

PAL News Update



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High Court NZYQ decision overrules controversial Al-Kateb case

Executive power limited by Chapter 3 interpretation

Syllabus

- 11PAL - roles of the judicial branch of government
- 11PAL - the court hierarchy
- 12PAL - roles and powers of the High Court of Australia, including Sections 75 and 76 with reference to a constitutional decision
- 12PAL - at least one contemporary issue relating to legal power
- 12PAL - the ways human rights are protected in Australia, including in the Constitution

Essential understandings

- 11PAL & 12PAL - the rule of law
- 12PAL - human rights

Keywords

- *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1
- *Al-Kateb v Godwin* [2004] 219 CLR 562 HCA 37
- *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37
- *Alexander v Minister for Home Affairs & Anor* [2022] HCA 19

Cross references

- PAL News Update - V5N3: High Court strikes down citizenship law
- Did You Know - this issue: NZYQ as a contemporary legal issue

On 8 November 2023, the High Court of Australia made a significant constitutional decision regarding the detention of a stateless Rohingya man under the *Migration Act 1958*. The man, previously convicted of a serious criminal offence, was detained in immigration detention after serving his prison sentence.



The legal questions were whether the Act's provisions for detention applied to him and if they were constitutional.

The man - known as NZYQ - had arrived in Australia in 2012, was detained, released on a visa, and then re-detained after his criminal conviction. Despite being recognised as a refugee and requesting deportation to another country, there was no likelihood of his deportation from Australia because of his country of origin - Myanmar - because he was stateless. No other country offered to settle him because of his criminal conviction.

NZYQ challenged his detention in the High Court on two grounds:

1. His detention was unlawful under the *Migration Act*.
2. The way the *Migration Act* was applied was unconstitutional,

The High Court unanimously found that, while the Act did permit his detention, the application of the Act to him was unconstitutional - thus, he lost on the first ground but succeeded on the second.

The Court decided that detaining someone indefinitely without a foreseeable chance of deporting them from Australia was not a legitimate, non-punitive purpose and thus contravened the Constitution.

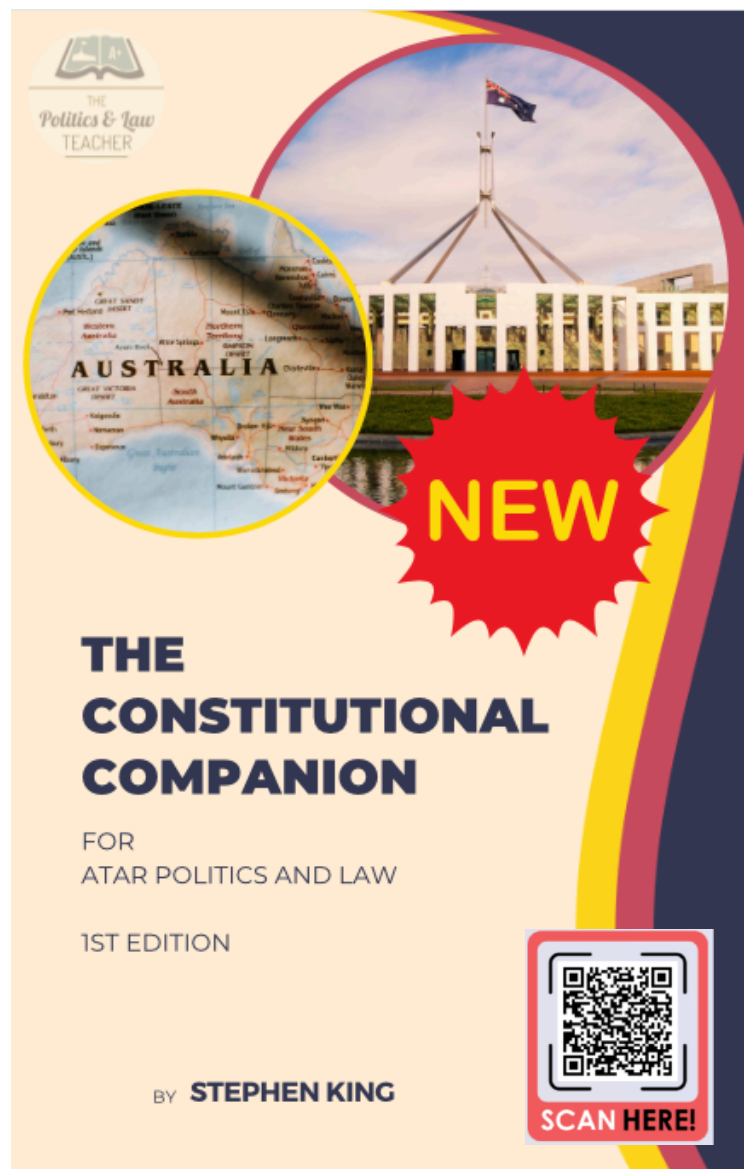
The case hinged on what constitutes 'punishment'. Chapter 3 of the Constitution assigns the power to punish - called punitive power - to judges and courts. The case follows recent comparable cases, such as *Alexander v Minister for Home Affairs & Anor 2022*, where the High Court has strictly interpreted the separation of the judicial power in Chapter 3 by striking down executive decisions that stray into 'punishment'.

NZYQ overruled a 2004 controversial decision - *Al-Kateb v Godwin 2004* - where the High Court held that indefinite detention under circumstances like NZYQ's was not unconstitutional. *Al-Kateb* was a 4-3 decision, with many dissenting reasons from the three judges in the minority. Their reasons would be influential in NZYQ, notably the failure of the majority of judges to consider the *Lim Case [1992]*. The "Lim Principle" states that the involuntary detention of a citizen in custody is penal or punitive. This principle was a significant point of reference in the NZYQ case. It stressed that detention must be limited to periods necessary for legitimate purposes, such as removing a non-citizen from Australia or

processing their application to stay.

The *Al-Kateb* decision was contentious due to its impact on human rights and the rule of law. The court ruled that the government could lawfully detain a stateless person indefinitely if they couldn't be removed from Australia. This interpretation was based on the *Migration Act 1958*, which permits detaining non-citizens lacking a valid visa.

