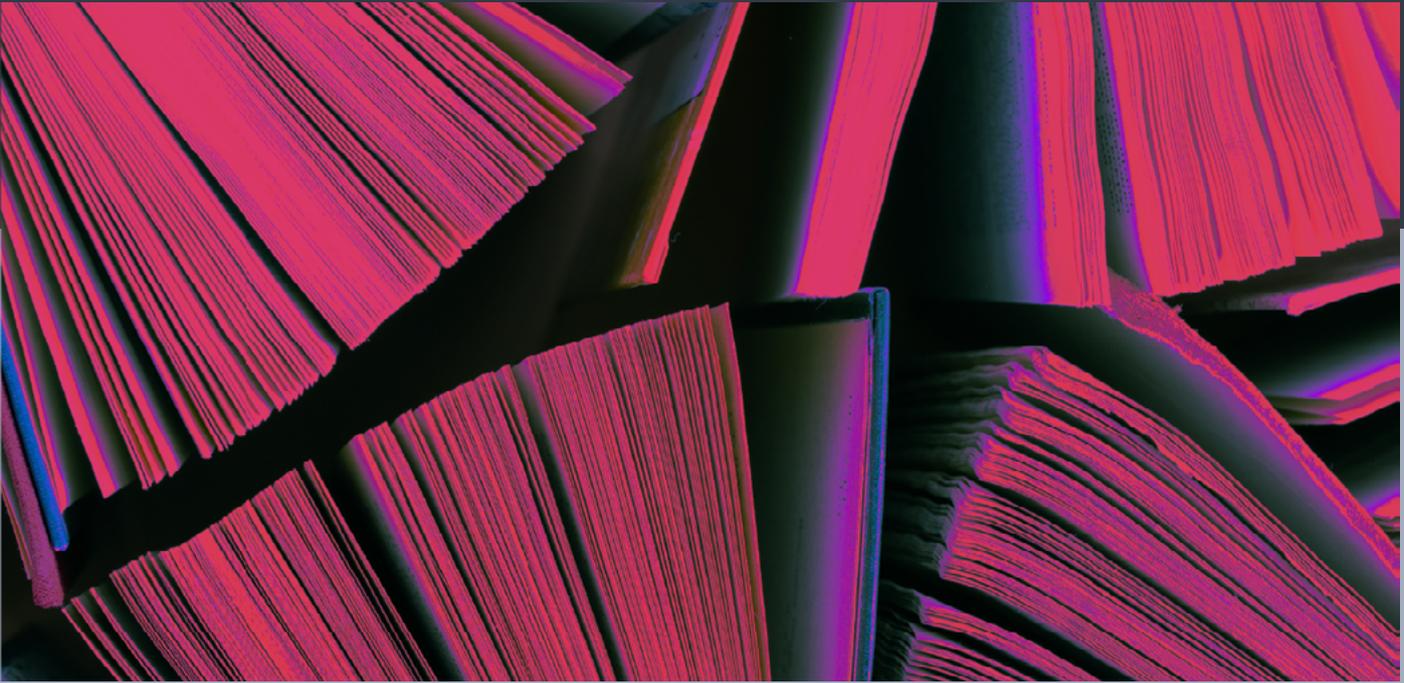


Parliament of Victoria



Summary notes

Parliament and the courts:

Reforming the law

About this resource

These notes were generated from a panel conversation on 21 July 2022, hosted by the Parliament of Victoria and the Victoria Law Foundation. Participants included the Hon. Justice Michelle Quigley QC from the Supreme Court of Victoria, Brad Rowsell MP, Member for Snadringham in the Legislative Assembly, and Andrew Young, Clerk of the Legislative Council and Clerk of the Parliaments.

This conversation focused on the process of law reform from both the perspective of parliament and the courts. Panellists considered the reasons for law reform, including influences from media, the public and advocacy groups, and what perspectives are taken into account when reforming the law. The panel explored the relationship between law reform and the legislative process, and the consequences that must be considered.

These notes are not intended to serve as a definitive resource for the topics covered, however, they do offer useful insights into the perspectives of the experts who took part in this conversation.

Panellists



**The Hon. Justice
Michelle Quigley QC**
Supreme Court of Victoria

In December 2017, Justice Michelle Quigley QC was appointed as a Judge of the Supreme Court of Victoria. Justice Quigley was subsequently appointed as the President of the Victorian Civil and Administrative Tribunal (VCAT) from 1 June 2018. Her Honour is the first woman to hold that position. On commencing at the Victorian Bar in 1988 Justice Quigley developed a strong practice in administrative law, including planning and environmental law and land valuation and acquisition. Her Honour took silk in 2002. She taught Planning Law at the University of Melbourne as a visiting lecturer from 1994 to 2006.



