Basic Legal Concepts
Outcomes:

P1 identifies and applies legal concepts and terminology
P2 describes the key features of Australian and international Law
P6 explains the nature of the interrelationships between the legal system and society
P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents.
P9 communicates legal information using well-structured responses.

Syllabus Dot Points:

1. Basic Legal Concepts

- meaning of law
- customs, rules and law
- values and ethics
- characteristics of just laws
- nature of justice: equality, fairness, access
- procedural fairness (principles of natural justice)
- rule of law
- anarchy
- tyranny
Anarchy

Anarchy describes the state of a society that does not have laws or state rule. Anarchy may be said to exist, in theory, in situations where there is no authority (such as a government, religion or business) to direct human behaviour. In practice, anarchy existed after the 2003 United States-led war against the government of Saddam Hussein in Iraq. Apart from the bloodshed, one enduring image is of citizens ransacking Iraqi national museums and art galleries for antiquities.

Philosophers have suggested several methods by which a purely anarchistic society can develop. The most infamous suggestion involves a violent and bloody overthrow of the power structures and persons in which they are organised and removing any form of human domination. A less violent view of the way in which an anarchistic society may develop is through small self-educating groups of workers creating their own rules for the betterment of their society without a state to control them. People who wish to join this society would be follow the rule of ‘no, or few, rules’.

Anarchy for a day: Year 12 muck-up day.

A clear example of what can happen where there are no rules can be seen in the tradition of Year 12 muck-up day. At the end of the year may Year 12 students, realising that the school can no longer punish them for breaking rules, take the opportunity to create anarchy on their last day of school. Uncontrolled behaviour often escalates beyond harmless pranks, with students destroying school property and harassing and assaulting staff and students. Laying criminal charges on the students responsible is difficult because the large number of students involved in misbehaviour makes it impossible to identify those who have committed specific acts of vandalism. The New South Wales government has now given school principles the power to withhold the Higher School Certificate of any student involved in muck-up day activities, enabling schools to enforce rules even on the last day of school.

Questions on the following page...
Anarchy for a day: Year 12 muck-up day

Questions

1. Why do you think that students are so eager to break school rules as soon as it is clear that they cannot be enforced?

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2. Explain what your answer to the above question indicates about the causes of anarchy.

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**Customs**

Custom is the collective habits, or traditions, that have been developed by a society, or parts of society, over a long period of time. Generally, customs are passed from generation to the next by word of mouth and do not require recording in books or other documents to be authoritative. Some societies, such as Aboriginal societies within Australia, still use custom as the basis of their legal systems.

Customs prevalent in Western society include a bride wearing white at her marriage ceremony; shaking hands when meeting someone for the first time; whispering when having to talk in the library; and the ‘etiquette’, or formal conventions of social behaviour, that must be followed during formal dinners or when writing a letter.

Many of the laws that were and continue to be developed by courts are based on the customary rules and practices of the region when the laws originated. Sometimes the customs of every day life become the law. For example, it is customary for a young person to stand on a train or bus to give a seat to an older person. School students who have concession passes for travel on public transport are legally required to give up their seats for full-fare-paying travelers.

**Rules**

There are several types of rules. There are those rules, or principles, that are used to solve mathematical problems. They have been tested over time and found to be effective. There are rules of conduct for particular games such as soccer or netball or chess or card games. These rules are formal and well known. There are also informal rules created to suit particular and unique situations. For example, if you hit a ball over the neighbour’s fence in backyard cricket, it is ‘six and out’; and if you lend a dollar to a friend for lunch, they will pay you back as soon as they can.

In the legal sense, rules are the authoritative regulation of behaviour. In the context of basic notions about the Australian legal system, rules may be defined as constraining and controlling commands which have the authority of superior power (such as a court, legislature or other controlling body). In the formal sense, rules are frequently the form of law known as delegated legislation. According to the legal system, there is no real difference between rules made by parliament or the courts and laws.
Law

Law is the regulatory and structural basis upon which most societies are organised. ‘Law’ may be defined as a rule of conduct imposed on a people and enforced by persons or bodies in authority.

Laws may be said to be effective because they are:

• discoverable in that they are written down and recorded
• generally accepted by society
• a source of stability for society in that they generally create consistency
• enforceable against citizens in society
• able to be changed due to changing customs.