The *Al-Kateb* ruling was criticised because it approved indefinite detention without trial, contravening the Universal Declaration of Human Rights (UDHR). Such rights and freedoms include the right to liberty and security of the person (UDHR Article 9) and freedom of movement (Article 13). It also imposed cruel and inhumane treatment (Article 5).



The decision was further criticised because it allowed indefinite detention based on a person's character or security risk without a criminal trial. Some viewed this as punitive without due process (Article 10). The 2004 case raised concerns in Australia and overseas about Australia's treatment of stateless asylum seekers and refugees.

The High Court's decision in *NZYQ* is a significant change in interpreting constitutional rights concerning the detention of non-citizens in Australia. Firstly, it aligns the *Migration Act* with human rights principles. Secondly, it makes immigration detention valid only if it's necessary to remove a non-citizen from Australia or to process their application to stay - both of which are administrative, not punitive reasons and thus within the executive branch's power. Finally, it further cements the High Court's current trend in interpreting the separation of judicial power.

Meanwhile, late last year, Parliament passed new legislation to allow judges to cancel the citizenship of terrorists. The new law responded to recent High Court rulings that have undermined the current anti-terror system, in which ministers had the power to strip terrorists of citizenship. Convicted terrorist Abdul Nacer Benbrika successfully appealed to have his citizenship reinstated after former Home Affairs Minister Peter Dutton cancelled it. The case highlights the High Court's stance - expressed in *Alexander 2022* - that citizenship removal is a form of punishment and must be decided by a court, not a minister.

Insights

11PAL & 12PAL

- i. *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* illustrates the role of the courts in Australia's political and legal system. The High Court is the highest in the court hierarchy. It has jurisdiction to interpret the Constitution when its meaning is disputed. In this case, the High Court held that indefinite detention is 'punitive', an exclusively judicial power. Thus, the executive branch cannot indefinitely detain a person without a court first convicting them of an offence.
- ii. The High Court's constitutional jurisdiction is specified in Sections 75 and 76 of the Constitution.
- iii. Indefinite detention under the *Migration Act* has been a legal issue since 2004 because of its impact on human rights. The *NZYQ* decision resolved the issue in 2023.
- iv. The *NZYQ* case illustrates the role of the courts in protecting human rights in Australia. The High Court has a role in constitutional rights because it interprets the Constitution. Many High Court cases have rights implications, even if they do not directly involve rights specified in the Constitution.
- v. *NZYQ* illustrates the rule of law and the separation of powers. A separate and independent judicial branch can uphold the law without fear or favour. Its rulings are legally binding on the executive branch, bringing it under the rule of law. Constitutional rulings bind the legislature and bring it under the rule of law. *NZYQ* further entrenches the separation of judicial power following similar rulings that have denied the executive the power to 'punish'.

- vi. NZYQ is a contemporary issue related to justice (11PAL) and legal power (12PAL).

Questions



Why NZYQ is a
justice & legal issue

*See Did You Know
section on p6 of
this issue.*

11PAL

1. What is the 'court hierarchy'?
2. Outline the role of the High Court of Australia in the Australian court hierarchy.
3. Discuss the separation of powers in Australia with reference to judicial power.

12PAL

1. According to the Australian Constitution, what is the High Court's jurisdiction?
2. With reference to the Source, explain, in your own words, two reasons why indefinite detention is a contemporary issue related to legal power. *(Hint: read the Did You Know section before answering)*
3. Discuss the role of the High Court of Australia as Australia's highest court.
4. Evaluate the High Court's role as a check on executive power.

DID YOU KNOW? A CONTEMPORARY JUSTICE AND LEGAL ISSUE

What makes the *NZYQ* judgment a contemporary justice and legal issue?

Because it...

- **Overruled a Previous Constitutional Ruling:** The judges unanimously agreed that the constitutional basis of the *Al-Kateb* decision was unjust and incorrect and should be overruled. The *NZYQ* judgment referred to the *Lim Case [1991]*, that to be just, detention must be limited to periods necessary for legitimate purposes, contrasting with the stance in *Al-Kateb*.
- **Limits an Unjust Aspect of Immigration Detention:** The Court held that sections 189(1) and 196(1) of the *Migration Act* cannot authorise indefinite detention if there's no realistic prospect of removing the person from Australia soon.
- **Was Unanimous:** All seven High Court judges agreed in a single judgment to overturn the previous High Court ruling in *Al-Kateb*.
- **Was Unanimous but with with Individual Reasons for Deciding:** Although it was a single joint judgment representing the Court as a whole, it unusually acknowledged individual judges' different reasons. This approach is rare in the High Court. Usually, if a judge agrees but reasons differently to the majority, they write a separate judgment, known as a concurring judgment. However, in this case, the Court combined all these perspectives into one joint judgment.

Four reasons why *NZYQ* is a contemporary legal issue:

1. The decision is a **fundamental shift in Australia's approach to immigration detention**, which has been a politically divisive issue for a quarter of a century. The Howard Government's contentious "Pacific Solution", the Gillard Government's failed "Malaysia Solution", and the Abbott/Turnbull/Morrison Governments' "stop the boats" policies were related to asylum seeker boat arrivals. The issue likely cost the Beazley Labor Opposition the 2001 election. The UNHCR has repeatedly expressed concern about Australia's treatment of asylum seekers and refugees. The UN has told Australia its policies violate the Convention Against Torture. According to the Refugee Council, 47 countries have expressed concerns.
2. The ruling **reinforces the Court's commitment to constitutional limitations on executive power** - notably the executive's power to make decisions that have a punitive effect, even if that is not the intent.
3. *NZYQ* is **expected to have profound political, legal and human rights consequences** - demonstrated by its immediate impact on the political debate and the speed with which the Commonwealth Parliament responded by passing emergency legislation in less than a day.
4. It signifies **a change in the High Court's methods**, emphasising the importance of individual judicial reasoning in reaching unanimous decisions and providing additional *obiter dicta* in joint judgments.

