

Legal essay VCE: Extended response

Judges make law and always have. Laws change as new situations come before the courts and it is necessary for judges to respond where there are no existing rules to cover the situation. Although parliament is the supreme law-making body, the role of the courts in law-making strengthens the effectiveness of our law-making processes.

To what extent are judges able to make law? In your answer, explain statutory interpretation and the effect it has on laws. Discuss the extent to which parliament and court work together to enhance the law-making process.

Since the adoption of the Westminster system at federation in 1901, Australian courts have been given the power to make laws. Common law (law made the courts) ensures an enhanced legal system and releases some of the pressure off parliament, even though judges have fairly minor law-making power. Whilst the close relationships between the courts and parliament have ensured an effectiveness legal system for a very long time, parliament will always be considered as the supreme law-making body in Australia.

Statutory interpretation is an important part of the Australian legal system and ensures that judges have the flexibility to impose laws based upon the real-life cases presented to them. Statutory interpretation is the process a judge undertakes when they interpret the meaning of a word or phrase within an act that has been passed by a parliament to determine its impact. Statutory interpretation is one way in which judges are able to make law. Through the interpretation of a word or phrase in statute, the judges gives the act meaning and determines its application to real-life cases and, as a result, create their own law. Judges have the flexibility to interpret the word and/or phrase by their literal meaning, such as referring to a piece of extrinsic material such as a dictionary, or they may wish to intrinsic materials, such as footnotes and headings within the act. This interpretation also helps reduce the problems that could have occurring in the original act such as mistakes during the drafting process. However, the courts are limited in their ability to interpret statute, as they must abide by the acts of parliament and cannot overstep their boundaries. Courts need to ensure that they are ruling based on the wishes of the acts of parliament. If they do not follow the meaning of acts as parliament presented them, then parliament have the power to make a law that abrogate (overrides) a decision of the court. Whilst statutory interpretation does give judges some ability to make law that best suits the individual requirements of the case, they are still limited by the legislation passed by parliament and their intentions.

Another situation in which judges are able to make laws is when they are deciding on a new issue that presented before them in a case. In this situation, or when a previous principle of law requires expansion to be applied to a case, the judge has the ability to form new laws which best suit the situation. With rapid changes occurring in society, the parliaments often find it difficult to keep up with the changing times. Therefore, courts have the ability to hear cases where no previous legislation exists to create new common law that ensures a fair and just legal system. In these cases, the judge may even encourage

Additional information

Essay question

Use of the phrase 'to what extent' is asking for a contention (eg is it true, partially true, not true at all)
Establishes direction for the discussion in the introduction
Begins with a preposition to signal time frame ('Since') of the response
Brackets used to insert additional detail
'Whilst', transition word used to signal the relationship between the courts and parliament
Last sentence establishes position on the topic
Clear topic sentence which establishes what will be discussed in the paragraph

Defines the key term 'statutory interpretation' and how it is used
Use of the word 'one' is a modifier which signals that there are other ways judges are able to make laws

Transition word acts to signal a shift and indicates a limitation on what has been previously discussed

Brackets used to add in a definition

Beginning sentence with 'another' signals that the second ways judges make laws will be discussed in the paragraph

Use of the word 'therefore' shows the consequences of this action

Use of the word 'however', introduces a statement that

parliament to look into legislation in this area and, therefore, have an influence over their operations. However, if a similar case has been brought before a court higher in the hierarchy with similar facts, then the judge has no choice but to follow this precedent. The principle of stare decisis (to stand by what has been decided) is the principle followed by the Australian court system in which courts lower within the court hierarchy must follow the decisions of higher courts on previous decisions in cases with similar facts. This limits judge's ability to make law as they are often forced to follow the precedent set by previous cases. As the extract above states judges do have the ability to introduce new laws as the situation presents itself for the first time, but only in situations when a similar case has not been heard at a court above them, which is rare to occur.

While the separation of powers ensures that the legislative (parliament) and judicial (courts) are kept completely separate, there is a relationship between the two in the process of law making. Other than the High Court, which is set up by the Commonwealth Constitution, only Parliament has the power to establish courts and decide on their jurisdiction. That is, for a court to exist there must be an Act of parliament to establish that court such as the *Supreme Court Act 1986 (Vic.)* which established the Victorian Supreme Court. However, the Commonwealth Constitution establishes the High Court of Australia and parliament must follow its decision-making. Unless the Commonwealth Parliament was to successfully undertake a referendum to abolish the High Court of Australia, then the High Court has the power to interpret the Commonwealth Constitution and parliament must follow their rulings. Parliament and the courts also work together as the courts statutory interpretation gives meaning to legislations passed by parliament. As mentioned above, statutory interpretation involves judges giving meaning to words or phrases in an Act of parliament in order to apply cases brought before them. This helps ensure that the legislation passed by parliament is applied with the purpose that parliament intended of it. For example, courts may refer to parliamentary minutes to ensure that the correct meaning of the legislation is applied to the case presented before them. Parliament has both the ability to confirm the interpretation of the courts and to overrule the decisions made by parliament by changing the law. If parliament disagrees with the interpretation by one of the courts, they have the ability to change the legislation to better reflect their opinions, which can hinder the law-making process. As the extract above illustrates, the role of courts is still an important part of the law-making process as they ensure that legislation created in parliament can be applied to real life cases.

While judges have some ability to make laws through the use of statutory interpretation and on new issues presented to them, the reality is that they have a reasonably limited power in this area. The parliament is, and always will be, the 'supreme law-making body' and it is the primary role of courts to enforce the legislation formed by them. However, parliaments and the courts are likely to more effective when they work together to ensure a fair and justice legal system for all.

contracts/contradicts the previous statement
Use of brackets to insert the definition of the key term

Topic sentence signals what will be discussed in the body paragraph
Use of brackets to add detail

Use of italics used to show the title

Use of 'also' is used as a transition word and signals that the next way the relationship between parliament and the courts is shown will now be discussed

Linking sentence connects the discussion points of the paragraph back to the overall topic

Use of quotation marks to cite the text from the above and link the ideas discussed back to the topic
Use of 'however' signals a shift from previous points Last sentence offers an overall position on the topic based on an evaluation of the points made
Conclusion sums up main points and restates position on the topic

Source: