

LEGAL STUDIES 2019 SYLLABUS
VOLUME 1 - EIGHTH EDITION

LEGAL STUDIES FOR QUEENSLAND

UNITS 1 & 2




LEGAL EAGLE
PUBLICATIONS

ROGER WOODGATE | JEFF BIGGS | DAVID OWENS

LEGAL STUDIES FOR QUEENSLAND

UNITS 1 & 2

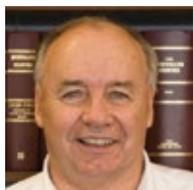
LEGAL STUDIES 2019 SYLLABUS | VOLUME 1 - EIGHTH EDITION

Our team of authors has an excellent blend of hands-on legal and educational experience that provides the reader with invaluable, practical insights into the application of the law in a variety of real-life contexts.



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CONTENTS

UNIT 1: BEYOND REASONABLE DOUBT

TOPIC 1: LEGAL FOUNDATIONS

CHAPTER 1: LAW

	2
1.1 THE CONCEPT OF THE RULE OF LAW	3
1.2 THE PURPOSE OF LAWS WITHIN SOCIETY	9
1.3 THE DIFFERENCE BETWEEN A RULE AND A LAW	18
1.4 CHARACTERISTICS OF AN EFFECTIVE LAW	24

CHAPTER 2: SOURCES OF LAW IN THE AUSTRALIAN LEGAL SYSTEM

	31
2.1 DIFFERENT MEANINGS OF 'SOURCES OF LAW'	32
2.2 LAW IN AUSTRALIA BEFORE BRITISH SETTLEMENT	32
2.3 LAW IN AUSTRALIA AFTER BRITISH SETTLEMENT	32
2.4 THE AUSTRALIAN CONSTITUTION	34
2.5 PARLIAMENTS: SOURCES OF STATUTE LAW	41
2.6 COURTS: SOURCES OF COMMON LAW	46
2.7 THE ROLE OF CUSTOMARY LAW IN AUSTRALIA'S LEGAL SYSTEM	56
2.8 THE ROLE OF INTERNATIONAL LAW IN AUSTRALIA'S LEGAL SYSTEM	60

CHAPTER 3: OVERVIEW AND ANALYSIS OF AUSTRALIA'S CRIMINAL JUSTICE SYSTEM

	63
3.1 FOUNDATIONAL PRINCIPLES OF AUSTRALIA'S CRIMINAL JUSTICE SYSTEM	64
3.2 INQUIRIES INTO CRIMINAL LEGAL ISSUES	69
3.3 KEY PROCESSES IN AUSTRALIA'S CRIMINAL JUSTICE SYSTEM	84

TOPIC 2: CRIMINAL INVESTIGATION PROCESS

CHAPTER 4: CRIMINAL SITUATIONS: BEHAVIOUR, SOURCES AND ROLES

	86
4.1 WHAT CONSTITUTES CRIMINAL BEHAVIOUR?	87
4.2 SOURCES OF CRIMINAL LAW	88
4.3 DIFFERENT ROLES IN AN ALLEGED CRIMINAL SITUATION	90

CHAPTER 5: THE ROLE POLICE PLAY IN THE CRIMINAL INVESTIGATION PROCESS

	92
5.1 INTRODUCTION	93
5.2 THE TYPES OF EVIDENCE THE POLICE MAY COLLECT	94
5.3 RIGHTS AND RESPONSIBILITIES OF POLICE, SUSPECTS, ACCUSED PERSONS AND VICTIMS	106

CHAPTER 6: THE NATURE AND EXTENT OF CRIMINAL OFFENCES

	114
6.1 INDICTABLE AND NON-INDICTABLE OFFENCES	115
6.2 THE ELEMENTS OF AN OFFENCE	117
6.3 OFFENCES AGAINST THE PERSON	118
6.4 SEXUAL OFFENCES	128
6.5 PROPERTY OFFENCES	129
6.6 MOTOR VEHICLE OFFENCES	134
6.7 OFFENCES RELATING TO PUBLIC ORDER	136
6.8 ATTEMPTS TO COMMIT CRIMES	137
6.9 PARTIES TO OFFENCES	139
6.10 STATISTICS OF CRIME IN AUSTRALIA	140

TOPIC 3: CRIMINAL TRIAL PROCESS

CHAPTER 7: PRE-TRIAL PROCESSES

	144
7.1 INTRODUCTION	145
7.2 BAIL	146
7.3 MENTIONS	154
7.4 CALLOVERS	157

CHAPTER 8: THE COMMITTAL PROCESS: PATHWAYS TO A FAIR TRIAL

	163
8.1 THE PURPOSE OF THE COMMITTAL PROCESS	164
8.2 THE COMMITTAL PATHWAYS	164
8.3 REGISTRY COMMITTALS	165
8.4 COMMITTALS BY MAGISTRATES	166
8.5 THE ROLE OF THE CROWN LAW OFFICE (OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS)	168
8.6 EX-OFFICIO INDICTMENTS	169