Labor legislates in response to NZYQ

Liberal Party influences law from opposition

Syllabus

- 11PAL - roles of the legislative, executive and judicial branches of government
- 11PAL - types of laws made by parliament
- 11PAL - legislative processes at the Commonwealth level
- 12PAL - functions of the Commonwealth Parliament in theory and in practice, including Section 51
- 12PAL - roles and powers of the Cabinet
- 12PAL - roles and powers of the opposition and the shadow ministry at the Commonwealth level
- 12PAL - lawmaking process in parliament with reference to the influence of political parties and pressure groups

Essential understandings

- 11PAL & 12PAL - the rule of law

Keywords

- *Migration Amendment (Bridging Visa Conditions) Bill 2023*

Cross references

- This issue - High Court NZYQ decision overrules controversial Al-Kateb case



The NZYQ decision ended 20 years of lawful indefinite detention. It led to the imminent release of approximately 80 detainees, some with prior criminal convictions and others deemed a risk to the community. The issue prompted highly-charged political debate, with the opposition claiming the government was responsible for putting the community in danger.

The Commonwealth Parliament acted with extraordinary haste to the NZYQ decision. So swiftly that a bill targeting the individuals to be released following the ruling was passed before the High Court published its reasons for the decision on 28 November. The bill was introduced on 16 November 2023 and passed both Houses of Parliament on the same day. It received Royal Assent the next day.

The Cabinet decided to amend the *Migration Act* to impose strict visa conditions on released individuals. Ministers central to the government's bill included Home Affairs Minister Clare O'Neil and Immigration Minister Andrew Giles. Meanwhile, the Cabinet established Operation AEGIS, claiming it was necessary to act urgently to ensure community safety in response to the High Court decision.

Operation AEGIS was a joint Australian Border Force & Australian Federal Police operation to coordinate federal agencies and state and territory police.

The *Migration Amendment (Bridging Visa Conditions) Bill*

2023 was subject to intense political and parliamentary debate, during which the major parties significantly influenced it. In the Senate, amendments were hastily debated and passed.

Leader of the Liberal Opposition, Mr Peter Dutton, influenced the government bill. A Liberal Party press release on its website said the government's handling of the NZYQ case was "botched", and its response to the issue was "incompetent". The Liberal Party forced the government to include changes that strengthened conditions and penalties for breaching the proposed bridging visa. He criticised the government's handling of the situation and, in a political tactic to pressure the government, tied the issue to broader national concerns. The political pressure influenced the government's proposed law by forcing the Labor government to change its draft bill. The Liberal Party also made two successful amendments in the Senate to include Section 76DA imposing a mandatory 1-year imprisonment for a person convicted of an offence against the conditions of a bridging visa - conditions such as reporting requirements, wearing a monitoring device or remaining at an address.

Acting PM Richard Marles, representing the Labor government, agreed to the opposition Liberal Party's demands to ensure the bill's quick passage. This move highlighted the government's willingness to negotiate and accept non-government party amendments amid opposition pressure.

The heavily amended bill faced scrutiny from legal experts and senators. Independent Senator David Pocock proposed a sunset clause amendment to

ensure a review of the legislation once detailed reasons from the High Court were available. However, this proposal was dismissed, highlighting the urgency of the issue and the reality of political pressure.

David Manne of the pressure group Refugee Legal voiced concerns about the dangers of legislating "out of all proportion" to the risk posed by the individuals released. Mr Manne and Alison Battisson, the director of Human Rights For All - another pressure group - warned that the changes might be "extrajudicial" punishment - the same reason the High Court ruled indefinite detention unconstitutional in NZYQ.

The bill was challenged in the High Court before it even passed Parliament.

Insights

11PAL

- i. This example illustrates the roles of the three branches of government:
 - a. The three roles of the legislative branch of government are to make laws, represent the people, and hold the executive accountable. The *Migration Amendment (Bridging Visa Conditions) Bill* is an example of the Commonwealth Parliament making a law. The law is intended to protect the community - an intention that represents the community's interests. Finally, the opposition used the Parliament to accuse the government of "botching" the case and "incompetently" handling the issue.
 - b. The executive implements laws. It comprises the formal (or constitutional) executive - i.e. the Crown and the Governor-General vested with

- legal executive power. The parliamentary executive (i.e. the government) has no legal power but is very powerful in practice because of Westminster conventions. It is the ministry formed in Parliament and led by the Prime Minister and Cabinet. Finally, the public service runs the business of governing by implementing laws and policies. Through its central executive committee - Cabinet - the government makes policies, proposes laws, and responds to crises. Before the *NZYQ* case, the government implemented the *Migration Act* by detaining stateless refugees like *NZYQ*. After the case, it created Operation AEGIS as its policy for coordinating federal and State law enforcement agencies to handle the imminent release of individuals freed by the High Court ruling. Finally, it proposed and introduced the *Migration Amendment (Bridging Visa Conditions) Bill*, an example of a government bill.
- c. The judicial branch ruled indefinite detention unconstitutional, precipitating the political crisis that led to the actions of the legislative and executive branches outlined in (a) and (b) above. The rule of law means that even though the government and opposition agree that indefinite detention should continue, they accept it is now unlawful. They used their parliamentary and political power to influence a law constructing a new system - bridging visas - to deal with the issue.
- ii. Parliaments make laws called legislation or statutes. Statutes are constructed through a formal process called the legislative or statutory process. The legislative process involves phases allowing parliamentarians to represent their constituents' views and scrutinise proposed laws. Theoretically, the process should be deliberative - which means contemplative and reflective. In practice, as in this example, bills can be rushed through with little time for proper deliberation. Rushed laws can be poorly constructed, which is one of the reasons the courts need to interpret statutes so they are just and make sense.
-
- 12PAL**
- iii. The Commonwealth Parliament has three functions - outlined in point (i a) above. Its power to make the *Migration Amendment (Bridging Visa Conditions) Bill* is specified in Section 51(xxvii). Section 51 contains a list of concurrent and exclusive-by-nature legislative powers. For a complete account of all constitutional sections relevant to 12PAL, see ***The Constitutional Companion***, available here - <https://thepoliticsandlawteacher.com.au/product/the-constitutional-companion/>
- iv. The Cabinet is the central committee of the executive branch of government. The Cabinet is the most significant body in the Australian political and legal system. It has no legal power yet exercises immense real power through its relationship with the Governor-General (who is bound by convention to follow its advice when exercising legal executive power) and the Parliament

