

UNIT 3 AOS 3- ROLE OF THE COURTS IN LAW MAKING

Key Dot Point #1: The ability of judges and courts to make law

NOTE: **Common law**- judge-made law or case law. It can only be created when a case is brought to the courts. It develops through the ratio decidendi being followed by future courts and was founded in England and adopted by the Australian legal system.

There are two situations where courts can make laws:

- ✚ Judges **make laws on an issue that arises in a case before them**, on which there is no previous statute or common law, or the current law requires expansion.
- ✚ Through **statutory interpretation**- meaning of words in an Act of parliament when applying them to a case the court is hearing.

Limitations on a judge's ability to make law

Although the doctrine of precedent provides the ability for judges to make new laws when the need arises in the community, judges and courts can only make laws when:

- ✚ **Case is brought before a superior court**- Judges can only develop or change the law when a relevant case is brought before them. A case will only be brought by a person who feels aggrieved or injured and has decided to have the issue resolved in court. The person bringing a case must have standing- be directly affected by the case.
- ✚ **there is no previous binding decision in a higher court in the same hierarchy that must be followed by lower courts**- the nature of common law is that the principles of law established in a higher court are binding on lower courts. However, if a court is bound by a principle of law that has been established by a higher court, there may be an opportunity to distinguish the precedent of the previous case and the case before the court.
- ✚ **Personality of judges**- some judges may be conservative, seeing their role as adjudicators rather than law-makers. Hence a predominantly conservative court is likely to leave parliament to create new areas of law.

Key Dot Point #2: The operation of the doctrine of precedent

DEFINE **PRECEDENT**:

A precedent is the reasoning behind a court decision that establishes a principle or rule of law that must be followed by other courts lower in the same court hierarchy when deciding future cases that are similar.

- ✚ Principle of doctrine of precedent creates **consistency and predictability** since the person bringing a case to court will have an idea of the outcome because cases are decided in a similar manner.
- ✚ The process of judges following the reasons for decisions of higher courts is at the heart of decision-making.
- ✚ Generally occurs when a court is **hearing an appeal** (no jury) or a civil case without a jury.
- ✚ Inferior courts follow precedents set in superior courts.
- ✚ A decision made by the HC on appeal from a state/territory court is binding on all states and territories

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The Principle of **Stare Decisis**:

“to stand by what has been decided”- process of **lower courts following the reasons for decisions of higher courts.**

Ratio Decidendi:

“the reason for the decision”- **binding part of the judgment** (statement by the judge at the end of a case outlining the decision and reasons for the decisions). The ratio decidendi is the decision of law that is to be followed in future (binding part of the precedent).

Finding the Ratio Decidendi

- ✚ May not be placed at the end of the judgment
- ✚ In cases heard on appeal or constitutional matters in the High Court, several judges are involved in reaching a decision. **A precedent created can be that of a majority (not a unanimous decision).** In this case the ratio decidendi is found by looking at the judgments of those judges who form the majority.
- ✚ **Look at the material facts** since they are considered when deciding cases in future.

Binding Precedents

Precedent that must be followed by the judges when making a decision on a similar case. It is the ratio decidendi, or the reason for the decision, which forms the binding part of the precedent.

For precedents to be binding on a particular case, they must be: (1) from **the same hierarchy** of courts and (2) **from a superior court**- higher in the hierarchy (3) **the material facts of the present case are similar to those in the earlier case.**

NOTE: HC is not bound by its own previous decisions. However in the interests of consistency, it will usually follow its previous decisions, unless it believes that a previous decision is not good law or outdated because of changes in attitudes, technologies or other circumstances.

Persuasive Precedents- eg. Donoghue v. Stevenson (1932)

Precedent that courts do not have to follow, but they may choose to do so for consistency. It is often highly influential in a court’s decision.

Precedents considered to be persuasive but not binding are:

- from courts **in another hierarchy** (eg. Other states/countries)
- from **courts on the same level of the hierarchy** (which are not binding)
- from **inferior courts** (lower in the court hierarchy)
- **obiter dicta contained in a judgment** of a court in the same hierarchy or another hierarchy.

EXAMPLE: The Donoghue v. Stevenson 1932 case was not binding on Australian courts, but was used as persuasive precedent in Grant v. Australian Knitting Mills 1936 which established the law of negligence in Australia.