CHAPTER 9: THE ATTRIBUTES OF A FAIR TRIAL	172	CHAPTER 13: INQUIRIES INTO SENTENCING OF CRIMINALS	273
9.1 A COMMON LAW RIGHT	173	13.1 INTRODUCTION	274
9.2 THE AUSTRALIAN CONSTITUTION	174	13.2 THE EFFECTIVENESS OF SENTENCING AND PUNISHMENT IN AUSTRALIA	276
9.3 TRIAL BY JUDGE AND JURY	174	13.3 RATES OF INCARCERATION AND REOFFENDING OF VULNERABLE PEOPLE IN AUSTRALIA	288
9.4 TRIAL PROCEDURES FOR INDICTABLE OFFENCES	186		
9.5 COURT RULES OF EVIDENCE	189		
9.6 THE RIGHT TO SILENCE	194		
9.7 THE RIGHT TO LEGAL REPRESENTATION	196		
9.8 CRIMINAL APPEALS AND DOUBLE JEOPARDY	198		
CHAPTER 10: CRIMINAL DEFENCES AND EXCUSES	206		
10.1 CRIMINAL RESPONSIBILITY	207		
10.2 CRIMINAL DEFENCES AND EXCUSES OF GENERAL APPLICATION	207		
10.3 PARTIAL EXCUSES FOR MURDER	218		
CHAPTER 11: BARRIERS TO JUSTICE AND EQUITY	224		
11.1 A FAIR AND IMPARTIAL APPROACH	225		
11.2 CHILDREN	225		
11.3 ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (INDIGENOUS AUSTRALIANS)	230		
11.4 PERSONS WITH A DISABILITY	237		
11.5 GENDER EQUALITY	240		
TOPIC 4: PUNISHMENT AND SENTENCING			
CHAPTER 12: SENTENCING OF CRIMINALS	248		
12.1 INTRODUCTION	249		
12.2 PRINCIPLES (PURPOSES AND FACTORS) AFFECTING SENTENCING DECISIONS	250		
12.3 THE RANGE OF SENTENCING AND POST-SENTENCE OPTIONS	256		
12.4 ANALYSING PRINCIPLES OF SENTENCING TO PREDICT OUTCOMES	267		

CONTENTS CONTINUED...

UNIT 2: BALANCE OF PROBABILITIES

TOPIC 1: CIVIL LAW FOUNDATIONS

CHAPTER 14: THE NATURE AND GROWTH OF CIVIL LAW 300

14.1	A BRIEF HISTORICAL BACKGROUND	301
14.2	SOURCES OF CIVIL LAW	302
14.3	DISTINGUISHING CIVIL LAW FROM CRIMINAL LAW	303
14.4	THE BRANCHES OF THE CIVIL LAW: CONTRACT AND TORTS	306
14.5	THE DOCTRINE OF PRECEDENT	307
14.6	HOW DOES INTERNATIONAL LAW INFLUENCE AUSTRALIA'S CIVIL LAW?	311

CHAPTER 15: DISPUTE RESOLUTION IN CIVIL LAW 312

15.1	WHAT IS A DISPUTE?	313
15.2	DIFFERENT METHODS OF RESOLVING CIVIL DISPUTES	313
15.3	WHY GO TO COURT?	316
15.4	DIFFERENCES BETWEEN CIVIL AND CRIMINAL COURT ACTIONS	316
15.5	WHICH COURT?	320
15.6	DIFFERENCES BETWEEN COURTS AND TRIBUNALS	321
15.7	TRIBUNALS INVOLVED IN DISPUTE RESOLUTION	322
15.8	COMPLAINTS AND APPEALS AGAINST GOVERNMENT DECISIONS	323
15.9	COMMISSIONS OF INQUIRY	326

CHAPTER 16: ALTERNATIVE DISPUTE RESOLUTION 329

16.1	BACKGROUND	330
16.2	THE MEDIATION PROCESS	332

CHAPTER 17: RESOLVING CIVIL ISSUES 339

17.1	INTRODUCTION	340
17.2	MAKING A COMPLAINT TO THE QUEENSLAND OMBUDSMAN	340
17.3	RESOLVING A FAMILY ISSUE IN THE QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL (QCAT)	341
17.4	RESOLVING A CONTRACT DISPUTE IN THE MAGISTRATES COURT	344
17.5	COURT-ORDERED ALTERNATIVE DISPUTE RESOLUTION	350

TOPIC 2: CONTRACTUAL OBLIGATIONS

CHAPTER 18: CONTRACT LAW IN MODERN AUSTRALIA 353

18.1	MEETING THE CHALLENGES OF THE MODERN AUSTRALIAN ECONOMY	354
18.2	CONSUMERS NEED STATUTORY PROTECTION	355
18.3	THE ROLE OF AUSTRALIAN CONSUMER LAW IN PROVIDING CONSUMER PROTECTION	357

CHAPTER 19: HOW A CONTRACT IS FORMED 358

19.1	PROMISES, PROMISES!	359
19.2	ESSENTIAL ELEMENTS TO FORM A CONTRACT	360
19.3	WHAT IS AN OFFER?	361
19.4	WHAT IS ACCEPTANCE?	365
19.5	WHAT ARE CONSIDERATION AND FORMALITIES?	374

CHAPTER 20: THE TERMS OF THE CONTRACT 380

20.1	WHAT ARE THE TERMS OF THE CONTRACT?	381
20.2	WHEN IS A REPRESENTATION A TERM OF THE CONTRACT?	383
20.3	WHEN CAN TERMS BE IMPLIED INTO A CONTRACT?	385
20.4	DISTINGUISHING BETWEEN CONDITIONS AND WARRANTIES	385
20.5	EXCLUSION CLAUSES	386

CHAPTER 21: ENDING A CONTRACT 390

21.1	SETTING ASIDE CONTRACTS	391
21.2	DISCHARGE OF CONTRACTS	401

CHAPTER 22: AUSTRALIAN CONSUMER LAW 405

22.1	THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)	406
22.2	STATUTORY PROTECTION AVAILABLE UNDER THE AUSTRALIAN CONSUMER LAW (ACL)	408

CHAPTER 23: REMEDIES FOR BREACH OF CONTRACT 418

23.1	INTRODUCTION	419
23.2	COMMON LAW REMEDIES FOR BREACH OF CONTRACT	419
23.3	INQUIRY INTO COMMON LAW REMEDIES FOR UNJUST ENRICHMENT	425
23.4	REMEDIES FOR BREACH OF STATUTORY OBLIGATIONS UNDER THE AUSTRALIAN CONSUMER LAW	428

CHAPTER 24: CONTRACT LAW ISSUES 430

24.1	RESOLVING CONTRACT DISPUTES	431
24.2	A RESIDENTIAL TENANCY DISPUTE	431
24.3	SPORTING CONTRACTS, RIGHTS AND OBLIGATIONS	432
24.4	ENTERING A MOBILE PHONE CONTRACT	435