- (the lower house of which it dominates through its majority and party discipline). The Prime Minister dominates the Cabinet. Its other members are ministers responsible for the most important portfolios, like Home Affairs Minister Clare O'Neil and Immigration Minister Andrew Giles. The Cabinet's role in responding to a crisis was demonstrated when it used its power to establish Operation AEGIS. Its role includes forming policy and proposing laws, illustrated by the government choosing strict conditions for bridging visas as its policy and introducing emergency legislation to make the policy lawful.
- v. The opposition's two roles are to hold the government to account and present itself as a viable alternative government. The example illustrates both. Mr Dutton and his shadow cabinet held the government to account by criticising it for "botching" the NZYQ case and "incompetently" handling the crisis caused by the imminent release of allegedly dangerous individuals into the community. By keeping up relentless political pressure to keep the issue in the media spotlight, explaining its preferred policies and seeking amendments to the government's bill, the Dutton opposition shows the public what a possible Dutton-led Coalition government might do if elected. Oppositions are usually relatively weak unless the political conditions favour them, as in this example.
- vi. The Labor and Liberal parties influenced lawmaking in Parliament through the *Migration Amendment (Bridging Visa Conditions) Bill*. As the governing party, Labor constructed the bill. As the opposition party, the Liberals exploited the hot-button issue by bringing political pressure on the

government to toughen conditions and penalties for breaching the proposed bridging visa. The Liberal Party used its Senate position to insert Section 76DA into the government bill.

Questions

11PAL

1. What is the executive branch of government?
2. Outline the legislative process and explain the purpose of any two phases.
3. With reference to an example, discuss how the three branches of government may interact with one another.

12PAL

1. What is the purpose of Section 51 of the Australian Constitution?
2. With reference to the Source, explain, in your own words, two reasons why the *Migration Amendment (Bridging Visa Conditions) Bill* was necessary.
3. Discuss the power of the opposition party to influence lawmaking in the Commonwealth Parliament.
4. Evaluate the role of the Cabinet in the Australian political and legal system.

Lawyer wins natural justice case

Courts uphold individual rights, democratic principles

Syllabus

- 11PAL - roles of the judicial branch of government
- 11PAL - the court hierarchy, methods of statutory interpretation and the doctrine of precedent
- 11PAL - types of laws made by subordinate authorities (in this case, a local council)
- 11PAL - strengths and weaknesses of Western Australia's adversarial civil and criminal law processes
- 11PAL - at least one contemporary issue (the last three years) centering on justice
- 12PAL - lawmaking process in the courts, with reference to the influence of individuals
- 12PAL - the ways human rights are protected in Australia, including in common law and statutory law.
- 12PAL - the ways in which Australia can both uphold and/or undermine democratic principles - rule of law & natural justice

Essential understandings

- 11PAL & 12PAL - the rule of law, the separation of powers doctrine, natural justice

Keywords

- Natural justice
- Queensland Supreme Court case - *Leahy v Brisbane City Council & Ors* [2022] QSC 200
- Queensland Court of Appeal case - *Brisbane City Council v Leahy & Ors* [2023] QCA 133

A recent case involving an ugly and oversized electronic billboard shows the role of courts in upholding natural justice, checking and balancing government, protecting citizens' rights and developing the common law.

Richard Leahy fought a legal battle with Brisbane City Council that set a new precedent in the development of common law. The dispute centred on a large electronic billboard erected near Mr Leahy's home in the residential suburb of Red Hill, Brisbane. The billboard was approved and erected without prior consultation with residents who might be affected by the decision.

Erected in 2020, the billboard, measuring 11.3 meters in height and 5.3 meters in width, obstructed views from Mr Leahy's property and impacted its amenity and value.

Mr Leahy asked the council to provide a statement of reasons for its decision. After the council refused to provide reasons, Mr Leahy - an experienced lawyer - began legal proceedings.

The case began in 2021 when Mr Leahy launched a case against the council for



approving the billboard in 2018. Mr Leahy's main argument was the council's failure to provide procedural fairness - also known as "natural justice" - a fundamental legal principle ensuring fair and just processes.

Mr Leahy's argument relied on several grounds, notably the denial of natural justice, failure to consider relevant factors, and the decision being unreasonable and contrary to law.

In September 2022, Justice Davis of the Queensland Supreme Court decided in favour of Mr Leahy, ordering the council's decision to be set aside. Justice Davis rejected the council's defence that Mr Leahy should have enquired about the billboard earlier. He emphasised Mr Leahy's reasonable efforts to understand the

decision-making process, including seeking a statement of reasons from the council.

Justice Davis highlighted the significance of local laws, which specify that signage must not be dominating or oppressive and should respect the views of neighbouring properties.

Justice Davis also found that the council had not provided Mr Leahy with the natural justice required by law, failing to consult residents and consider the impact of the billboard on him.

The council appealed to the Queensland Court of Appeal, which dismissed the appeal and upheld the original decision in May 2023. In doing so, the Court of Appeal

STUDY TIP: THE 5 P'S PROPER PLANNING PREVENTS POOR PERFORMANCE

At the beginning of a new year, it's important to start well and stay on top of things. It's easier to keep up than catch up. Here are some planning strategies to get you off on the right path.

1. **Set Clear Goals:** Before studying, define what you want to achieve. This could be understanding a concept, finishing a topic or chapter, applying contemporary examples or practising questions for an upcoming assessment.
2. **Create a Study Schedule:** Allocate specific time slots for studying each day. Try to mix it up - left-brain subjects like maths should be followed by right-brain subjects like English. Do a tricky subject followed by an easier one. Make sure to include breaks to avoid burnout.
3. **Prioritise Your Tasks:** Not all tasks are created equal. Identify and tackle the most important and challenging topics at the beginning of a session when you're most alert.
4. **Break Down Large Tasks:** Large tasks can seem overwhelming. Break them down into smaller, manageable parts and tackle each one at a time. It's called "chunking" - mountaineers reach Everest's summit one step at a time, moving from base to base on the way up.
5. **Use a Planner:** Keep track of assignments, deadlines, and exams using a planner. Digital or physical, it doesn't matter as long as it works for you.
6. **Review and Adjust Your Plan:** Regularly review and adjust your plan based on your progress. Remember, the plan serves you, not the other way around.



Remember the 5 Ps... "Proper Planning Prevents Poor Performance".

confirmed the necessity for the council to abide by the principle of natural justice.