Brad Rowswell MP
*Member for Sandringham,
Legislative Assembly*

Brad Rowswell MP was elected to the Victorian Legislative Assembly in November 2018, representing the seat of Sandringham. He serves as the Deputy Chair of the Integrity and Oversight Committee, which is responsible for monitoring and reviewing the performance of the Independent Broad-based Anti-corruption Commission, the Victorian Ombudsman, the Office of the Victorian Information Commissioner, and the Victorian Inspectorate. Mr Rowswell has also served as Liberal Party Whip in the Legislative Assembly since September 2021.



Andrew Young

*Clerk of the Legislative Council
and Clerk of the Parliaments*

Andrew was appointed to the position of Acting Clerk of the Legislative Council, Parliament of Victoria, in 2014. He assumed full appointment as Clerk in July 2015. The Clerk performs the role of principal adviser to the President and members of the Council and is the chief executive of the department of the Legislative Council. In August 2017, Andrew was sworn in as Acting Clerk of the Parliaments (Victoria), and assumed the full appointment on 5 January 2019.

Andrew has served as Honorary Secretary of the Australian Study of Parliament Group (Victorian Chapter), President of the Australian and New Zealand Association of Clerks-at-the-Table (ANZACATT) from January 2016 to January 2018, and in October 2017 was appointed Honorary Secretary of the Commonwealth Parliamentary Association, Victoria Branch.

Parliamentary proceedings

There're several ways that parliament engages with law reform; there is the parliament's legislative role and parliamentary debates, the parliamentary committees, and through engagement with the community, either through direct contact with members or through petitions.

There are two types of formal parliamentary proceedings. There are the processes that take place within the chamber, and outside of the chamber there is the work of parliamentary committees, that conduct inquiries.

Proceedings within the chamber

The legislative proceedings in the chamber begin with the introduction of the bill (the First Reading) and move to the debate (predominantly the Second Reading), to voting on the bill, or the division (the Third Reading), and the repeating of this process in the other Chamber. The bills, or draft laws, can either be a bill which seeks to amend an existing Act (law), or a bill which seeks to introduce a completely new Act.

Drafting and passing laws

The bills that are put before parliament probably originated as an idea two or three years before they're introduced. It could likely take a year to a year and a half for the public service to develop an idea, get it through the cabinet processes and receive in-principle approval for it to be drafted by the Chief Parliamentary Council. It's only after this time that the bill is formally presented to parliament. The time it takes to go through the Legislative Assembly might be a week or two. However, it can take two or three months going through the upper house. Therefore it can take two or three years for a new law to be passed, and sometimes longer.

The committee stage

The committee stage happens in the chamber during the Second Reading Debate, and it is the process whereby each clause of a bill is considered in detail. The Minister responsible for the bill answers questions, amendments are proposed, and there is a division for each clause. The division is usually done by what's known as 'on the voices' (members say aye or nay) in order to keep the process moving quickly. If the on-the-voices division is unclear or someone contests the result, a precise count of all those in favour and against will be taken. In the Legislative Assembly this process is called Consideration in Detail and in the Legislative Council the process is called Committee of the Whole.

The process doesn't happen very often in the Legislative Assembly, in fact only twice during the 59th Parliament. One of the contributing factors to this is that the government has the majority in the Legislative Assembly. When Consideration in Detail happens in the Legislative Assembly it is usually with a view to delving further into the legislation to better understand it, and to support the judiciary's interpretation of the legislation if needs be. It is possible that the Minister and the Shadow Minister may have spoken beforehand to discuss moving the bill into the Consideration in Detail stage.

The Committee of the Whole happens more frequently in the Legislative Council, and relates to the Upper House's role as the 'house of review'. Of the 182 pieces of legislation that have passed through the Upper House (up until July 2022), 144 bills have gone to Committee of the Whole.

Proceedings outside the chamber: parliamentary committees

Parliamentary committees are similar to subcommittees of the chamber, conducting their work outside of the chamber and looking at specific issues. Parliamentary committees are where members of parliament from all parties come together to look at aspects of how government is working (for instance committees focused on integrity and oversight) or at particular issues in the community (such

as committees that focus on legal and social issues or transport and infrastructure issues). Each committee will submit reports back to the houses, suggesting changes to laws.

While some committees are given broader portfolio areas, others are more specialised. For instance, the Public Accounts and Estimates Committee, which looks at public sector reform and accountability, or the Electoral matters committee, which just looks at electoral laws. Committees can be an opportunity for members from different sides to come together and assess whether a particular set of laws or aspect of government administration is working as it should.

Parliamentary committees have the advantage of being able to conduct public inquiries. This an advantage compared to government, for example, that when making policy may not have the opportunity to consult the public in the same way.