TOPIC 3: NEGLIGENCE AND THE DUTY OF CARE

CHAPTER 25: WHAT ARE THE ELEMENTS OF NEGLIGENCE? 437

25.1	WHAT ELEMENTS MUST THE PLAINTIFF PROVE?	438
25.2	WHAT IS A DUTY OF CARE?	442
25.3	WHEN DOES A PERSON BREACH THE DUTY OF CARE?	445
25.4	WHEN IS THE DAMAGE CAUSED BY THE BREACH?	451

CHAPTER 26: DEFENCES AND REMEDIES IN NEGLIGENCE 459

26.1	WHAT DEFENCES ARE AVAILABLE TO THE DEFENDANT?	460
26.2	VOLENTI NON FIT INJURIA - VOLUNTARY ASSUMPTION OF RISK	460
26.3	CONTRIBUTORY NEGLIGENCE	463
26.4	REMEDIES AVAILABLE FOR A SUCCESSFUL CLAIM IN NEGLIGENCE	467

CHAPTER 27: NEGLIGENCE LAWS IN CONTEMPORARY CONTEXTS 470

27.1	THE CHANGING LANDSCAPE OF NEGLIGENCE	471
27.2	DEFECTIVE GOODS	475
27.3	DRIVERS OF MOTOR VEHICLES	476
27.4	TEACHERS	476
27.5	RESCUERS	476
27.6	DOCTORS AND HEALTH CARE PROFESSIONALS	477
27.7	NEGLIGENCE IN SPORT	479

CHAPTER 28: ESSENTIAL LEGAL STUDIES SKILLS 486

28.1	FOCUS ON INQUIRY-BASED LEARNING	487
28.2	FINDING AND SELECTING THE LAW	491
28.3	LEGAL PROBLEM SOLVING	493

PREFACE

The authors welcome you to this **Eighth Edition** of **Volume 1 of Legal Studies for Queensland**, which covers **Unit 1 (Beyond reasonable doubt)** and **Unit 2 (Balance of probabilities)** of the **Queensland Legal Studies 2019 Senior Syllabus**.

We are an experienced team of legal practitioners and educators. We continue to aim for the highest standards of legal accuracy and scholarship in our writing so that the content can be used as an authoritative reference by teachers, while ensuring that the text is readable and engaging for secondary school students. **Our emphasis in this edition is to give students and teachers theoretical and practical experiences that enable them to navigate the challenges of the new assessment system.**

We continue to use the **practical activities** previously classified in the **distinctive categories** of Inquiry, Case study, Practical application, Hypothetical, Research, What do you think?, You be the Judge, and Review. Identification of the **focus questions** for each activity are based on the following Queensland Legal Studies 2019 Senior Syllabus **objectives** and the range of cognitive processes which students are required to use in order to demonstrate and meet these objectives.

[C] Students are required to **comprehend** legal concepts, principles and processes, retrieving and using details to present meaning and demonstrate understanding.

[S] Students are required to **select** from primary and/or secondary sources, making choices based on currency and relevance, and use a recognised system of referencing to document and acknowledge sources.

[A] Students **analyse** legal issues, applying concepts, principles and processes to determine the nature and scope of an issue. Students dissect information to compare components or classify parts into relevant elements. Analytical processes build on comprehension and selection of information, enabling examination of viewpoints and consequences.

[E] Students **evaluate** legal situations, using knowledge from their analysis of legal issues to present legal alternatives, and to make a decision, or propose recommendations, to resolve

a situation. Students synthesise information to discuss and justify decisions, recommendations and their implications, using legal criteria.

[R] Students create responses, using their knowledge to communicate meaning according to the intended purpose. Students communicate, demonstrating the order, sequencing and development of ideas by using paragraphs and extended responses.

The Inquiry Approach: Students are given a hypothesis/question or form their own, and a number of resources/activities, encouraging them to go through all stages of cognitive reasoning while continuing to reflect on the given hypothesis. The detailed illustration on page 10 of the 2019 Syllabus describes Reflecting as a crucial metacognitive activity connecting the four inquiry components of Forming, Finding, Analysing and Evaluating.

We have interpreted and implemented the syllabus to assist you, as students, to understand, appreciate and apply the inquiry-based method of learning it requires. To the best knowledge of the authors, this Eighth Edition provides an accurate picture of the law at the time of writing.

Although the primary users of this textbook are secondary students in Queensland, the level of content enables it to retain its place as a useful reference for colleges of technical and further education, libraries, and as an introduction to the law at university level. It will also be useful in the other states of Australia, as much of the law is the same throughout Australia.

Special thanks are due to our book designer, Jennifer Hillhouse, for her graphic design and illustrations. Thank you to Janelle Wilmett for typing manuscripts for Jeff Biggs, and thank you to our respective spouses, Sue Woodgate, Robyn Biggs, and Cathy Owens, and the legal firm of Biggs Fitzgerald Pike, for the active support and assistance to publish this new Eighth Edition of Volume 1.

Roger Woodgate, Jeff Biggs, David Owens
(Brisbane, September 2018).

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UNIT 1

BEYOND REASONABLE DOUBT

TOPIC 1: LEGAL FOUNDATIONS

In Topic 1, and with a focus on criminal law, students are introduced to the foundations, features and processes of Australia's legal system. They investigate the difference between legal and non-legal rules through a consideration of who makes, interprets and enforces the rule of law.

TOPIC 3: CRIMINAL TRIAL PROCESS

In Topic 3, students examine the role and jurisdiction of the courts in hearing criminal matters. They consider a range of criminal cases to help them in their understanding of trial processes, defences and excuses. Students focus on the concept of a fair trial and discuss the extent to which features of the criminal trial contribute to the achievement of justice.

TOPIC 2: CRIMINAL INVESTIGATION PROCESS

In Topic 2, students develop an appreciation of criminal law by investigating its principles, the types of crimes it involves and how criminal law is enforced. They explore the individual's rights and responsibilities in dealing with the police and others with designated authority.

TOPIC 4: PUNISHMENT AND SENTENCING

In Topic 4, students study theories of punishment and the consequences of a criminal conviction. They discuss the purposes of sentencing, the types of sentences that may be imposed, and sentencing trends and approaches. Students evaluate the effectiveness of sentencing from different viewpoints.

TOPIC 1: LEGAL FOUNDATIONS

CHAPTER 1: LAW

FOCUS SUBJECT MATTER

1.1 THE CONCEPT OF THE RULE OF LAW

1.2 THE PURPOSE OF LAWS WITHIN SOCIETY

1.3 THE DIFFERENCE BETWEEN A RULE AND A LAW

1.4 CHARACTERISTICS OF AN EFFECTIVE LAW

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ the importance of the rule of law for a strong democracy to exist;
- ▶ the term, 'law', has different meanings, purposes and functions;
- ▶ all societies need laws to enable them to be safe, just and peaceful;
- ▶ laws have features which make them different from rules and customs; and
- ▶ an effective law has certain essential features or characteristics.

1.1 THE CONCEPT OF THE RULE OF LAW

The concept of the rule of law is a **foundation principle of Australia's legal system** and is defined in the Glossary of the Queensland Legal Studies 2019 General Senior Syllabus (referred to as 'the syllabus' in this textbook) on page 66 as:

the doctrine that all people are equal before the law, and that the government is subject to the law.

The above definition is the first of three different ways in which the rule of law is described in the syllabus Glossary. The two further, more complicated, meanings of the rule of law in the Glossary will be considered in Chapter 2.4: 'The Australian Constitution.'

The rule of law is of central importance to the effective operation of Australia's legal system. The Attorney-General of Australia (the Minister in the Australian Government responsible for the administration of Australia's legal system) describes it as follows:

The rule of law underpins the way Australian society is governed. Everyone – including citizens and the government – is bound by and entitled to the benefit of laws. We uphold the rule of law through our daily work to ensure laws are clear, predictable and accessible.

Attorney-General's Department (Australian Government, 2017) www.ag.gov.au

The ruleoflaw.org.au website states that the rule of law is important for society for the following reasons:

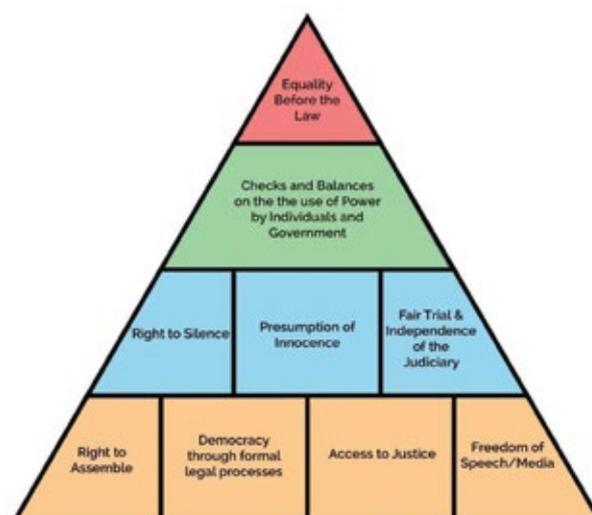
A country that adheres to the rule of law ensures that -

-  All persons and organisations including the government are subject to and accountable to the law
-  The law is clear, known, and enforced
-  The Court system is independent and resolves disputes in a fair and public manner
-  All persons are presumed innocent until proven otherwise by a Court
-  No person shall be arbitrarily arrested, imprisoned or deprived of their property
-  Punishment must be determined by a Court and be proportionate to the offence

WWW.RULEOFLAW.ORG.AU

According to the ruleoflaw.org.au website, the following pyramid is used to start discussion about 'What is the Rule of Law?' by establishing 'a hierarchy of principles within the rule of law.'

RULE OF LAW PYRAMID



Ch 2.4



WHAT DO YOU THINK?



FORMER HIGH-PROFILE SOLICITOR TIM MEEHAN SENTENCED TO FIVE YEARS FOR FRAUD, FALSIFYING RECORDS

SOURCE: KATE MCKENNA AND SARAH MOTHERWELL, THE COURIER-MAIL (COURIERMAIL.COM.AU), 14 JULY 2017 (EXCERPTS)

FORMER high-profile criminal lawyer Tim Meehan has been sentenced to 5.5 years' jail for crimes a judge says have brought the legal profession into disrepute. In sentencing the 41-year-old in the Brisbane Supreme Court, Justice Roslyn Atkinson said his actions serve to "feed the public perception that lawyers are greedy and self-serving".

Meehan, whose clients included Brett Peter Cowan, pleaded guilty last month to one count of aggravated fraud of more than \$30,000 and eight counts of fraudulently falsifying records. The father-of-four collected hundreds of thousands of dollars in cash payments from clients as part of a scheme to dodge financial reporting and bankruptcy obligations, before attempting to hide his tracks by falsifying records. The court heard Meehan alleged two of his colleagues, known as "S1" and "S2," were also involved in the scheme – claims they deny.

Meehan's conviction may just be the tip of the iceberg, with the Crime and Corruption Commission investigation broadening to other firms and it is understood police are confident that others will face charges. Justice Atkinson said the Crime and Corruption Commission investigation only kicked off after Meehan himself turned up to the watchdog last September -- one month after he was sacked from the law firm – and confessed.

"There was no investigation at the time that you did that," she said. "Your admissions largely related to matters that the investigators did not know about, and could not know about. So the charges against you are based in no small part on what you told investigators...and that is very much to your credit."

Queensland Law Society president Christine Smyth said his actions had left an indelible stain on the legal profession. "It is extremely disappointing when any lawyer abuses the trust and faith members of the public place in them and as an officer of the court deserves the harsh penalty imposed by the Supreme Court of Queensland," she said.

"Justice Roslyn Atkinson is a very experienced judge and the sentence she has imposed reflects just how dimly the courts and the justice system views crime committed by lawyers. The criminality in this case is nefarious and the sentence imposed reflects just that. It also takes into account a range of other considerations, including Mr Meehan's full cooperation with the administration of justice and his full cooperation with investigating authorities and his entering of a guilty plea at the earliest opportunity.

"In cooperating Mr Meehan has demonstrated that, at least in part, he appreciates the damage he has caused to the community's faith in the justice system." Meehan will be eligible for parole in December 2018. Research and select a case which shows an example to illustrate your answer to this question.