The council appealed to the High Court but abandoned its appeal in August 2023.

The council's unsuccessful challenge to Mr Leahy's case illustrates the judiciary's role in ensuring that administrative bodies - government departments and agencies - apply legal principles and laws in their decision-making processes. Mr Leahy's case also shows how individuals can use the courts to enforce legal obligations and rights. It demonstrates the judiciary's role in checking and balancing government power and protecting citizens' rights - for which the independence of the courts and the separation of powers is necessary. Finally, the case develops the common law interpretation of natural justice.

Leahy vs. Brisbane City Council shows how courts are the primary branch of government for upholding natural justice and the rule of law. The case illustrates how the doctrine of the separation of powers limits government power and protects citizens' rights.

Insights

11PAL

- i. *Leahy vs. Brisbane City Council* illustrates the role of the courts in Australia's political and legal system. Courts settle disputes, uphold legal principles and rights and enforce obligations. These roles uphold the rule of law and check and balance executive power. In performing these roles, superior courts may set precedents by interpreting common law and statutes.
- ii. The Queensland Supreme Court and Court of Appeal are superior courts. Appeals courts hold other courts to account by reviewing their decisions. Both courts interpreted the *Brisbane*

City Council Local Laws, which are council laws made using legislative power delegated by State Parliaments, to uphold natural justice and Mr Leahy's rights.

- iii. Despite *Leahy vs. Brisbane City Council* being a Queensland administrative law case, it illustrates the strengths and weaknesses of the adversarial trial processes used in all Australian jurisdictions, including Western Australia's civil and criminal trials. Strengths include the trial processes' focus on procedural fairness that enabled Mr Leahy to be treated as an equal before the law and uphold his rights against a local government. A weakness is illustrated by the fact Mr Leahy is an experienced lawyer and thus knew his rights and the legal procedures needed to enforce them. Arguably, a citizen without Mr Leahy's professional background may be ignorant of their rights or deterred by the cost of legal representation.
- iv. *Leahy vs. Brisbane City Council* is a contemporary issue related to justice because of Mr Leahy's arguments and Justice Davis' *ratio decidendi* relating to natural justice.

12PAL

- v. Mr Leahy is an individual who influenced lawmaking in the courts by winning a Queensland Supreme Court case that clarified the legal principle of natural justice as it applies to local government decisions.
- vi. Australia upholds human rights, which include the right to natural justice. Australia's human rights protection system relies heavily on United Nations human rights declarations, conventions and covenants - the so-called International Bill of Rights. The following UN instruments are

relevant to the human right to natural justice - note b-g have been ratified by Australia and codified into Australian law, giving them the legal status:

- a. **Universal Declaration of Human Rights (UDHR):** Articles 10 and 11.
 - b. **International Covenant on Civil and Political Rights (ICCPR):** Article 14.
 - c. **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):** General focus on fair treatment.
 - d. **International Convention on the Elimination of All Forms of Racial Discrimination (CERD):** General provisions on non-discrimination.
 - e. **Convention on the Rights of the Child (CRC):** Article 40.
 - f. **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):** General focus on equality and non-discrimination.
 - g. **Convention on the Rights of Persons with Disabilities (CRPD):** General provisions on equal rights and non-discrimination.
- iii. Judicial interpretation of common law and statute is a way Australia protects human rights. Court procedures and the maxims and rules of statutory interpretation uphold principles that protect natural justice and individual rights. The Principle of Legality is one example of a rule of interpretation that presumes Australian Parliaments do not intend to infringe rights unless they express a clear intent to intervene in rights or depart from established legal principles. It also protects against retrospective laws.

Questions

11PAL

1. What is meant by 'natural justice'?
2. Outline two elements of natural justice.
3. Discuss the role of the judicial branch of government.

12PAL

1. What is meant by 'human rights'?
2. Outline one strength and one weakness of Australia's human rights protection system.
3. Discuss the courts' role in Australia's human rights protection system.

Electoral review recommends reforms

Ensuring Australia's electoral system is best in class

Syllabus

- 11PAL - the Commonwealth electoral system since Federation
- 11PAL - a recently implemented or proposed reform (the last ten years) to the electoral systems in Australia
- 11PAL - ways individuals, political parties and pressure groups can participate in the electoral processes in Australia
- 12PAL - functions of the Commonwealth Parliament in theory and in practice, including Sections 7, 24
- 12PAL - the accountability of the Commonwealth Parliament through elections for the House of Representatives and the Senate

Essential understandings

- 11PAL - the principles of fair elections, equality of political rights, political participation
- 12PAL - representative government, participation

Keywords

- Joint Standing Committee on Electoral Matters
- *Conduct of the 2022 federal election and other matters - Final report* - (the Final Report)

The Joint Standing Committee on Electoral Matters reviews Australia's electoral system after each election to ensure the system remains fair, representative and immune from emerging threats. In its "*Conduct of the 2022 federal election and other matters - Final report*" (the Final Report), the Committee proposed several reforms based



on evidence gathered from over 1500 submissions and 11 public hearings.

Public submissions were a significant influence on its recommendations. They included submissions from:

- Experts in electoral matters (e.g. the Northern Territory Electoral Commission)
- Constitutional and legal specialists (e.g. Anne Twomey)
- Academics (e.g. Prof George Williams)
- State and Territory governments (e.g. the ACT, QLD),
- Political parties (e.g. the Nationals, the Australian Greens),
- Independent MPs (e.g. Kate Chaney, Allegra Spender, Kylea Tink, Andrew Wilkie, David Pocock)
- Pressure groups (e.g. the Samuel Griffiths Society, Protect the Vote Campaign, Climate 200, Transparency International Australia)
- Media organisations (e.g. the ABC, Twitter)
- Public figures (e.g. Craig Reucassel, Malcolm Mackerras).
- And many hundreds of ordinary citizens

The Final Report addresses areas such as transparency of political donations, limiting money's influence in elections, combating misinformation and disinformation, enhancing voter participation and

Table 1

State or Territory	Elector Average by Electorates*	Number of Electorates
New South Wales	116,436	47
Victoria	111,390	39
Queensland	116,787	30
Western Australia	118,265	15
South Australia	127,205	10
Tasmania	80,466	5**
Australian Capital Territory	104,776	3
Northern Territory	72,969	2***
Note: * In 2016, the average electors per electorate was 104511. This will grow as population increases unless the number of electorates increases. **Tasmania is guaranteed a minimum of five electorates by the Constitution. ***The Northern Territory is guaranteed a minimum of one electorate by legislation, but currently has two due to population.		
Source: Conduct of the 2022 federal election and other matters - Final report Joint Standing Committee on Electoral Matters		

enfranchisement, and improving representation.