Obiter Dictum

“**things said by the way**”- In the judgment given at the end of a case, the judge can make a statement that is **not part of the ratio decidendi** (the statement was not a matter necessary to the decision in that case but was still a **matter of considered opinion**). This may be **influential on decisions in the future (acting as persuasive precedent).**

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Ways judges can develop precedent or avoid precedent

Distinguishing a previous precedent (main facts different, pre. Does not apply)

- If there is a binding precedent from a superior court, the judge may find **some material fact in the case presently being considered that is different** from the facts of the previous case where the precedent was set. It can therefore **decide that the court is not bound to follow the previous decision.**
- There will then **be two different precedents** (one for each situation)

Reversing a precedent (in the same case, another court reverses decision)

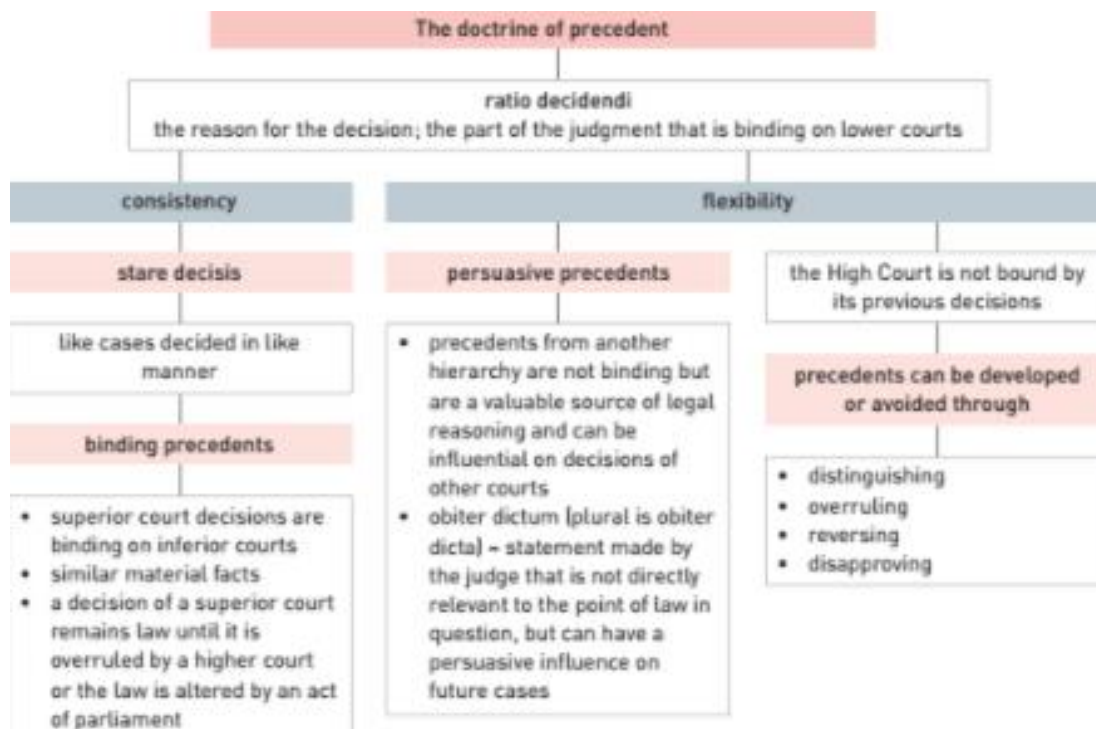
- When a case is taken on **appeal to a higher court, the superior court may change the decision of the lower court in the same court hierarchy, thereby reversing the earlier precedent in the same case.**
- The new precedent created by the superior court is then the one to be followed in future cases.

Overruling a precedent (different cases, higher court overrules lower court)

- If a **superior court decides not to follow an earlier precedent of a lower court in a different case**, it can overrule the previous precedent.
- A **new case in the higher court creates a new precedent that makes the previous precedent inapplicable. It can do this since it is not bound by precedents created in lower courts.**
- Eg. HC can overrule a previous precedent created by the Supreme Court of Victoria.
- When a precedent is overruled, the **new ratio decidendi from the latest case has the effect of becoming the present to be followed in future.**
- HC generally provides consistency in the law by following previous decisions. However there have been instances where HC has overruled its earlier decisions.