1. What was the crime for which Tim Meehan was convicted? [C]
2. What punishment was imposed on Mr Meehan for his crime? [C]
3. How does the punishment of Mr Meehan illustrate the meaning of the rule of law? [C]
4. Do you believe that Mr Meehan, as a former human rights and criminal defence lawyer, was effectively and fairly punished for his crimes? Give your reasons. [A] [E]
5. Are ordinary people in our society treated differently from high profile members of our society? Research and select a case which illustrates your answer to this question. [S] [A]



WHAT DO YOU THINK? CONTINUED...



6. What about Indigenous Australians? Are they treated differently from other members of Australia by our criminal justice system? Research and select a case which illustrates your answer. [S] [A]
7. What about corrupt police officers? How does the criminal justice system respond to corruption of the very people who are meant protect us from crime and bring other criminals to justice? Research and select a case which illustrates your answer. [S] [A]

The media is often a self-appointed guardian of the rule of law, particularly when it applies to high profile members of the community, as the following online news report illustrates.

PRACTICAL APPLICATION

BRISBANE BRONCOS PLAYER ACCUSED OF ASSAULTING WOMAN

SOURCE: THE COURIER-MAIL (ONLINE), 18 JANUARY 2018 (EXCERPTS)

AN UNNAMED Brisbane NRL player has been accused of assaulting a woman. The Broncos player, who cannot be named for legal reasons, allegedly had “slapped and manhandled” a woman on Sunday night and will face court. It is understood the woman was known to the player.

The Broncos and the NRL Integrity Unit were made aware of the incident some time before the allegations surfaced publicly yesterday afternoon. “The club has been made aware of a private matter involving a player that currently sits within a court proceeding,” the Broncos said. “The NRL Integrity Unit was immediately made aware of the matter by the Broncos, and no further comment can be made until the matter is resolved.”

Queensland police are also reportedly making inquiries to determine if the alleged assault was isolated. The allegations come just seven weeks before the start of the Broncos NRL 2018 season.



1. What rule of law applies to the ‘unnamed Brisbane NRL players’? [C]
2. What do you think might be the legal reasons for the Broncos player not being allowed to be named in the media? [C] [A]
3. How might the Broncos and/or the NRL Integrity Unit be involved if the player is guilty of alleged assault? [C] [A]
4. You are a long-standing fan of the Broncos. Write an online blog (one paragraph in length) saying why such an incident is important to you with respect to how it is dealt with by our criminal justice system. [A] [R]



Australia is a democratic country. The concept of the rule of law in a democracy (see Chapter 2.4 ‘The Australian Constitution’, for an explanation of Australia’s constitutional parliamentary system of representative government) is encapsulated in the famous words of the former President of the United States of America, Abraham Lincoln:

*Government of the people, by the people, for the people,
shall not perish from the Earth.*



Ch 2.4

According to Professor of Law at the University of Queensland, Geoffrey Walker, it is the people who should be central to the rule of law in the following two ways:

... most of the content of the rule of law can be summed up in two points:

(1) that the people (including, one should add, the government) should be ruled by the law and obey it; and

(2) that the law should be such that people will be able (and, one should add, willing) to be guided by it.

Geoffrey de Q. Walker, *The rule of law: foundation of constitutional democracy*, (1st Ed., 1988) (<http://www.ruleoflaw.org.au/what-is-the-rule-of-law>)

Prior to November 2017, the Australian Government refused to hold a vote in Parliament to change the *Marriage Act 1962* (Cth) to legalise same-sex marriage. This was despite being urged to do so by the Australian Labor Party in opposition, various minor parties and much of the media. Instead, the Australian Government decided to hold an Australia-wide postal ballot to determine the level of community support for legalising same-sex marriage.

61.6% of Australians who participated in the national postal survey, during the months of October and November 2017, voted 'Yes' to the legalisation of same-sex marriage, while 38.4% voted 'No'. The change to the law, in the *Federal Marriage Act 1962*, was immediately made with the large majority of the members of both houses of the Parliament of Australia voting to give legal effect to the will of the majority of the people.

PRACTICAL APPLICATION

SAME-SEX MARRIAGE LEGALISED IN AUSTRALIA AS PARLIAMENT PASSES HISTORIC LAW

SOURCE: MICHAEL KOZIOL, THE SYDNEY MORNING HERALD ONLINE (SMH.COM.AU), 8 DECEMBER 2017 (EXCERPTS)

Australia has officially become the 26th country to legalise same-sex marriage after the law was passed on Thursday with the overwhelming backing of the Federal Parliament. Thirteen years after changing the Marriage Act to explicitly forbid same-sex unions, federal politicians voted to undo the last major piece of discrimination against gay and lesbian Australians.

"Australia has done it. What a day for love, for equality, for respect," declared a jubilant Prime Minister Malcolm Turnbull, who punched the air as he called it a historic day for the nation. This belongs to us all. This is Australia – fair, diverse, loving and filled with respect for every one of us. This has been a great, unifying day in our history."

Attorney-General George Brandis advised the law would formally change on Saturday, allowing same-sex couples

to lodge a Notice of Intended Marriage from this weekend. The minimum notice period is one month, meaning the first legally recognised same-sex wedding could take place on January 9.

Only four MPs voted against the change, and so clear was the result that a formal count was not required. A handful of MPs - including former prime minister Tony Abbott and Treasurer Scott Morrison - chose to abstain. When the vote was declared on the floor of the House, the packed public gallery exploded into cheers and applause, while MPs crossed the chamber to embrace each other, wave rainbow flags and in some cases cry.

The public galleries sustained rapturous applause for several minutes and eventually burst into a rendition of *I Am, You Are, We Are Australian*. Some also chanted "Warren!" referring to Liberal MP Warren Entsch, a long-time gay rights advocate and ally.

PRACTICAL APPLICATION CONTINUED...