The Final Report's recommendations relate to fairness, representativeness, integrity and participation within Australia's electoral system.

*See Table 1 for data
on the ratio of
constituents to MPs.*

population growth and the over-representation of some jurisdictions. A public submission by Mr Malcolm Baarman recommended adopting proportional representation to elect the House of Representatives. However, the Committee rejected the idea as too radical and confusing for voters. Increasing the size of the lower house was the preferred option to address malapportionment and to improve the ratio of electors to MPs.

Fairness

- Increasing the House of Representatives to reduce malapportionment caused by
- Exempting charities from donation caps while applying these limits to political parties, candidates, and third parties to reduce money's influence in elections.

Representativeness

- Increasing Senate representation for the ACT and NT from two to four senators each, acknowledging the growth and significance of these Territories.
- Engaging the Australian community in a debate about Section 44 of the Constitution to reevaluate qualifications for Parliament, ensuring that representation and legislation reflect contemporary expectations.

Integrity Measures

- Introducing truth in political advertising laws and removing the media blackout period before elections are recommended to combat misinformation and disinformation.
- Amending the *Commonwealth Electoral Act 1918* to eliminate loopholes by clearly defining terms like "electoral matter" and "electoral expenditure" to enhance transparency and accountability.

Enhancing the Franchise and Participation

- On-the-day enrolment for federal elections and referendums is suggested, making it easier for Australians to vote.
- The Australian Electoral Commission (AEC) should develop close relationships with community organisations, especially for Aboriginal and Torres Strait Islander peoples and those in remote areas.
- Expanding accessible voting options, such as telephone voting for people

with disabilities and Australians overseas, and continuing the mobile polling program for older Australians in aged care.

- Easing procedures for overseas voting and encouraging non-citizens to apply for Australian citizenship so they can participate in elections.
- Boosting civics education in schools to prepare future voters to engage effectively in the democratic process.

The question of Senate representation was prominent amongst the public submissions, particularly the idea of increasing the two Territories' Senate representation based on population. When addressing this question, the Committee concluded that the House of Representatives is based on population. It noted that the Constitution clearly expresses that Senate representation *does not depend on population*. However, it recommended additional Senate representation for the territories, but not because of population.

The Committee suggested Territories should have more senators to protect their interests at the Commonwealth level, similar to the Constitutional intent for smaller States like Tasmania. And, because the Territories lacked sovereignty, they were vulnerable to the Commonwealth Parliament overriding their laws.

Insights

11PAL

- i. The Commonwealth electoral system is among the best in the liberal democratic world. However, democracy is under threat everywhere, including Australia. Contemporary threats include money in politics, misinformation/disinformation, voter disengagement and voter polarisation. Therefore, regular reviews of elections and recommendations for

reforms are essential to maintain the health of Australia's electoral systems. The Parliament's Joint Standing Committee on Electoral Matters performs this function.

- ii. The Committee's Final Report makes many recommendations - all of which are 'recently proposed reforms (the last ten years) to the electoral systems in Australia'.
- iii. Individuals, political parties and pressure groups participate in the electoral processes in Australia by writing submissions to the Joint Standing Committee on Electoral Matters. The Final Report acknowledges everyone who made submissions. Evidence of the influence of these people and organisations is found in references to them and their ideas in the footnotes on the Final Report's pages, where the Committee responds to their suggestions - incorporating some and dismissing (with reasons) others.

12PAL

- iv. The function of the Commonwealth Parliament under Sections 7 and 24 relates to representation. Each house has a different type of representative function - the House (s24) represents the people; the Senate (s7) represents the States. The Final Report references these functions when recommending two additional Territory senators. It rejects submissions based on population but accepts those based on Territories being like "smaller States" needing an adequate voice in the Commonwealth Parliament to protect their interests.
- v. The proposal to increase the size of the House relates to its Section 24 function. It must remain close to the people, which implies the ratio of MHRs to constituents must be low enough for MHRs to represent constituents' concerns adequately.

- vi. The accountability of the Commonwealth Parliament through elections depends on robust oversight and reform of electoral systems to keep them fit for that purpose.

Questions

11PAL

- 1. What is meant by 'fair elections'?
- 2. Explain two ways individual or pressure groups can participate in Australia's electoral processes.
- 3. Discuss one recently implemented or proposed reform to the electoral system in Australia.

Using Table 1, respond to the following:

- 1. What is meant by 'constituents'?
- 2. With reference to the Source explain, in your own words, two reasons why some States and Territories are overrepresented.
- 3. Discuss the principle of 'one vote, one value' and why it is important for fair elections.
- 4. Evaluate the extent to which Australia upholds the equality of the political right to vote.

12PAL

- 1. According to the Commonwealth Constitution (Australia), outline the representative role of the Senate.
- 2. With reference to the Source explain, in your own words, two reasons why the Joint Standing Committee on Electoral Matters recommends increasing the size of the House of Representatives.
- 3. Discuss the role of elections in the accountability of the House of Representatives.
- 4. Evaluate the claim that Territory senators are more accountable than State senators.

WA first to sign up for national education plan

Co-operative federalism delivers for WA

Syllabus

- 11PAL - structure of the Australian political system and the Australian legal system, including federalism
- 12PAL - federalism in Australia with reference to:
 - intergovernmental relations through the Council of Australian Governments (COAG, 1992 to 2020) replaced by National Cabinet (2020 to present) with Ministerial Councils (2022 to present) reporting to it
 - co-operative federalism as opposed to coercive federalism

Essential understandings

- 11PAL - division of powers, federalism
- 12PAL - division of powers

Keywords

- National School Reform Agreement

Western Australia is the first State to sign up for the National School Reform Agreement (NSRA). The NSRA embodies the essence of co-operative federalism in Australian education, resulting from negotiation and agreement between the Commonwealth, States, and Territories. The agreement encourages States and Territories to implement uniform national education policies and reforms designed to boost educational standards across Australia.