Is law necessary? Laws are a positive aspect of most societies because they:

• are generally universal in their application to the society (for example, motor traffic regulations affect all road users)
• are enforceable (for example, criminals face fines, detention or a gaol sentence)
• regulate behaviour to remove socially undesirable behaviour (for example, they reflect the current attitude to illegal drug use)
• are written and available to all society (for example, road rules are recorded in motor traffic handbooks)
• may be modified to coincide with changes in the attitudes of society (for example, the law regarding domestic violence and abortion has been changed)

Is law necessary? Laws may be considered a negative part of society because they:

• restrict individual freedom (for example, a person must reach a certain age before being able to buy alcohol or gain a driver’s license)
• are imposed by a sovereign body - a supreme authority in society such as parliament - which may not be just (for example, there are cases of police corruption and miscarriages of justice)
• may be avoided if not properly policed (for example, police may misuse discretionary powers to arrest a suspect) or there are not enough police to detect or deter crime
• may be arbitrary or discriminatory (for example, certain tax laws or gaoling Aborigines may have discriminatory effects)
• may not reflect the true view of society (for example, laws regarding euthanasia or immigration may reflect minority views)
Fairness

Fairness refers to the legitimate and proper conduct in the performance of an act or duty. For example, fairness does not allow for bias or prejudice when making a decision or controlling an activity. Therefore, fairness may be seen to consist of honesty and integrity.

To the extent that fairness is part of our legal system, it may be argued that one of the ideals of law is to be fair to all. Laws that are racist, unduly prejudicial or sexist, or that give an unequal preference to one part of society over another are removed from our statutes and modified by our courts - although not often quickly enough for those who suffer from them. While fairness is ideally part of all laws, it is the case that some laws are ‘unfair’. Such laws exist because to be fair would not necessarily be a good thing. For example, to apply the same amount of tax to every wage-earner may be fair (because everyone is treated equally) but it would not be necessarily a good thing (a person who pays tax at the rate of $35 for every $100 yet earns only $5000 a year is paying, proportionately, more tax than someone who is taxed at the same rate but earns $100 000 a year).

Laws are therefore required to be more fair in many cases; they are also required to be just.

Equality

Equality suggests that everyone is treated the same. However, equality may have different outcomes depending on the context in which it is practiced. For instance, in terms of the Australian Legal system, formal equality occurs when the law provides that, in certain circumstances, everyone is treated equally regardless of background, social or economic status, or personal beliefs. It should be noted that not all laws relating to formal equality create real equality (that is, have equal outcomes) - simply stating that everyone will be considered equally does not take into account the varying backgrounds and life opportunities that different people have. For example, anyone who is guilty of a crime can expect to suffer the same penalty as anyone else who is guilty of that same crime. If an unemployed person is fined $500 for shoplifting and a millionaire is fined $500 for the same offence, has the law treated those different persons equally?

Clearly, there is sometimes a need to match equality before the law with equality of outcomes.
Justice

Justice has different meanings depending on the context in which it is used. It may refer to the philosophical notion of the ‘just’ decision; that is, a decision that is good and fair according to universal principles. Justice may also refer to vengeance, such as the retribution against criminals which formally exists in some forms of official punishment.

A just law must have some or all of the following characteristics:
• It treats all people equally.
• It is based on religious or ethical precepts to which most people subscribes.
• It aims to ensure the greatest possible happiness for the greatest possible number of people.
• It aims to ensure community survival and well-being by stressing consensus and social cohesion above all.
• It allows for general principles to be mitigated in individual cases on the ground of mercy and sympathy.
• It aims to redress systemic inequalities by positive action.
• It leaves people free (it does not incarcerate them without good cause).
• It takes account of limitations of the material resources available to society.
• It can be invoked without undue delay at the insistence of all people, irrespective of their financial resources.

Relationship between rules, laws and customs

People may obey the law partly because of external factors. For example, people may obey the law because of the wish to conform. Everyone in society obeys the law and so the individual does too. Often people will follow the actions of the majority because they do not want to be seen as being different. Another factor is the fear of punishment. People may obey the recognised laws in order to avoid the sanctions that follow from breaking those laws. People also have a tendency to follow the commands of people in power and authority and will often obey the law because they are told to.

Alternatively, people may obey the law because they internalise values and rules such as;
• Taking pride in being a law-abiding citizen - sometimes people will obey laws because they feel
good by being able to claim that they have not broken the law. Such a feeling is closely linked to the fact that any such claims are going to be favorably viewed by society.

