.
- These rights may not be a reflection of societal values.
- Normally legal rights are only granted if certain duties are performed, hence rights and duties co-exist. E.g. Students will be granted their rights to education if teachers perform their duty of care.

○ **Differences between domestic and international rights**

- Domestic rights are those established under domestic law. These rights apply to all people within the jurisdiction in which they are made. E.g. Rights granted under NSW legislation only apply in NSW.
- International rights are universal. They apply equally to all human beings, regardless of where they live. However, many international rights have been protected in Australia by domestic legislation.
- Human rights are said to be:
 - **Universal:** They are to be enjoyed by everyone regardless of differences
 - **Indivisible:** All equally important
 - **Inherent:** Belong to all people simply because they are human
 - **Inalienable:** They cannot be taken away

• **Identifying the types of international rights:**

○ **Civil and political rights**

- Relate to the treatment of the individual both as an individual and as a member of a wider society.
- Protect people from oppressive governments.
- Principle international instrument is ICCPR
- Encourage basic conditions for healthy societies in which the rule of law is a feature.
- The International Human Rights Committee was established to monitor the implementation of human rights policies throughout the world.
- The first 27 articles of ICCPR guarantee rights such as the right to life, a fair trial, freedom of thought and religion, freedom of movement and the right to vote. Also slavery, racial discrimination and torture are prohibited.

○ **Economic, social and cultural rights**

- The ICESCR is the main instrument to protect these rights.
- The function is to ensure everyone is provided with everything they need in order to maintain human dignity.
- The ICESCR protects the right to have an adequate standard of living, have the highest attainable standard of physical and mental health, receive an education, participate in cultural life, enjoy scientific freedom and receive equal pay for equal work.
- Marriage is to be entered into freely and families have access to assistance (social security and medical assistance).

○ **Environmental rights**

- Environmental declarations such as Stockholm Declaration (1972), Rio Declaration (1992) and Kyoto Protocol (1998) represent a growing attempt by the international community to deal with environmental problems, such as global warming, the spread of epidemic, marine pollution and the depletion of the ozone layer.