Prime Minister Julia Gillard presided over reforms to the Australian education system.

One of the most notable was the Review of Funding for Schooling, known as the 'Gonski Review'. The recommendations of this review formed the basis for the Gillard Government's National Plan for School Improvement (NPSI).

The NSRA is a continuation of the Gillard-era reform originally negotiated by COAG and based on the principles of co-operative federalism. According to these principles, different levels of government unite to achieve shared objectives, bringing their particular strengths to the agreement. This approach ensures that while the federal government sets overarching 'national' educational standards and ties its grants to achieve them, the States and Territories tailor school curricula to meet the 'national' standards - accessing Commonwealth funding when they do so. Co-operative federalism in education reform allows flexibility and customisation in educational strategies and promotes a unified effort towards common goals.



Under the NSRA, each State and Territory enters into a separate agreement with the federal government, specifying actions to improve student outcomes - which is what Western Australia just signed.

A significant milestone in NSRA is the agreement between the Commonwealth and Western Australian governments, setting a precedent for "fully funded" public

schools by 2026. The agreement increases the Commonwealth's funding share and mandates a corresponding increase in State spending. Other States are free to negotiate independent agreements with the Commonwealth. Western Australia is protected by a "no worse off" clause that means if any other State gets a better deal, Western Australia will receive the same benefit.

The history of school funding is a case study of Australian federalism's journey from a highly coercive form to today's more co-operative variety. Historically, the Commonwealth's involvement in State education - a residual power - dates back to the 1960s, beginning with tied grants for science laboratories in high schools and evolving through various forms of support, culminating in the NSRA. The early part of this history contains much evidence of coercive federalism - for instance, the Menzies Government refused to negotiate the science labs grants, offering them on a take-or-leave-it basis.

A short overview of the Commonwealth/State relations in the residual field of education follows:

- **Menzies Government (1964):** The Commonwealth introduced capital funding for government and non-government schools, introducing federal support for independent and religious schools.
- **Expansion of Grants (1968):** More tied grants for school libraries, complementing science laboratory grants
- **Introduction of Recurrent Funding (1970):** The State *Grants (Independent Schools) Act 1969* introduced ongoing grants tied to the costs of running schools, such as teacher salaries, school maintenance, and educational resources. The level of funding

provided by the Commonwealth was determined based on the number of students and school needs. Recurrent funding continues today.

- **Adelaide Declaration on National Goals for Schooling in the 21st Century - NAPLAN (2008):** The National Assessment Program – Literacy and Numeracy (NAPLAN) was introduced in 2008 to enhance 'national' outcomes education assessing and improving literacy and numeracy standards.
- **National Schools Specific Purpose Payment (2009):** Commonwealth Section 96 school funding was divided into two streams for government and non-government schools until the *Australian Education Act 2013*.
- **Australian Education Act (2013):** Introduction of the Capital Grants Program for capital projects, like buildings, in non-government schools, representing a significant change in school funding.
- **National School Reform Agreement (2018):** The NSRA is a co-operative agreement between the Commonwealth, States, and Territories to improve national student outcomes in Australian schools.

11PAL

- i. The Australian political and legal system's structure includes the division of powers between two sovereign levels of government - called federalism. Federalism allows flexibility in government, whereby States govern in the interests of regions while the Commonwealth governs national matters.
- ii. Powers are classified as:
 - a. Exclusive powers are Commonwealth powers. They are national in character and few in number. An example is s51 of the Constitution, which allocates legislative power over the seat of national government and the federal public service to the Commonwealth. Section 90 allocates the financial power related to excise tax to the Commonwealth.
 - b. Concurrent powers are non-exclusive powers shared by the Commonwealth and States. They are concentrated in s51 of the Constitution - taxation is an example. However, despite being non-exclusive, many are 'exclusive-by-nature' and only exercised by the Commonwealth - migration is an example.
 - c. Residual powers are unspecified (not written in the Constitution) and fall to the States. Education is an example. They are non-national in nature and unlimited in number - giving the State parliaments so-called 'plenary power' (the complete power to legislate in a particular field).

12PAL

- iii. Co-operative federalism entails collaboration and coordination between the Commonwealth and States. It is necessary when effective policy requires the resources and legislative powers of both levels of government. Typically, co-operative federalism works by the following mechanism:
 - a. In COAG/National Cabinet negotiations with the States, the Commonwealth establishes 'national' priorities and a framework law.
 - b. The Commonwealth and States sign an intergovernmental agreement. The agreement sets out policy goals and funding arrangements.
 - c. The Commonwealth makes grants to the States as they work towards the agreed policy goals - these are called 'incentive payments' and are made under s96 of the Constitution.
 - d. The States legislate 'mirror' laws so each jurisdiction has the same laws. Mirror legislation creates uniform 'national' laws - i.e. the same legal framework across the country. State laws may be flexible to allow for regional variation - so they are not always wholly uniform (note that this is a strength of federalism - and a weakness depending on the circumstances).
 - e. The result is a 'national' legal framework. In this context, 'national' means an Australia-wide legal format that is not a Commonwealth law.
- iv. Students should use "Commonwealth" to describe federal law and "national" to describe

uniform State laws arising from COAG or National Cabinet agreements.

- v. Intergovernmental relations through the Council of Australian Governments (COAG, 1992 to 2020) and the National Cabinet (2020 to present) result in policies and programmes with the prefix "national" and are the outcomes of co-operative federalism.

Questions

11PAL

1. What is the 'division of powers'?
 2. Explain how the Australian political and legal system achieves the 'division of powers'.
 3. Discuss how Australian federalism works using at least one example.
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12PAL

1. What is meant by 'co-operative federalism'?
2. Identify one example of intergovernmental relations negotiated through COAG or the National Cabinet and outline two aspects demonstrating co-operative federalism.
3. With reference to examples, discuss coercive versus co-operative federalism in Australia.

PAL Briefs

Times have changed - the government "breaks a promise"
Is a mandate for good government a reason to break an election promise?