- The maxim ‘Do unto others as you would expect them to do unto you’ - people treat others and their property with respect (that is, do not break the law) in the hope that others will treat them and their property in the same way.
- It is morally wrong to break the law - people do not break laws because they may also see breaking the law in itself a bad thing to do.

Many of the rules and values that people internalise have become part of the law. People obey the law because it is based on long-standing rules or customs which they have been conditioned to follow.

Humans have a psychological need for system and order. Rules are one way in which order and organisation may be achieved. Rules are developed and people may follow or break those rules. If rules have been used by a particular ground of people for a long period of time, then those rules may become custom. Often the customs of society are explicitly recognised by a sovereign, either the ruler or parliament, and become law. For instance, most societies have developed rules and customs prohibiting relationships with close family members (incest). These rules and customs developed for a variety of reasons, including the need to avoid genetic abnormalities. Such rules and customs were recognised by a sovereign and become law.

In the last decades of the twentieth century some stages of Australia had laws against consenting sexual relationships between men. In one state, if men were found guilty of having a consensual sexual relationship, they faced fourteen years in gaol. Yet a man found guilty of sexual assault against a woman faced a maximum of ten years in gaol.

**Question:** Do you feel justice exists in this case? Explain your answer.
Procedural fairness is often referred to as ‘natural justice’. The overriding principle of procedural fairness is the concept of fair treatment before the law. The doctrine of natural justice includes:

- the right of a person to participate in legal proceedings in which they have interest. *For example, if a person were charged with a crime but denied the right to attend the trial, we would say this is unfair.*
- the right of a person accused of a wrongdoing (the defendant) to know the accusation made against them. This is essential as it allows the defendant to prepare their defence and gather their own evidence.
- the right of the defendant to have a hearing, during which they are able to present evidence.
- the right to have a matter heard before a court that is free from bias. It is for this reason that judges and juries are required to put aside their personal views about a matter and use only the evidence presented to them to make a decision.
- the right to test the evidence presented in a case. This is often called ‘cross-examination’ and means that each side is able to question the witnesses who give evidence for the opposing side, in a bid to cast doubt on the evidence if the witness.
- the right of the accused to not have previous criminal convictions or accusations to be brought up during the trial. This ensure that only the evidence relating to the current case is used to make a decision.
The rule of Law

The rule of law is a key principle in the legal systems of democratic societies; it means that the use of arbitrary power is eliminated. Arbitrary power is the unrestrained use of power - that is, making decisions without any reference to the law (discussed further in the HSC course).

Unrestrained use of power is common in many dictatorships, where rulers make any decision they wish. However, in modern democracies, constitutions outline the powers of governments and they must act within these powers. In Australia, if the government attempts to pass a law that is beyond its powers, the Governor-General and the High Court of Australia are empowered to intervene.

The other element crucial to the rule of law is the notion that the law must be known and that application of the law will be certain. This basically means that, once a law is made, people are made aware of it so that they can comply with it. Members of society need to also know that the law will be applied equally and fairly, meaning that no individual, no matter how powerful, will be exempt from the law.

Key features of a legal system that complies with the rule of law include:

• An independent judiciary (the courts and the judges that sit in them). The courts should not be influenced by the Parliament. It is for this reason that it is very difficult for a judge to be dismissed by the Parliament
• controls placed on enforcement agencies, such as the police, to ensure that they do not abuse power.
• the accused should not be forced to incriminate themselves
• the legal defence for the accused must be free to operate without interference from the prosecution
• the accused must be informed of the allegations allegations made against them
• criminal laws must never be retrospective
• governments are bound by a constitution
• human rights, particularly those relating to freedom of association (the right to form or join a political organisation), speech and religion, are protected.
Case Study

Clash of law with human rights: The views of the United Nations Human Rights Committee on the communication by Nicholas Toonen regarding Australia.

**Facts:** Nicholas Toonen was and is an activist for the promotion of rights of homosexuals in Tasmania. Toonen challenged sections 122 and 123 of the Tasmanian Criminal Code on the basis that those sections had created an offence against consenting sexual contact between homosexual men. Toonen argued that the Criminal Code was contrary to the International Covenant on the Civil and Political Rights 1966, in particular articles 2, 17 and 26. Article 2 requires a state party to the treaty not to distinguish persons within that state on the basis of sex or other opinion. Article 17 provides that no one shall be subjected to arbitrary interference with their privacy and article 26 states that: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law... [the law shall not discriminate] on any ground such as ... sex ... and opinion ...’