Numerous well-known gay and lesbian Australians were present to witness the historic moment, including Olympic swimmer Ian Thorpe and actress Magda Szubanski. "What an extraordinary moment," Szubanski said. "When I watched all of those people move to the 'yes' side of the House, I thought Canberra was going to tip over."

Thorpe, who struggled with his sexuality for many years and came out publicly in 2014, said it was a "momentous day" for young gay and lesbian people. "We have created an Australia that is more equitable, more fair and more just, and it is the kind of place that more Australians want to see," he said.

Opposition Leader Bill Shorten said he was "humbled" by the momentous event and "privileged" to be part of it. "This isn't about me or the other 150 members of Parliament - it is about Australians and Australia, the LGBTIQ people and their families and their partners," he said immediately after the vote. "We are telling them: we love you, you're equal."

While gay rights campaigners have fought for marriage equality for decades, the direct path to Thursday's vote began two years ago when the former Abbott government announced it would settle the question of same-sex

marriage by a public plebiscite. Mr Turnbull continued that policy, but it was blocked by opponents in the Senate. The government later opted to hold a voluntary postal survey asking: "Should the law be changed to allow same-sex couples to marry?" Australians voted "yes" to that question by 61.6 per cent to 38.4 per cent, prompting the government to allow a free vote in Parliament, which passed on Thursday.

There were emotional scenes in Parliament House following the vote, as Labor senator Louise Pratt hugged her partner Bek and flagged their intention to marry. "It means the world to us," she said. "We've been working to this day for a really, really long time." Veteran gay rights campaigner Rodney Croome dedicated the victory to those who had campaigned over many years, including those who had died before the law was changed. Their lobbying and activism had "built a mountain from which our legislators were able to see the truth," he said. Alex Greenwich, the NSW parliamentarian who co-chaired the Equality Campaign, said: "We came, we saw, and love finally conquered. Marriage equality is finally the law of the land and we are so proud of Australia."

1. What law was passed by the Australian Parliament? [C]
2. What say did the people of Australia have in the passing of this law? [C]
3. How did the Australian Parliament respond to the will of the people of Australia? [C]
4. Using the explanation of the rule of law by Geoffrey Walker, was the rule of law properly applied to the issue of the legalisation of same-sex marriage, taking into account opposing viewpoints to the majority vote in relation to this controversial issue? Research and select a source which opposes the view expressed in the above article in order to provide a balanced consideration of this issue. [S] [A]

There have also been concerted attempts by the Australian Government in recent years to widen the reach of the rule of law internationally in an attempt to protect not only Australian citizens in our country and overseas but also citizens in countries all around the world from the insidious spread online of terrorist propaganda and recruitment of people to engage in acts of violence.

PRACTICAL APPLICATION

TRANSCRIPT OF AUSTRALIAN PRIME MINISTER MALCOLM TURNBULL'S AUSTRALIAN MEDIA CONFERENCE (HAMBURG, GERMANY)

SOURCE: PARLIAMENT OF AUSTRALIA (WWW.PM.GOV.AU/MEDIA) 8 JULY 2017 HAMBURG, GERMANY PRIME MINISTER'S OFFICE (EXCERPTS)

PRIME MINISTER: Good morning. As you know last night, the G20 (a forum of 19 countries, including Australia, and the countries of the European Union, comprising a mix of the world's largest advanced and emerging economies, representing about two-thirds of the world's population, 85 per cent of global gross domestic product and over 75 per cent of global trade leaders) have agreed for the first time very clearly that **the rule of law must prevail online as well as offline**. In the lead up to this summit, as you know, I've been talking to other leaders about the importance of ensuring that the internet is not used as a vehicle for spreading terrorist propaganda and recruiting people to the Islamist cause. But also that the encryption basis of the internet's messaging

and communications platforms are not used as a means of enabling terrorists to hide in the dark where the law cannot reach them.

And so obviously as you know, this is a complicated issue and contentious in some respects. But it's good to see that, as a result of the arguments that we've placed and the unanimity that we've built up with other leaders and other nations, you've seen strong language that now enables us to go forward and say to the tech companies, say to Silicon Valley and its emulators, 'you've got to work with us to solve this problem. We cannot allow the internet to be an ungoverned space'.

1. What have the G20 countries agreed upon for the first time? [C]
2. What role does Prime Minister Turnbull claim to have played in bringing about this agreement? [C]
3. According to Mr Turnbull, why is this an important development in the global fight against terrorism? [C]
4. Why do you think this issue of countries working together to apply the rule of law (i.e. effectively govern) to online terrorist communications for attacks worldwide is described by Mr Turnbull as 'complicated ... and contentious in some respects'? Conduct research to find sources which provide insights into the opposing viewpoints of the leaders of different G20 countries such as China, Russia, Germany, France, Britain and the USA in relation to the Australian Government's attempts to effectively regulate the Internet throughout the world. [S] [A] [E]

RESEARCH

People sometimes refuse to comply with the law for a variety of reasons. Mahatma Gandhi, the father of Indian independence, believed in the use of non-violent civil disobedience to persuade the British rulers to grant India independence from the rule of the British Empire. In the 1960s, many young men in Australia and the United States of America objected to the Vietnam War and would not serve in the army. They were punished for this. There is a long history of conscientious objection to war in the countries which have the English democratic tradition: Great Britain, the United States of America, Canada, New Zealand and Australia.

1. Conduct research into primary and secondary sources in relation to one legal situation involving a person or group of people refusing to comply with a particular law in Australia, whether it involved conscription during the Vietnam War, environmental protestors (e.g. currently against the Adani mine in northern Queensland or against the proposed damming of the Franklin River by the Tasmanian Government in the 1980s) or any other real-life example of the rule of law being seriously challenged and disobeyed. [S]
2. Using examples drawn from your research, describe and explain how the rule of law was challenged by protestors. [C]
3. Examine the main opposing viewpoints in relation to the attempts by the government to uphold the rule of law against the dissenting and disobedient citizens and the legal and social consequences which followed. [A]
4. Write a one paragraph speech that you would make in a protest rally in relation to one of the examples you have researched above. [A] [R]

1.2 THE PURPOSE OF LAWS WITHIN SOCIETY

No law can possibly meet the convenience of every one: we must be satisfied if it be beneficial on the whole and to the majority.