Disapproving a precedent (not avoiding- statement of disapproval for earlier pre)

- When a previous decision (precedent) has been made in a court at the same level in the hierarchy or lower level, the present court may disapprove the earlier decision.**
- A **statement that the court does not agree with the earlier decision.**
- SAME LEVEL IN HIERARCHY- present court is not bound to follow the earlier decision** (though for the sake of consistency it usually will). If the later case does not follow the earlier case it can **make a new precedent. Both the disapproved precedent and the precedent created in the present case remain in force until another case is taken to a higher court, which can overrule the previous decisions and create a new precedent.**
- INFERIOR COURTS-** judges **can express disapproval** about a precedent set in a superior court that they **are bound to follow**. Eg. A judge could make a **statement in their obiter dictum** saying that they do not agree with the precedent but believe it should be left to parliament to change the law/indicate to a higher court that they believe the precedent needs to be reconsidered.



- NOTE: When a case comes before a court a judge must
- investigate previous principles of law established in earlier cases
 - determine if existing precedent is binding or persuasive
 - analyse the ratio decidendi and obiter dictum of relevant judgments
 - decide which principles of law are to be followed

IMPACT OF APPLYING PAST PRECEDENTS ON THE LAW:

- **strengthen the authority** and importance of precedents
- **extend/restrict the application** of past precedent
- overrule, distinguish or disapprove past precedent

Evaluating the Doctrine of Precedent

ADVANTAGES	DISADVANTAGES
Litigants are treated consistently and predictably as a case will be decided similarly to a previous, comparable case.	The law may become inflexible as a court is bound to follow precedent and may not be able to avoid it, so common law is limited in responding to changes in society .
Greater degree of certainty and fairness	There are some uncertainties as no two cases can ever be the same. It is very difficult to establish if the material facts of the case are similar enough .
Law grows out of the needs of society so new rules can arise out of concrete facts and situations . Hence they can recognise a new situation and fix it without parliament having to pass an Act (which would take up a considerable amount of time). Judges can then create new areas of law to uphold the rights of disputing parties before them.	It is a slow and irregular way to develop the law . This is restricted by having to wait for a case to be brought to court . For this to happen, a person bringing a case to court must be directly affected or have standing .
Judges are appointed, not elected so there is no fear of voter backlash. Hence they are more likely to be open to using the doctrine of precedent.	The judiciary's views may not reflect the views and values of majority of the community .

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Difficulties with interpreting past decisions

✚ Locating the relevant precedent

Unlike parliament, where legislation on a particular topic can be found in one Act of Parliament, there is **no set area** where a case relating to the case before the court is found.

✚ Conflicting precedents

A court may be faced with **more than one relevant precedent**. In this circumstance, a court can take into account factors such as the standing of the court within the hierarchy, the number of judges that heard the case, whether the decision was unanimous and whether or not other courts have followed that precedent.

✚ Dissenting judgments (ratio decidendi of each judge are different)

In some appeal courts, there are **several judges presiding over a case**. In this situation there is **not a unanimous decision**, so the **majority decision will prevail** and this sets the precedent. The **decision of the minority is referred to as the dissenting judgment, and does not set a precedent**.

✚ Identifying the ratio decidendi

A case may be complex and have **an enormous amount of detail and competing arguments**. It may therefore be **difficult establishing what the exact nature of the arguments** is, and what the ratio decidendi is (as opposed to the obiter dictum).

✚ Conservative nature of judges (Parliament is the supreme law-making body so judges may be reluctant to make significant changes to the law)

It has been a long-held view that it is not a judge's job to make law, but rather to interpret and apply what already exists. Even when a court is able to make or change a present, they **tend to follow what already exists as per the principle of stare decisis**.

Key Dot Point #3: Reasons for interpretation of statutes by judges

The process by which judges interpret the words or phrases in an Act of Parliament (statute) in order to give words meaning. The meaning given will form the ratio decidendi and precedent from the case, and will be read with the act in future to determine the complete law.