At the end of an inquiry there are committee reports that are written up with formal recommendations. The executive have a requirement to respond to those recommendations within a certain timeframe, and some of these recommendations do lead legislative reform. This is a good indication that parliament is listening and responding to the community.

Past committee inquiries have looked into issues like school uniforms, home schooling, lowering the age for probationary drivers and the use of rural school buses.

There's no limit to what parliamentary committees can explore if there's a general will and consensus to do so. It's an opportunity for members of parliament, regardless of political affiliations, to listen to members of the community with particular interests, special interests, and to formally consider these needs with the benefit of parliamentary privilege within those hearings. That means that witnesses can give evidence without fear or favor, without fear of criminal prosecution or civil prosecution, and focus on putting their case forward.

The courts involvement in committee inquiries

The courts don't generally formally participate in committee inquiries; an exception, for instance would be the contribution of the Coroner's Court to inquiries such as the Voluntary Assisted Dying bill or the inquiry into the Medically Supervised Injecting Centre. However, if there is a proposed policy or legislation coming forward, particularly major legislation that affects a particular area of jurisdiction, the relevant government departments will consult the courts. For



The Public Accounts and Estimates Committee Inquiry into the Budget Estimates.

instance, the president of VCAT may field inquiries from the Department of Justice seeking feedback about the operational impact of a particular proposal; How does the president see the proposal working? How might the proposal affect resourcing and or relate to other issues that have already been identified?

Besides the courts, there are other organisations such as the Law Institute or the Victorian Bar and other community interest groups who might be consulted on particular pieces of legislation, especially ones that might be seen to have a broader impact.

Community involvement in the law reform process

The community themselves can directly contribute to the parliament in a few ways, like writing letters to one of their six MPs (one MP from the Legislative Assembly and five from the Legislative Council), making a submission to a committee inquiry, or signing a petition.

Petitions

A petition is where somebody generates an idea for change or for action to be taken by the parliament and the government. They ask other members of the community to sign that petition. Petitions may not be immediately successful, but they bring to every member of parliament's attention the fact that something, an issue, is bubbling away out in the community. It may be specific to a particular local community, such as the Hampton Pier, but more often than not it is an issue that has more state-wide application. If a petition comes in with 20,000 signatures it is very likely to get attention.

Petitions have been around for a long time, such as the Monster Petition for women's suffrage that's over 100 years old, and have been influencing the most fundamental reforms in this parliament for over a century. But there is more that can be done in many Westminster-style parliaments to strengthen the role of petitions.

Both houses in the Victorian parliament have recently updated their processes to include e-petitions rather than hard copy petitions. There are organisations like change.org and other online petitions, but these don't go to parliament necessarily, but they do give public attention to an issue; if you want to ask parliament to change something, then you need to submit a formal petition to parliament.

In some parliaments, there are petition committees, so that if the community sends a petition to the parliament calling for legislative change, there's an obligation on a parliamentary committee to then take that petition and inquire into it further, particularly if it reaches a certain threshold of signatures.

To implement this in Victoria, parliament would require a change to the Standing Orders for each chamber; they could simply make a rule that's self-governing, for example, stating that if the house is presented a petition with at least 1,000 signatures it must be referred to a parliamentary committee and that committee must, at least, make a decision about whether it might hold public hearings, invite members of the community to come in and explore that issue further.

**Learn more about
e-petitions on the
parliament's website**

The role of the courts in law reform

Advising the Attorney General of issues and concerns

Judges interpret the law, they do not make the law, which is the provenance of parliament. Judges may, as cases are decided, recognise a conflict or have questions and identify whether something needs to change or if there's a new approach that perhaps needs to be taken.

For example, one of the roles of the President of VCAT is to advise the Attorney General of any issues that may need to be considered, arising from one of the 150 various Acts of Parliament VCAT has jurisdiction over. They'll explain what issue has arisen and, if the Attorney General decides to look at the law, how it might potentially be amended or fixed. It's then a matter for parliament to decide if and how they might change it.

If there is an issue that should be subject to consideration by the Attorney General, they'll want to know how urgent it is, how many people it affects, and if there are any downstream impacts. In the face of a busy legislative agenda, this provides a sense of how big an issue is, its consequences and the impact on the operation of that particular piece of legislation. These can be important factors in the executive government's decision to move an issue further up the agenda. The issues that get attention are the ones that are creating big problems, so it can take some time to address some of the smaller issues.

One recent example of the courts advising the Attorney General of some identified need for changes relates to the pandemic period, where there was, perhaps, a lot of legislation that needed to be altered as to the way courts and tribunals worked. For a start, there is a requirement that courts be open, and with everything being closed because of the pandemic, the

courts had to operate in a closed system. This restricted the way VCAT operated and there was limited opportunity to work on the papers; the work always required a hearing of some type. During the pandemic, a particular provision was altered, Section 100 of the VCAT Act, which allowed more work on the papers. The provision has been considered useful, and has subsequently become permanent; the close focus on how VCAT operated over the pandemic highlighted a particular way of working and parliament was happy to make that change.