Titus Livius, 59BC-17AD

The law means different things to different people. People have argued throughout the centuries about a correct definition of law. The reason why law is difficult to define is that the term covers a **diverse range of human activities** and that it **impacts upon people's lives differently**. What the law is, or should be, depends upon many interacting factors such as a person's or group's background, status, beliefs and current circumstances. That is why **laws can never satisfy all of the people all of the time**.



WHAT DO YOU THINK?



On the following page are various attempts to and explain the law. Answer the following questions in relation to these descriptions of the law.

1. Which of the definitions or explanations of the law do you think are the best? [C]
2. If you were asked to explain the purpose of the law, how would you? Take a few moments to write your own explanation of the law, using any of the descriptions that you selected in your answer to question 1 above. [C]
3. Imagine our lawmakers passing a law prohibiting all citizens from leaving their homes from midnight Saturday through to 1.00pm on Sunday each week. This law may not be very popular with many people but would still be a law. Even though it has the power to do so, would the State Government be likely to make such a law? In answering this question, refer to the definitions and explanations given on the next page that are most relevant to this situation. [C] [A] [E]
4. In your opinion, what are the key purposes of a law? Quickly brainstorm them in the following format. [C]



WHAT IS LAW?

Written laws are like spiders' webs; they will catch, it is true, the weak and poor, but would be torn in pieces by the rich and powerful.

Anacharis, 6th Century BC

Law is the essential foundation of stability and order both within societies and in international relations.

J. William Fulbright, 1905-1995

A law is something which must have a moral basis, so there is an inner compelling force for every citizen to obey.

Chaim Weizmann, 1874-1952

Law is the expression of the will of the strongest for the time being.

Henry Brooks Adam, 1838-1918

Law is the command of them that have the legislative power.

Thomas Hobbes, 1681

The precepts of the law are these: to live honestly, to injure no one, and to give everyone else his due.

Marcus Tullius Cicero, 106-43BC

Simply put, law is a procedure (however crude or ultra sophisticated) for conflict management.

Sarah Robbins, 1990

Law [noun]: rule or set of rules established in a community, demanding or prohibiting certain actions.

Oxford Dictionary

Law is those rules which will be recognised and enforced by the courts.

Richard Chisholm and Garth Nettheim, 1992

The people's good is the highest law.

Marcus Tullius Cicero, 106-43 BC

Law is order, and good law is good order.

Aristotle, 384-322 BC



On the one hand, a law may be for the protection or other benefit of citizens, however, on the other hand, citizens may complain that the law unduly restricts their freedom of choice, as illustrated by the law that makes it compulsory to wear a helmet when riding a bike, failure to do so subjecting the bike rider to a fine by the police.

There are many things you can point to as proof that the human is not smart. But my personal favourite would have to be that we needed to invent the helmet. What was happening, apparently, was that we were involved in a lot of activities that were cracking our heads. We chose not to avoid doing these activities but, instead, to come up with some sort of device to help us continue enjoying our head-cracking lifestyles: the helmet. And even that didn't work because not enough people were wearing them so we had to come up with the helmet law. Which is even stupider, the idea behind the helmet law being to preserve a brain whose judgment is so poor, it does not even try to stop the cracking of the head it's in.

(Jerry Seinfeld, *SeinLanguage*, 1993)



WHAT DO YOU THINK?



Are laws requiring citizens to wear helmets when riding bikes justified in order to protect people from their own lack of good judgement or are they unnecessarily turning our society into a 'nanny state' in which the government has gone too far in telling us what we can and can't do in case we hurt ourselves? In other words, do the benefits of mandatory helmet wearing laws outweigh the restrictions or limitations placed on citizens' freedom of choice? In answering this question, can you think of any other laws which might be regarded as making us a 'nanny state'? [R] [A]

HYPOTHETICAL

Man without law is the lowest of animals.

ARISTOTLE, 384-322 BC

What if you were in a situation where basic customs, rules or laws for survival were not enforced? To understand some of the reasons why we need enforceable rules, read the following extracts from the classic novel *Lord of the Flies* by William Golding (abridged and dramatised). The boys have been marooned on a desert island as a result of an air crash during the Second World

War. No adults are present and the boys suddenly have to make their own decisions about how best to organise and run their small community.

To bring the scenes on the next pages to life, allocate roles to members of your class and act them out.



ACT I - SCENE IV



A platform crowded with children. The late afternoon sun streams in from the west and illuminates the platform. All is still and quiet. Ralph with a conch in his hand sits on a fallen tree trunk looking directly ahead of the platform. The small children are in front of him. On his left are the large boys who had not known each other before the air crash. On his right are the choir members. Ralph lifts the conch to his knees. He clears his throat.

Ralph: *Well then. We're on an island. We've been on a mountain top and seen water all around. With no other people on it.*

Jack: *All the same you need an army – for hunting. Hunting pigs –.*

HYPOTHETICAL CONTINUED...


 ACT I - SCENE IV
 

Ralph: Yes. There are pigs on the island.

Choirboy 1: *We saw –*

Choirboy 2: *Squealing –*

Choirboy 3: *It broke away –*

Jack: (Slamming his knife into a tree trunk and looking around challengingly)
Before I could kill it – but – next time!

Ralph: *So you see. We need hunters to get us meat. And another thing, there aren't any grown-ups. We shall have to look after ourselves.*

The small children break into an anxious murmur. After Jack looks around at them, the murmurs subside.

Ralph: *And another thing. We can't have everybody talking at once. We'll have to have 'hands up' like at school. If anyone wants to talk, then I'll give him the conch.*

Jack: *Conch?*

Ralph: *That's what this shell's called. I'll give the conch to the next person to speak. He can hold it when he's speaking.*

Choirboy 2: *But –*

Choirboy 1: *Look –*

Choirboy 2: *And he won't be interrupted. Except by me.*

Choirboy 3: *(Excitedly) We'll have rules! Lots of rules! Then when anyone breaks them –*

Choirboy 1: *Whee – oh!*

Choirboy 3: *Wacco!*

Choirboy 1: *Bong!*

Choirboy 2: *Doing!*

Piggy lifts the conch out of Ralph's lap.