- ✚ APPLICATION PROBLEM: **BROAD WORDING**- When Acts are drafted they are done so in **general and broad terms** and so **judges need to interpret them when applying them to cases in court**. When a judge interprets the meaning of a word, or words in a statute, the reasoning behind the interpretation sets a precedent which becomes binding on all other courts law in the same court hierarchy- this new precedent becomes part of the law along with the statute (Act of Parliament). For future cases, the Act and the precedent which was created by the court when interpreting the Act, are read together and form the law.
- ✚ DRAFTING PROBLEM: FAILURE TO FORSEE FUTURE APPLICATIONS- legislation may not deal with a particular circumstance that arises in a case, as parliament may not have foreseen all future circumstances when drafting the Act. In this case the court is required to look at the purpose and context of the law to broaden the application of the law.
- ✚ APPLICATION PROBLEM: AMBIGUOUS- words in the legislation may have several possible legitimate but contradictory meanings. Hence the court will need to decide which of the meanings best achieves the purpose of the legislation.
- ✚ DRAFTING PROBLEM: Legislation may not include new types of technology so the court will need to determine whether new technology should be included in the meaning of the words

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- 🚦 APPLICATION PROBLEM: The meaning of words used in legislation may have changed over time.

Methods used by judges to interpret Acts

Principles have been developed by judges to help them in interpreting statutes. If the words/meaning of an Act are unclear, judges will look to other sources in order to try and determine the intention of parliament at the time the Act was passed.

- 🚦 **Intrinsic Materials-** contained in the Act itself
Judges will refer to other sections of the Act to interpret the meanings of terms or words in an Act, eg. Words of the Act, long title, preambles, headings, margin notes, footnotes and schedules.
- 🚦 **Extrinsic Materials-** outside the Act but can assist with interpretation
Eg. Parliamentary debates recorded in Hansard, reports from committees and law reform bodies, interpretation Acts, dictionaries and law reports.

Judges have two approaches in interpreting the words in the Act:

Literal Approach- judges look at the literal meanings of the words in the Act. They may also ascertain the precise meaning of words by looking at other sections in the Act or dictionaries. However in dictionaries, the meaning may not convey the intention of the Act or situations of a case before court. Words can also have a number of different meanings.

Purposive Approach- If the judges feel that the literal approach may not achieve the intention of parliament when the Act was drafted, this approach is used. It involves looking at the purpose and deciding what the Act was intended to achieve when it was originally passed. The Acts Interpretation Act 1901 (Cth) and Interpretation of Legislation Act 1984 (Vic) provide guidance to the courts on how legislation should be interpreted.

NOTE: **Ejusdem Generis Rule (Class rule)**

When there are several specific terms, all in a particular class, which are followed by more general terms, the general terms will be interpreted in the same class as the preceding words.

Eg. S.51(v) states 'postal, telegraphic, telephonic and other like services'- 'other like services' indicates that terms can be interpreted as within the same class.

NOTE: The Supreme Court of Victoria is required to interpret legislation in a way that is compatible with human rights under the Victorian Charter of Human Rights and Responsibilities. In interpreting a statutory provision, the court may refer to international law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights.

CASE EXAMPLE OF STATUTORY INTERPRETATION

Deing v. Tarola (1993)- Studded Belt Case

A young man was charged under the Control of Weapons Regulations 1990 (Vic) with possessing a regulated weapon. He was wearing a black studded leather belt to hold up his trousers, which the police argued was a weapon. After consulting a dictionary, legal journals and previous decisions on the interpretation of 'regulated weapon', Justice Beech held that a studded belt used as an article of clothing is not a weapon, although it could be used as one. The impact of this decision is that it restricted the definition of 'weapon' to those things likely to be used for an offensive or aggressive

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purpose only. Any similar case after this about use of a regulated weapon will now abide by the definition interpreted by Justice Beech.

Key Dot Point #4: Effects of statutory interpretation by judges

Words in the Act are given meaning

The courts cannot change the words in the Act but can interpret the words and give them meaning that will then be followed in the future.

Precedents are set for future cases to follow

The interpretation of the words in an Act forms a precedent that is then read together as part of the law with the Act of parliament. This type of law-making is carried out by the Supreme Court, the Court of Appeal and the HC. The precedents created by these courts may be extended or changed in higher courts (HC can overrule its own decisions).

Restricting the law through a narrow interpretation of a statute

if the court interprets a word or phrase narrowly, this could restrict the scope of the law. Words in legislation are given a more specific meaning, enabling judges to see whether the facts of the case fall within that meaning. For example, in the Studded Belt case a precedent was set on the meaning of the phrase “regulated weapon”. The judge created a common law definition of it as anything that is not in common use for any other purpose but that of a weapon”, thereby narrowing the scope of the law.