Syllabus

- 11PAL - roles of the executive branch of government
- 12PAL - political mandates in theory and in practice, including competing mandates

The Albanese Government recently revised the controversial Stage 3 tax cuts in a significant policy shift. The Stage 3 cuts were part of a package of tax cuts legislated six years ago by the Coalition. They favour the wealthy by abolishing the 37% tax bracket, lowering the 32.5% rate to 30%, and raising the 45% threshold to \$200,000. Labor, then in opposition, reluctantly agreed to Stage 3 to get Stages 1 and 2 passed. However, it did not sit comfortably with Labor's social democratic equality creed.

At the 2022 general election, Mr Albanese promised to implement Stage 3 unaltered if Labor formed a government. The promise was to prevent the Coalition from attacking Labor on tax. Fast forward to 2024, and Labor - now in government - wants to revise the cuts, igniting accusations of broken promises.

Political mandates and the principles of good governance are the real issues here. At the very least, Mr Albanese has no mandate for his proposed changes - the opposite, in fact, since he promised to implement Stage 3 unaltered.

In the six years since Stage 3 was legislated, the world has changed - a lot. A global pandemic, supply chain disruptions, wars in Ukraine and the Middle East, Chinese economic weakness, and the return of high inflation, rising rents and house prices. All of these contribute to a steep rise in living costs, which fall heavily on low and middle-income earners. In this context, the Stage 3 cuts have been criticised as unfair and inflationary - ill-suited to the times.

Despite criticisms about broken promises, a government's mandate is bound to the parliamentary term following an election, suggesting that policy adjustments are permissible and, at times, necessary in light of new economic realities or challenges. This view asserts that governments retain the flexibility to adapt policies to serve the national interest - regardless of prior commitments, especially if those promises would be counter-productive or harmful. Arguably, all governments have a general mandate to govern for the times. That's what governments do - they respond to crises, make policies responsive to contemporary needs, etc. To argue that governments must abide by promises in all circumstances is to govern with one hand tied.

The Albanese government's policy revision also touches on the broader notion of good governance, characterised by adaptability, responsiveness, and foresight in addressing contemporary challenges. In revising the Stage 3 tax cuts, the Albanese Government prioritises adaptability and responsiveness to the prevailing economic climate, aiming to meet the needs of the Australian public in changing times.

The debate really centres on competing mandates. Should a *specific* mandate to act (or not) override a *general* mandate to govern well?



11PAL

- i. One role of the executive (i.e. the government) is to govern in response to the challenges of the time. As recent history attests, governments act decisively in natural disasters, wars, pandemics, and economic shocks. They also make promises during election campaigns. Sometimes, conflicts arise between what is promised and what is necessary. It is another role of the government to resolve that conflict.

12PAL

- ii. Mandates are a political idea that a government's legitimacy derives from winning elections. This is true - to an extent. However, governments must respond to crises and challenges during their term. Occasionally, the necessity to act may conflict with election promises.
- iii. There are different types of political mandates. The government claim a "will of the majority" mandate based on winning elections. There are two categories of the will of the majority mandate - *specific* mandates and *general* mandates. Electoral promises result in specific mandates for particular policies (e.g. "*we will implement Stage 3*"). Winning the election results in a general mandate for the term of office (e.g. "*we must address the cost of living crisis*"). Specific and general mandates may compete - as in the Albanese government's response to the Stage 3 tax cuts.

Israel's Supreme Court upholds democratic principles

Court strikes down a law restricting judicial independence

Syllabus

- 11PAL - structures and processes of one democratic political and legal system (Israel)

Essential understandings

- 11PAL - separation of powers, judicial independence, constitutionalism

Cross references

- PAL Update V6N4 Jul/Aug 2023 - Is Israel's democracy at risk?

In July 2023, Israel's parliament - called the Knesset - approved the Netanyahu Government's judicial reform bill, leading to widespread protests and demonstrations. Many Israelis opposed the reforms as they could seriously undermine the independence of the judiciary. At the time, Israel's ceremonial President Isaac Herzog called on the government to "come to its senses" over the issue and abandon the law.

The Movement For Quality Government in Israel (MQGI), a civil society group,

challenged the law in the Supreme Court. The group argued the law represents a "substantive change in the fundamental structure of Israeli parliamentary democracy and the character of the Government". The opposition leader, Yair Lapid, joined the case on MQGI's side.

On 1 January 2024, the Israeli Supreme Court invalidated the law, declaring it unconstitutional. Eight out of fifteen judges held that the law was incompatible with Israel's democratic principles, citing its potential to undermine the country's democratic political and legal system.

MQGI and other defenders of Israel's democracy celebrated the court's decision to uphold democratic principles, praising it for preserving the separation of powers and safeguarding the judiciary's independence. They argue that the invalid law, intended to limit the Supreme Court's jurisdiction, posed a significant threat to institutional checks and balances, potentially allowing the executive branch to avoid constitutional accountability. See PAL Update V6N4 Jul/Aug 2023 - Is Israel's democracy at risk?

The Netanyahu Government and its supporters criticised the court's ruling, accusing the Supreme Court of 'judicial overreach' and an intrusion into the Knesset's legislative power. They claim that the court exceeded its authority and disrupted the democratic process by invalidating a law legitimately passed by elected representatives, affecting the majority's will. Some expressed concerns about the court setting a precedent to justify a more active judiciary that may act in the political sphere.



11PAL

- i. The Israeli experience illustrates the balance between limiting executive authority and the power of representative legislatures through their accountability to judicial oversight. It is a case study of the doctrine of the separation of powers, checks and balances and judicial independence in operation.
- ii. In contemporary times, Australia has witnessed contests over the balance between the executive and judicial branches in cases such as *Alexander 2022* and *Benbrika 2023*. In these contemporary rulings, the High Court of Australia has actively preserved the separation of powers, checks and balances and judicial independence.
- iii. The Israeli Supreme Court and the High Court of Australia have demonstrated the judicial branch's role as the guardian of democratic principles and the rule of law against an overzealous executive branch that can impose its will on the legislature by forcing undemocratic laws.
- iv. Parliamentary systems like Israel and Australia - where the executive is formed within the legislature - can be vulnerable to executive overreach because the government often dominates the parliament through its superior numbers and the discipline of its political party. Robust judicial independence, the principle of constitutionalism, and the rule of law protect parliamentary democracies from executive overreach.

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