**Issue:** Were the Tasmanian criminal laws inconsistent with the International Covenant on Civil and Political rights to which Australia is a party?

**Decision:** The committee found that the criminalisation of homosexual acts in private was a violation of article 17 and considered that the Australian government should ensure that the Tasmanian Parliament changed the relevant sections of the Criminal Code of that State.

**Question:** How was the Tasmanian Criminal Code inconsistent with the International Covenant?

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Azaria Chamberlain, a ten-week old baby, disappeared from her parents’ tent one night during a camping trip at Uluru in 1980. The baby’s mother, Lindy Chamberlain, claimed that she had seen Azaria’s limp body being carried from the tent by a dingo. The coroner accepted this claim, but the Northern Territory Supreme Court later quashed (to ‘quash’ a verdict is to overrule and set aside the findings of the court) the coroner’s findings and placed Lindy Chamberlain on trial for murder, charging her husband as an accessory to the crime.

The case involved conflicting testimonies from expert witnesses, who were unable to agree about the gripping and killing habits of dingoes, or whether a stain under the dashboard of the Chamberlain’s car was caused by blood spraying from a severed artery. Indeed, if the stain did contain bloody, the experts were in conflict as to whether it was adult or foetal blood. It is suspected that the jury could not understand most of the evidence due to its technical nature and were confused by the conflicting expert testimonies.

The wider public appeared eager to demonise the Chamberlains, partly because they were Seventh Day Adventists, and partly because the media portrayed Lindy as a cold woman who displayed no reaction to evidence being given about the death of her child. Eventually, most Australian’s concluded that she was guilty.

After nearly nine months in court the jury returned a guilty verdict. Lindy was sentenced to life in prison while her husband was released on a good behaviour bond. Lindy’s attempted to appeal to the Victorian Supreme Court and the High Court of Australia were both rejected. Then two and a half years after Lindy was imprisoned, Azaria’s matinee jacket was found at Uluru, torn and stained in a manner that suggested that Azaria was attacked by a dingo. The Northern Territory Supreme Court found that this new evidence, along with indications that forensic tests on the stain in the Chamberlain’s car were flawed, placed doubt on their guilt. Lindy was released immediately, but it was not until six years after the matinee jacket was found that the Chamberlain’s convictions were quashed. The pair received compensation of $1.3 million, most of which was used to cover legal fees.
1. Which aspects of the Chamberlain trial and appeals do you consider to be unjust?

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2. Explain how the courts tried to achieve justice during this case.

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3. What does this case tell us about how difficult it can be to achieve justice?

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QUESTIONS

1. What is meant by the term ‘anarchy’?
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2. Where does custom originate?
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3. What is a definition of the word ‘law’?
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4. How are rules different from and the same as laws?
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5. Name five characteristics of a ‘just’ law.
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6. How is fairness, equality and justice the same? How do they differ? Provide examples in your answer.
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Basic Legal Concepts
7. List five school rules. Why are they rules? How do students learn about them? How are they enforced?
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8. How is a person’s view of justice affected by their position in society?
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9. Is the permanent incarceration in a prison hospital of a person who has killed another but is declared mentally incapable of murder a just result? Consider this question in terms of justice for the victim’s family and friends, the perpetrator and the community as a whole.
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10. What are the characteristics that make a good law effective?
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Basic Legal Concepts
11. What external factors cause people to obey the law?

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12. What intrinsic factors cause people to be law-abiding?

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13. How does the following show conflict between justice, equality and fairness?
Mr Kid is caught speeding on a local highway and fined $250. Ms Po is caught for the same offence and fined the same amount. Mr Kid is a struggling widower supporting three children whereas Ms Po is a millionaire who can easily afford the fine.

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14. Describe the key features of natural justice.

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15. Explain why the defendant must know exactly what wrongdoing they are accused of.

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16. Outline the concept of cross-examination.

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17. Describe the meaning of arbitrary power.

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18. Explain the role of the constitutional documents in maintaining the rule of law.

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19. Why is it essential that the law is known?

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Basic Legal Concepts