Chapter 1
The Functions of the Law

Chapter 2
Types of Law

Chapter 3
The Basis of Government in Australia
KEY IDEAS

- What forms can the rules concerning human conduct take?
- What are the essential functions of all laws?
- How can society use laws to achieve social cohesion?
- How can laws assist society to achieve social progress?
- What are the primary sources of law in Australia?
- How is law classified in Australia?
- What are the main distinctions between criminal law and civil law?
- What are the guiding principles essential for the rule of law to function in Australia?
- What is a constitutional monarchy and how does it contrast with a republic system?
- Why is a division of (legislative) powers necessary in a federal system?
- Why is the doctrine of the separation of (government) powers an essential feature of a democratic community?
- Why is the principle of representative government an essential element of Australian Parliaments?
- How does the Westminster system make Executive Governments accountable in Australia?
- Why is judicial independence the integral feature of the separation of powers?
- How is the Australian court system structured to resolve legal disputes in the Australian federal system?
- How does the doctrine of judicial review foster and protect human rights and freedoms in a democratic community?

LEARNING REQUIREMENTS

At the end of the topic students should be able to:

- display knowledge and understanding of the influences that have shaped the Australian legal system
- know, understand, and analyse legal principles, processes, and structures
- recognise ways in which the Australian legal system responds to diverse groups in the community
- demonstrate civic literacy through inquiry into the legal system
- analyse the Australian legal, constitutional, and justice systems
- communicate informed observations and opinions on contemporary legal issues and debates, using legal terminology and appropriate acknowledgment of sources.
The functions of the law

What is law?

Law prescribes acceptable standards of conduct, and breaches of these laws will incur a legal consequence. For example, speed signs prescribing a 60 km/h on main metropolitan roads indicate the distinction between lawful and unlawful behaviour. Driving below 60 km/h is lawful behaviour, but any speed above it is unlawful. A motorist detected exceeding the 60 km/h speed limit will incur a punishment as a sign of the community’s disapproval.

Legal rules and non-legal rules

Legal rules are guidelines of lawful behaviour that promote and maintain social harmony. These rules could be statutes enacted by parliaments, regulations made by delegated authorities or case law rules created by judges. They all have one feature in common. When a legal rule is broken, a dispute ensues and a court can impose a legal consequence to resolve it. In criminal law, the consequence may be a sanction such as a fine or a period of imprisonment.

Non-legal rules cannot be enforced by courts because they have no legal force. They can be made by parents to regulate the behaviour of their children, sporting and social clubs to manage the affairs of their members, and institutionalised religions to administer the direction of the church. The consequence of breaching a non-legal rule is at the discretion of the person or organisation which made it.

Both legal and non-legal rules perform an important role in regulating human behaviour so that social cohesion is achieved.

Focus Questions

1. What is a law? Give examples.
2. What is the difference between a legal rule and a non-legal rule? Give examples from your own experience.
### The functions of the law

Laws are necessary to achieve the dual functions of social cohesion and social progress.

<table>
<thead>
<tr>
<th>Social cohesion</th>
<th>Social progress</th>
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<tr>
<td>1 Laws must be able to protect and preserve societal values and human rights.</td>
<td>Laws that facilitate social progress are designed, among other things, to:</td>
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<td>2 Laws set acceptable standards of behaviour and prescribe the legal consequences for breaching them.</td>
<td>1 provide a universal education system for all citizens</td>
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<td>3 Laws create the institutions of government to make laws and enforce them and for the adjudicating bodies to bring about just outcomes to legal disputes that may arise.</td>
<td>2 assist the development of youth into well-adjusted adults</td>
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<td>4 Laws must be able to be adapted to meet changing circumstances and needs.</td>
<td>3 foster good health practices</td>
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<td>4 protect the environment.</td>
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#### Social cohesion

1 **Laws that protect and preserve societal values and human rights**

Laws reflect the prevailing values of society as perceived by the law-makers. These values include:

- **Political values** – example: law-makers should be voted into office.
- **Social values** – example: marriage should be voluntary between two people.
- **Moral values** – example: people should have a right to personal privacy.
- **Economic values** – example: private property rights are paramount.
- **Religious values** – example: people can practise a religion of their choice.

