

Introduction to law - blw16

Law, Common Law



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Assignment 1: Essay (value 15%) In theory the doctrine of binding precedent means that judges declare what the existing law is. However many people think that judges actually make law, especially in the High Court of Australia. Write an essay of 1000 words stating whether you believe judges should make law and mention some arguments for and some arguments against this idea. I am of the opinion that judges in Australian courts should make law, within specified boundaries. Through the doctrine of precedent, the decisions that judges make in cases before them, form a body of law known as unenacted or judge-made law. The ratio decidendi or the reasons for the judge's decision form a binding precedent that will direct the decisions of lower courts in the same hierarchy, and guide other courts (Graw, 2005). This body of law, known as decisional law, makes up a large part of law as it stands. However, there are limits on the ability of judges to create laws. Also there are valid arguments for and against the act of judges making law. One of the key arguments in favour of judges being able to make law through setting precedent is that law needs to represent the beliefs, values and needs of society as a whole (Graw, 2005). It would be difficult for statute law to cover every contingency that the court may face; especially considering that between 1995 and 2004 an average of only 159 Bills received assent each year (Chamber Research Office, 2004). Judges take existing law and interpret and apply it to cases before them in a fair and non-arbitrary manner (Thomson & Sarre, 2006). This then creates further precedent,

constantly adding to the body of judge-made law. In this manner, law can more closely represent the needs of society, allowing for outdated law to be updated and modified to suit current circumstances (Thomson & Sarre, 2006). Another advantage of following the doctrine of precedent is that it ensures that everyone facing the court at a given level, no matter what judge they appear before, will be facing the same law. Another point in favour of judges making law is that the power of judges is not unlimited, the doctrine of parliamentary sovereignty, holds the power of the judges in check (Alderson, 2005). Under this doctrine, the parliament is the supreme law making body within its jurisdictional boundaries, and whenever a conflict exists between judge-made law and legislation, the legislation will prevail. The courts cannot overturn, or modify this body of law, except in certain circumstances (Alderson, 2005). The High Court of Australia has the power to determine whether parliament has acted within its constitutional boundaries, and if it is determined to have exceeded these boundaries the High Court can overturn the legislation (Thomson & Sarre, 2006). This point also highlights the importance of the doctrine of the separation of powers. The doctrine of the separation of powers holds that the three arms of government, the legislature, the executive and the judiciary, are to remain separate bodies and act without interference from each other (Thomson & Sarre, 2006). The judiciary is responsible for interpreting and applying the law, and to ensure that the law-making powers of the legislature and the executive have not been exceeded (Alderson, 2005). If the judiciary were to focus too much on making law, rather than interpreting and applying the law, that would go against this doctrine. An argument against judges making

law is that judges may not always exercise appropriate judicial restraint, and may focus too much on creating law, or even on sociological concerns.

Professor David Flint (1999), in the UTS Law Review identified a case where a 28 year old Western Australian man mugged and injured an elderly man with a knife, in the process taking \$465 from the elderly man. In this case the accused pleaded guilty, but claimed that he was struggling to feed and support his young family. The judge, Mr Justice Wallworth, accepted what the accused had claimed and proceeded to state, "...until the community takes some responsibility for its citizens we are going to have this type of crime being committed (Flint, 1999, p4)". However upon media investigation it became clear that the accused was receiving almost \$700 per fortnight, but that most of that money was being spent on drugs (Flint, 1999). In this case, the judge started to overstep the role of the judiciary, rather than reviewing the case from the standpoint of legal principles and deciding the outcome based on those principles (Alderson, 2005), he instead was making a sociological comment on society. This is not the role of a judge in a court room. Professor Flint makes the point that judge's actions are an important part of ongoing social debate, due to their position in the community, however they should not be progressing this debate themselves, and definitely not from the bench (Flint, 1999). In a speech to the Judicial Conference of Australia Colloquium in Adelaide in October 2004, Murray Gleeson highlighted the point that although judges are part of the community and may encourage ongoing debate the judiciary itself as an institution is passive in this debate (Gleeson, 2004). Professor Flint makes the point that the majority of judges do in fact exercise appropriate judicial

restraint. Judges, especially in the higher courts, tend to be older men, who also by their very nature, tend to be very conservative. This conservatism may make these judges less likely to change the law, even in circumstances where it is warranted (Thomson & Sarre, 2006). As previously stated, one of the benefits of judges making law is that they can ensure that the law represents the beliefs, needs and values of society. However this will be difficult to achieve if the judges themselves are constantly out of touch with these beliefs, needs and values (Gleeson, 2004). Therefore for judge-made law to be effective it is important that judges are 'up to date' with these values. This can make the difference between the law smoothly evolving along with society, and slipping further out of touch. That judges make law is an accepted and an important part of our legal system. This process allows law to be modified as time passes, as different cases come before the courts. Judges shoulder a large responsibility in ensuring they exercise this ability appropriately. They must exercise judicial restraint, focusing on interpreting and applying the law as it stands, and only adding to it when necessary. High Court judges also have the added burden of ensuring that the legislature stays within its constitutional law-making mandate. Bibliography Alderson P, 2005, Legal Dictionary for Australians — 2nd Edition, McGraw Hill Educational, North Ryde Australia Chamber Research Office, House of Representatives- Infosheet - Making Laws, No 7, Dec 2004, p5. www.aph.gov.au/house Viewed 17th September 2006 Flint D, 1999, The Courts and the Media — What Reforms are Needed and Why, University of Technology Sydney Law Review The Courts and the Media--What Reforms are Needed and Why - [1999] UTSLR 8; (1999) 1 UTSLR 30 Viewed 16th September 2006

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