Extending the law by a broad interpretation of a statute

a broad interpretation of a word or phrase in an Act can extend the law to cover a new situation or area. For example, the decision in the Tasmanian Dam case extended the interpretation of the phrase ‘external affairs’ in the constitution to include areas covered by international treaties. This case set a precedent, and from that time, the meaning of the words ‘external affairs’ has been extended and the Commonwealth Parliament has jurisdiction over areas covered by international treaties.

NOTE: the decision of a court remains in force unless one party decides to appeal against the court’s decision. The appeal court may then reverse the decision or let it stand. When a law is made through courts it applies to the parties of the case and any person bringing a similar case before the courts in future. The law remains in force until it is reversed, abrogated or overruled. Parliament can confirm a decision made by court by passing an Act which codifies the common law into legislation. (eg. Mabo case)

Case Studies for Avoiding Precedent

State Government Insurance Commission v. Trigwell & Ors 1979

Mr and Mrs Trigwell were injured when a vehicle collided with their car after hitting two sheep. They sued the driver of the other car and the owner of the sheep for damages. The High Court’s decision was to follow the old common law principle which stated that the landowner was not responsible for any injury caused if their livestock strayed onto the highway, even if they had not kept their fences in good condition. Justice Mason disapproved of the common law and acknowledged that it was outdated, and thereby stated that the law-making should be left to parliament in their obiter dictum. **The Victorian Parliament decided to follow this suggestion by passing the Wrong (Animals Straying on Highways) Act 1984 (Vic) which abolished the common-law and made owners of land liable for damage negligently caused by their animals straying on highways.** (use for question on relationship between parliament and the courts)

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Queen v. Tomas Klamo (2008)

Tomas Klamo was convicted of manslaughter of his four week old son in the Supreme Court. The child died of a brain haemorrhage. This was appealed to the Court of Appeal, where it was decided that the case could be distinguished from other cases referred to in the judgment since there was no evidence to show that the accused was of unsound mind at the time of the death of the child. Klamo was acquitted of manslaughter, and this reversed the decision of the Supreme Court. The ratio decidendi was that there was insufficient evidence for the jury to reach any firm conclusion about how the baby had died. In particular, no evidence for showing that the shaking by Klamo was the cause of death.

Key Dot Point #5: Strengths and weaknesses of law-making through the courts

The courts are able to develop and clarify the law, and fill in the gaps left by parliament as society requires it. Judges are able to create areas of law when cases come before them on issues which the parliament has not previously legislated. This remedies the oversights or omissions of parliament, and expands the law to cover new situations in the community that require it. In areas of law where parliament has legislated, the courts can clarify and add detail to the legislation through statutory interpretation when applying it to cases. However, the courts must wait for a test case to be brought before them before they can change the law. This relies on the plaintiff to have standing and be directly affected by a specific situation. Furthermore, courts are generally seen making small, specific laws rather than creating whole bodies of law since their law can only cover the issues raised by the case.

The doctrine of precedent provides consistency and certainty for the outcomes of court cases. This is pursuant to the principle of stare decisis, where the lower courts must follow the decisions of higher courts in the same hierarchy. This consistency leads to a fairer and more predictable outcome for those taking legal action. However, the effectiveness of courts as a law-making body is affected by the fact that the judges tend to be conservative and reluctant to change the law. This makes law-making by the courts more inflexible as common law will be less likely to change, even if society's views and values have changed. It may also result in unjust outcomes for those taking legal action.

Judges are free from political pressures since they are independent bodies from parliament and government. Since they are appointed rather than elected, judges are able to objectively assess the most appropriate law for the case they are adjudicating, and do not need to fear voter backlash as parliament does. However, as undemocratic law-makers, judges are not representative or responsible to the community, so their decisions may not represent their views and values. Hence some laws made by judges may not be accepted or followed by the community.

The appeals process allows for the review of decisions. If a party to a dispute appeals their case to a higher court, the decision made by a lower court can be checked by a higher court staffed by more experienced judges. If it is found that the trial court was incorrect in its decision, then the precedent created can be reversed by a higher court. However, precedent can be overridden or abrogated at any time by parliament. As parliament is the supreme law maker, it is able to pass legislation that overrides statements of law made by the courts. In addition courts can only make laws after the fact (ex post facto). Hence they can only create laws after the wrong or offence has already been committed. Courts cannot make laws for the future.