- Environmental rights are considered to be a matter of common concern of humankind rather than the protection of individual human rights.
- Environmental law protects the right of future generations to have the same level of environmental equality as the present generation enjoys.
- This is known as intergenerational equity, each generation has the responsibility to care for the environment so that future generations can have access to its resources.
- One of the main problems in achieving progress in this area is the failure to ensure all nation-states will commit to measures for the benefit of the global community when these methods may seem to the short-term disadvantage of interest in their own countries.
- **Peace rights**
 - The UN passed a non-binding resolution in 1984 that assert the rights of all peoples to peace.
 - In ancient times there was no recognition of a right to peace.
 - The declaration recognised that nuclear war was a danger to humanity and that international disputes should be resolved by peaceful means.
 - Numerous NGOs seek peaceful solutions to conflicts by lobbying governments to reduce the number of nuclear weapons or eliminate them entirely.
 - The multilateral Nuclear Non-Proliferation Treaty of 1968 and bilateral arms reduction between US and USSR signed between 1963 and 1991 have been more effective in cutting back and controlling the spread of nuclear weapons.
 - However, these treaties can fail to protect the proliferation of nuclear weapons, now looming as one of the major treats to the right of peace of everyone on the planet in the 21st century.
- **Collective right to self determination**
 - Collective rights are rights of groups, not individuals.
 - The right of people, especially indigenous people, to have at least partial sovereignty over their land.
 - Aims to allow minority groups the right to have control over their land, while still being part of the country.
 - One Example is Arnhem Land in NT, is controlled by local Indigenous people but remains part of Australia.
 - Self-determination may also mean the granting of independent to the traditional owners such as the annexation of India by the British.
 - In the second half of the 20th century there was a period of great decolonisation in which huge areas of Africa, Asia and Pacific were handed back to the indigenous people; East Timor is a recent example.
 - The right to self determination is enshrined in the UN charter (1945).
- **The recognition of human rights under Australian law:**
 - **Constitution**
 - Australia does not have a Bill of Rights; however a few rights are stated and protected in the Australian Constitution.
 - These include freedom of religion (s. 116), the right to vote (s. 24 & 40), the right to presumption of innocence in a criminal trial (s.14.2), the right to be informed of the nature of the charge if arrested (s. 14.3), the right to trial by jury (s. 80) and the right to acquisition of property on just terms (s. 51.3).
 - **Common law**
 - Because common law may be overruled by Parliament or legislation, some argue that common-law rights are merely privileges, as they can easily be removed.
 - Elements of common law have both protected and impeded human rights.
 - For example, the concept that a person is not to be denied natural justice has been important in established the right to a fair trial in Australia. Presumption of innocence is also an important common-law right.
 - However, there have also been instances when old common-law rights have stood in the way of human rights.
 - *Dietrich v. The Queen* (1992) held that there is a right to a fair trial. However in *McInnis v. R* (1979) the trial proceeded when the defendant's barrister withdrew the day before the trial was to start. He was convicted, and appeal dismissed.
 - There is no right to legal representation. The court in *Dietrich v. The Queen* said that a trial should proceed in serious cases when there was no legal representation 'only in exceptional circumstances'.
 - **Statute law**
 - In the last 50 years a large body of statute law has grown up to protect human rights, partly due to the increased volume of international law.
 - When a treaty is signed is ratified into domestic law.
 - Many international treaties and declarations to deal with human right issues have been signed and then written into domestic law.
 - For example, aspects of The Convention on the Rights of the Child (1989) have been incorporated into family law.
 - Anti discrimination legislation has been enacted into each of the state and federal law jurisdictions.
 - As a result tribunals have been created to enforce them, such as NSW Office of Equal Opportunity in Public Employment and federal Human Rights and Equal Opportunity Commission.
 - **Administrative law**
 - Courts have power in common law to prevent or overturn unlawful government action.
 - Administrative tribunals have been formed by statute to restrain unlawful actions and to determine whether decisions are 'correct or preferable'.
 - This allows tribunals to apply human rights standards to the actions of government.
- **Evolving human rights, including the possibility of a Bill of Rights**
 - In Australia, Human Rights are protected through Common and statute law, as well as the constitution.
 - Unlike other Western Democracies, Australia does not have a Bill of Rights.
 - There have been numerous attempts to introduce a Bill of Rights in the past, however these have been unsuccessful.
 - At the Constitution convention in 1942, it was proposed that the Commonwealth be given powers to guarantee freedom of speech and expression and religious freedom.

- A limited proposal went to referendum, but was unsuccessful.
- A Human Rights Bill was drafted in 1983, passed by House of Representatives in 1985, but was blocked in the Senate and withdrawn.
- There is great debate over what a Bill of Rights should contain and if Australia really needs one and whether rights are sufficiently protected in the constitution, common and statute law.
- Suspicion that a Bill of Rights could be misused and make rights inflexible and very hard to change problems that arise from it lead to a rejection of an Australian Bill of Rights.
- The classic example is Article 2 of the US Bill of Rights which states all citizens have the right to bear arms. This has made gun control very difficult in the US despite the very high numbers of deaths by guns.
- Those in favour of a Bill of Rights, argue that Australia still does not adequately protect all people, especially the powerless and minority groups.
- A Bill of Rights would make it harder for the government to interfere with people's basic rights.
- The ACT and Victoria have passed *Human Rights Acts* in 2004 and 2006 respectively and other states are moving in the same direction, to provide good protection of Human Rights.
- The last effort to bring about change in the Constitution was the referendum in 1999 on a republic.
- The debate over what some regard as increasingly draconian laws to counter terrorism in recent years has again promoted some people in the legal field to call for a human rights act.
- Arguments given for and against the creation of an Australia Bill of Rights:

Arguments for	Arguments against
<ul style="list-style-type: none"> - Australian law affords inadequate protection of rights - Universal rights would get greater recognition - It would help empower powerless Australians - It would bring Australia into line with the rest of the world - It would help Australia meet international obligations - It would enhance Australian democracy by protecting rights of minorities - It would put rights above politics - It would improve government policy making and administrative decision making - It would serve an important educative function - It would promote tolerance and understanding in the community 	<ul style="list-style-type: none"> - Rights are already well protected in Australia - The political system itself is the best protection of rights - The judiciary would become politicised - It would be very expensive given the amount of litigating that could be generated - It would work against the Westminster tradition of parliamentary sovereignty - It would actually restrict rights because to define a right is to limit it - Rights listed in constitutions and statutes actually make little or no difference to the protection of fundamental freedoms - It would be unable to take into account of changing conceptions of rights

- **Recognition and enforcement of rights**

- Since the formation of the United Nations in 1945 and the UDHR, human rights have become increasingly important and central to both international and domestic law.
- All over the world, international human rights conventions have been written into constitutions, used in common law decisions and implemented into domestic law by parliaments.
- Once implemented into domestic law, these rights are enforced in the same way as all other domestic law.
- The enforcement in the international sphere is not as simple however.
- Enforcement on the global stage takes the moral and political will of world leaders to give weight to human rights treaties.
- The establishment of the International Criminal Court in 2002 provided a means for prosecuting gross violators of human rights when national governments fail to do so.
- The success of the ICC depends on the wisdom of foresight of our world leaders to effectively protect human rights under international law.
- Human Rights in Australia are recognised in a range of new common and statute laws, even without a Bill of Rights.
- This is seen in the growing recognition of the customary rights of Indigenous Australians and a willingness of the courts to enforce them.
- For example, in the case *Yanner vs. Eaton (1999)* the high court agreed with Mr Yanner that he had the customary right to hunt crocodiles. This overrode Queensland legislation requiring a licence to do so.

- **Contemporary struggles for human rights**

- Despite major advancements in the recognition and protection of Human Rights, there are many countries that continue to breach these rights.
- Today, there are numerous groups around the world that struggle to have their basic human rights met.
- War crimes and 'ethnic cleansing' – Rwanda and the former Yugoslavia
- Refugees – the world's willingness to provide for these refugees is decreasing in European and Pacific countries
- Economic hardship has led to widespread hunger, unemployment and a severe shortage of medical supplies
- Education is a right to which millions of children around the world have no access
- Slavery-type practices continues in various parts of the world
- Political repression – many countries have killed or imprisoned people who have disagreed with the government
 - o Burma
 - o East Timor
 - o China
- **Australian struggles**
 - o rights of children

- Lack of a bill of rights or legislative effect to human rights treaties
- Treatment of Aboriginal and Torres Strait Islander peoples
- Treatment of refugees and illegal immigrants
- Attitude to international human rights bodies
- **The changing understanding of human rights and the effectiveness of legal measures both domestically and internationally in addressing human rights issues**
 - The nature of the world in which we live is rapidly changing.
 - Massive structural changes have significantly reduced the power of the state.
 - It is now far less easy for the government of a country to control who or what enters through its borders.
 - Human rights are no longer seen as a means of imposing external cultural or even political values; instead they have begun to be recognised as expressions of respect for human dignity and the right to live in equality.
 - An understanding that human rights are fundamental and exist beyond the power of the state is critical to their recognition and protection.
 - Despite the changing perceptions of human rights, the large number of contemporary human rights struggles in the world today demonstrates the limited effectiveness of international and domestic agreements in protecting them.
 - Human rights may receive effective domestic protection through constitutional, statute or common law only while the rule of law exists in a country.
 - Many human rights are protected by international law, but how effective is it?
 - While nations wish to participate in international law, it is very effective. However, when a nation refuses to adopt an international agreement, there is very little that can be done.
 - Even when a nation has signed an agreement there is virtually nothing that the international community can do to ensure that it abides by the agreement.
 - An International Court of Justice exists, but its powers are limited by state sovereignty. A nation has the sovereign right to refuse to participate in a court case.
 - If there is no 'international police force', the court has very little power to enforce its rulings, anyway.
 - While a single person has very little influence, many joined together have a powerful voice.
 - International organisations such as Amnesty international provide a voice for those who are oppressed. These organisations can apply political pressure to offending nations and sometimes, through boycotts, can also bring economic pressure to bear