#### Values – An historical perspective

British values prevailed over those of Australia’s indigenous people when the first colonists arrived at Botany Bay in 1788. The ways that indigenous people owned and used land was not recognised by British property law and the values upon which it was based, so the doctrine of *terra nullius* was considered appropriate for Governor Phillip to assume ownership of all lands, seas and rivers on behalf of the British Crown.

Since colonisation, the early law-making authorities made laws that reflected the prevailing values of the ruling class. Land owners who dominated the early Legislative Councils passed laws to...
protect their interests, often to the detriment of other colonists, such as working class people and the indigenous population. For example, many indigenous people were forced onto religious missions or government reserves and forced to observe European lifestyles and values.

With the development of elected parliaments in Australia, the nature of legislation has changed to be more representative of the values held by a broader section of the community. Unless laws reflect the prevailing values of society, they will not have the respect of the community and will probably never effectively achieve their desired objectives. For example, Australia’s voting laws reflect the democratic values of the community by allowing adult citizens to vote at regular elections of parliament.

As societal values are not homogeneous, it is almost impossible for our law-makers to make laws that will satisfy everyone simultaneously. Critics contend that the laws made by modern Australian parliaments still reflect the values of the wealthier sections of the community who have the resources to use and apply the laws to protect their interests at the expense of others.

The law-making process is not perfect and debate still rages about how the democratic processes should be reformed to empower people to take a more active and constructive role in the democratic processes, so that the laws equitably and fairly reflect the values and aspirations of all members of the community.

Values also change over time to reflect changes in lifestyles and community attitudes, as well as developments in technology.

Laws are made to protect and preserve human rights and freedoms.

**Individual human rights**
This category refers to fundamental civil rights, such as the right to the freedoms of speech, association, conscience and religion. Human rights also include the right to an education and to marry a person of your choice.

For example, the *Marriage Act 1961* (Cth) protects an adult person’s right to choose his or her own marriage partner.
Political and democratic rights
This category refers to the individual’s right to be involved in the democratic decision-making process, particularly by casting a vote at a referendum to change the Constitution or by voting at regular elections to elect members of Parliament. These rights are protected by Commonwealth, State and Territory electoral legislation.

Legal rights
This category identifies the rights that individuals can expect to receive when they are in a relationship with the state or involved in a legal dispute. In criminal law, people are entitled to the presumption of innocence, equality before the law and the right to present their own cases before an independent judge. These legal rights are protected by common law rules developed over many years in Britain and Australia, as well as by codified law.

2 Laws to set acceptable standards of behaviour and prescribe the legal consequences for a breach of them
To preserve and protect values and human rights, the law-making institutions, parliaments, courts and delegated authorities have defined the unacceptable standards of behaviour that may threaten our values and rights. By imposing legal consequences on people who breach these standards, it is more likely that people will respect the rights of other members of the community and obey the laws so that social cohesion can be achieved.

The standards of unacceptable behaviour have been defined by law as being either:

- **Public wrongs**: These are crimes that incur a sanction as a sign of the community’s condemnation. For example, to give expression to the individual’s inalienable right to life, the South Australian Parliament has declared that the crime of murder is an indictable offence punishable by a mandatory sentence of life imprisonment.

- **Private wrongs**: These are civil wrongs where one legal entity has infringed the rights or interests of another legal entity. Civil wrongs have been defined in a countless number of court decisions in civil law. For example, people who breach the duty of care principle in negligence law can be ordered to pay damages for the harm that their careless behaviour caused the plaintiffs.

As a general rule, all behaviour not prescribed as a crime or civil wrong is lawful and legal entities will not be called to answer for them in a court.

**Focus Questions**

1. What is social cohesion?
2. How does the law protect values and rights?
3. What is the difference between an acceptable and unacceptable standard of conduct? Give examples to support your answer.
4. How are unacceptable standards of behaviour decided?