*VCAT, the Victorian Civil and Administrative Tribunal, resolves disputes and makes decisions.
Image: VCAT*

Changing the law

It is the role of the parliament to make law and the role of courts to interpret it. But there is a relationship between the two powers.

Responding to community sentiment

When a court makes a decision that may not necessarily be in accordance with broad community sentiment, there may be an opportunity for parliament to review that piece of law and consider reforms that align the law to more closely reflect community expectations.

When a case is brought before the court, be it a prosecution or a civil matter, and the interpretation of what the legislation says and what's adjudicated does not meet contemporary community standards, the judge must apply the law as it is. There is nothing more a judge can do about that, and it then becomes a matter for the parliament to address. The members of parliament are there to represent the views of the community, which are ever-changing; if the needs of our community are ever changing, then the laws of the state need to reflect that.

An example of this is Lynette's Law, or the Crimes Legislation Amendment Bill 2022 (passed the Legislative Assembly as of July 2022), named after one of the officers killed on the Eastern Freeway in 2020. It was clear from the advocacy role of several community members that the application of the law in relation to certain aspects of the crime, for example sharing the crash on social media, did not meet expectations. The Attorney General responded by proposing an amendment to the Crimes Legislation Act, and the amending bill received bipartisan support in the Legislative Assembly.

Addressing the need for urgent reforms

There are procedures in both houses, which are rarely used, where bills can be declared urgent and can therefore potentially pass through both houses in a day. Generally, there are two situations when a bill might fall into this category.

The first is where members of parliament consider that the application of the law in relation to a particular case, for example, parole for someone serving time for murder, doesn't meet with community expectations. An example of a bill to pass both houses in a short amount of time is the Justice Legislation Amendment (Parole Reform and Other Matters) Bill 2016 that was commended to the Legislative Assembly on 6/12/2016 and passed on 7/12/2016. It was then introduced into the Legislative Council on the 8/12/2016 and passed the same day, receiving Royal Assent on the 13/12/2016.

The second example can occur when the Parliament of Victoria steps in, for various reasons, to dissolve a local council. This is usually in relation to accountability and oversight issues, such as allegations of overspending, corruption, or toxic culture. Recent examples include City of Casey, South Gippsland Shire Council and City of Whittlesea. For example, the Local Government (Whittlesea City Council) Bill 2020 was introduced to the Legislative Assembly on 17/03/20 and was passed to the Legislative Council the same day. It then passed in the Legislative Council on 19/03/2020 and was given Royal Assent on 20/03/2020.

Interpreting legislation

In the very early days of a new piece of legislation there may be areas that are uncertain or not as clear. In such cases, the judge interpreting the legislation will follow the principles for interpretation that are set out. For instance, the starting point is the ordinary natural meaning of the words, as written in the context of the act. However, there are times—usually in a first-of-a-kind case, for example, a case related to the Voluntary Assisted Dying Act 2017—where the judge may have to go beyond the meaning of the words in context because there are competing interpretations. In these situations, judges will go to the extraneous material to consider the intentions of parliament in the interpretation.

There are established parliamentary processes that aid this, and a judge may interrogate the official record of debates (Hansard) as the bill moves through these processes. For example, the debate that takes place during the committee stage can be used by the judiciary to help them understand the intentions of the parliament and inform their interpretation of the law.

The initial language of a bill is drafted by people who are experts in the language of legislation. Members of parliament, on the other hand, are trained in policy and the politics of representing the Victorian people. Therefore, sometimes amending the language of a bill is how it is what enables it to pass the houses, but it is also where ambiguity in the language becomes possible.

Sometimes words, such as ‘ordinary’, ‘reasonable’, ‘adequate’ are put into legislation as a matter of compromise. For instance, from 2014 to 2018, of the 271 bills that passed Upper House, 69 of them were amended. In the 59th parliament, of the 182 bills (as of July 2022) that have passed the Upper House, 30 of them have been amended. It is then up to the courts to interpret that language and the intention of the legislation.

The interpretation of the Voluntary Assisted Dying Act is a good example of seemingly straightforward language needing to be interpreted by referring to the explanatory report and the parliamentary debates. For instance, there were competing interpretations of the term ‘residency’, so the explanatory memorandum and the parliamentary debates were used, first to clarify the intention of the word ‘residency’ and secondly to clarify how someone might meet the eligibility requirement of Victorian residency. For instance, what if your main home is Victoria but you have been travelling for the last few years? Referring to the debate can help the courts interpret and apply the law in the manner it was intended.