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Courts help to maintain flexibility in developing the common law and statutory interpretation by avoiding precedent through distinguishing, overruling and reversing past precedent. In this way the law is kept from being too rigid. However, courts are restricted in their ability to make law if they are bound by old precedent, particular courts which are lower in the same hierarchy. They may be unable or unwilling to avoid these processes, making the law-making process through the courts relatively inflexible.

Key Dot Point #6: Relationship between courts and parliaments in law-making

Courts are responsible for settling disputes. Many disputes are settled by the courts by interpreting the words in an Act of parliament. A secondary role of the courts is to occasionally make laws.

Parliament is the supreme law-making body, and has sovereignty over other law-makers. Hence it is able to make laws on any issue provided it has the constitutional power to do so, without being constrained by existing laws it has made. Parliament can make laws that either confirm or reject laws made by the courts.

Courts depend on parliament to make the bulk of the law. Parliament depends on courts to apply the law made by parliament and to establish new laws on situations that have arisen for the first time.

1. Parliament pass Acts to establish courts and outline their jurisdiction

Through the passage of legislation, parliament establishes courts and their structures, jurisdictions and procedures. For example, the Victorian Parliament passed the Supreme Court Act 1986 (Vic) to establish the Supreme Court. Furthermore, parliament can pass legislation which changes the jurisdiction of courts so that the types and severity of cases heard by the court can be changed. For example, the Magistrates' Court Act has been amended in nearly every year it was enacted, makes changes such as establishing the Koori Court and Drug Court Divisions.

2. Courts apply and interpret legislation created by parliament

When adjudicating a dispute, courts need to apply the case before them to statutes or delegated legislation. In doing so they are often required to interpret the meaning of words or phrases within the legislation. Decisions about the meaning of words in statutes form precedents that become part of the law to be followed in the future. The impact of this is that the legislation and the precedent created by the court's interpretation are read together to form the law. Further, this interpretation may have the effect of broadening or narrowing the meaning of the original legislation.

However, for courts to be able to interpret the meaning of the words of an Act of parliament, an individual or group must take the matter to court. Parliaments have passed laws setting up bodies that provide legal assistance such as the Legal Aid Act 1978 (Vic).

3. Parliament can change laws created by courts

Courts make laws through the creation of precedent and through statutory interpretation. Parliament can change the law to override or abrogate a decision made through the courts. The courts may interpret the meaning of the words in a statute in a way that was not the intention of parliament or that does not reflect the current meaning of the Act. They can also interpret common law in a conservative way that no longer reflects current values in the community. For example, in *Trigwell's Case*, the Victorian Parliament disapproved of the statement of law by the High Court and passed legislation to override the current common law.

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4. Parliament can codify laws made by courts

Parliament is the supreme law-making body within its jurisdiction and can make law that confirms a precedent set in a court by passing an Act of parliament that reinforces the principles established by the courts. This process is known as codification- making common law into statutes and thereby strengthening the law. For example, the Commonwealth Parliament codified the common law principles of the Mabo case into the Native Title Act 1993 (Cth).

5. Court decisions can influence changes in the law by parliament

Courts can influence changes in the law by parliament through their statements made during court cases. Parliament can also be influenced to change the law if a court is bound by a previous precedent and makes a decision that creates an injustice. A progressive decision reached by the courts could alert parliament to the need for a major change in the law.

Reasons parliament can be influenced by courts

- ✚ **Courts may be too conservative or indicate in a judgment that they think the law should be changed by parliament.** Courts may be reluctant to change the law because it feels the parliament is better able to research a whole area of law, but statements made by a judge in the obiter dictum of a court decision may influence parliament to change the law. For example in the Trigwell case, the court was reluctant to set a new precedent, but stated in the obiter dictum that the law should be changed by parliament.
- ✚ **Court decisions highlight problems and lead to public outcry.**
- ✚ **Creativity by courts may alert the parliament to an area of law where new laws made by parliament are needed.** The Mabo decision is an example of the High Court breaking new ground. The High Court overturned the old concept of terra nullius and stated that Mabo and the Meriam people had a right to their land under native title.
- ✚ **Lenient sentences can lead to changes in the law.** Following lenient sentences handed down to a series of one-punch assaults in Australia, NSW parliament passed an amendment Act which included a mandatory 8 year minimum prison sentence for anyone who kills with a single punch while intoxicated or on drugs.