Piggy takes off his glasses and blinks at the assembly and he wipes them on his shirt.

Things do not work out as planned. Jack is now the leader of the 'tribe' – a large part of the group, consisting mainly of the former choir boys. The tribe is armed and the rules agreed on earlier, which included not stealing from each other, have broken down. The tribe has raided Ralph's camp site. Now Ralph and the group of boys with him are climbing up a steep cliff overlooking the ocean, on top of which stand Jack and his tribe.


 ACT III - SCENE V
 

Ralph, Piggy and Jack stand on a narrow neck of land joining the forest and a rocky outcrop which is higher than the forest. The tribe, painted in green and black, is on the rocky outcrop side of the neck.

Jack: *See they do what I say.*

Ralph: (Looking at the tribe) *You're an animal and a bloody thief.*

HYPOTHETICAL CONTINUED...

Jack and Ralph charge each other. Each hits the other with a solid but not serious blow.

Piggy: *Let me speak!*

The tribe boos.

Piggy: (Holding the conch) *I've got the conch. I tell you I've got the conch.*

The tribe's booing subsides.

Piggy: *I got this to say. You're acting like a crowd of kids.*

The tribe's booing starts again.

Piggy: *Which is better – to be a pack of painted natives like you are or do you want to be sensible like Ralph is?*

The noise from the crowd rises again.

Piggy: *Which is better – to have rules and agree, or to hunt and kill?*

Ralph: *Which is better – law and rescue or hunting and breaking things up?*

The tribe with Jack at its head are menacing.

Roger on the seaward side of the neck and higher above the crowd on the rocky outcrop pulls on a lever. A large rock catapults down towards the people below.

It strikes Piggy in the chest. The conch explodes into a thousand fragments and Piggy, without saying a word, silently falls 15 metres onto a rock ledge. His head opens up and stuff comes out and turns red.

His body twitches. The sea boils over the ledge and withdraws. Piggy disappears and isn't seen again.

1. Why is the conch shell important? [C]
2. What rules are associated with the conch? [C]
3. Jack suggests that the boys should have rules. Why do you think he does so? [A]
4. Piggy gives the tribe a choice between having rules and agreeing to follow them, or hunting and killing. Why does the tribe angrily respond to this suggestion? [A]
5. Look back at the different attempts to define law and its purpose earlier in this chapter. Which definition do you think most closely describes the legal system that exists in *Lord of the Flies*? [A]
6. If the laws of a society are dictated by principles such as 'might is right' or 'survival of the fittest', what could be the consequences? [A]
7. From your own experience (or from your imagination), write a short story (approximately an A4 page in length) that describes the breakdown in obedience to rules in a classroom. In your story explain what effect this has on the students who want to obey the rules. How is the teacher affected in your story? Remember, if your story is based on actual events, to be careful to avoid embarrassing anyone. [C] [A] [R]

In *Lord of the Flies*, William Golding made a very strong statement that no group of people, however well educated or civilised, could exist without rules that are capable of being enforced. This is based on the belief that human nature is basically evil and that, as a consequence, doing evil will always prevail over doing good unless laws are made and enforced. Based on this view of humankind, societies certainly need laws to protect the weak and innocent and also to prevent social chaos.

On the other hand, those who argue that laws should not be needed assume that human beings are born good rather than evil and that external factors at work in society (such as poor communication leading to misunderstandings and disputes) have led to the growth of greed and corruption. Based on this view of humanity, resolution of the external problems would mean laws would be unnecessary.



WHAT DO YOU THINK?



1. Which of the two opposing views of human nature – that it is either basically evil or basically good – is most in line with your viewpoint? Why do you hold that view of human nature? [E]

*The more rules you have, the more unhappy people are;
And the more weapons there are, the worse things will happen.
The more we want luxuries, the more we abandon simplicity;
And the more laws you pass, the more we will break them.*

Tao Te Ching

2. If it were possible to live in a society with fewer laws, which laws, in particular, would you like to see abolished? Which laws would you like to keep? [A] [E]
3. What might be some of the social consequences of removing certain laws? Give three examples. [A] [E]

PRACTICAL APPLICATION

FOCUS: IDENTIFYING THE PURPOSES OF NEW OR PROPOSED LAWS IN AUSTRALIA

Read the following snapshots of new and proposed changes to, and interpretation of, the law in Australia's criminal justice system, which will be explored in greater detail and depth in the next three topics in this unit. Then, for each source example, answer the following contextual focus questions which culminate in the final 'Why?' (purpose) questions for each new law, change to the law or new interpretation of the application of the law to particular cases (scenarios).

1. **What** is the new or proposed law? [C]
2. **When** was the new law made or proposed? [C]
3. **Where** does the law or proposed law apply? In other words, what is the **legal jurisdiction** to which the new or proposed law applies? For example, is it a federal criminal matter affecting all of Australia or does it relate to a particular Australian state or territory? [C]
4. **Who** made or proposed the new law? [C]
5. **How** was the law made or how is it proposed to be made? [C]
6. **Why** do you think the new law was made or proposed? [C]



AUSTRALASIAN LEGAL INFORMATION INSTITUTE

SOURCE: [HTTP://WWW.AUSTLII.EDU.AU/AU/LEGIS/QLD/CONSOL_ACT/CC189994/S314A.HTML](http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s314a.html)

CRIMINAL CODE 1899 - SECT 314A (excerpts)

314A Unlawful striking causing death

(1) A person who unlawfully strikes another person to the head or neck and causes the death of the other person is guilty of a crime.

Maximum penalty—life imprisonment.

(3A) For subsection (1), the striking of another person is unlawful unless it is authorised or justified or excused by law.

(4) A person is not criminally responsible for an offence against subsection (1) if the act of striking the other person is—

- (a) done as part of a socially acceptable function or activity; and
- (b) reasonable in the circumstances.

(5) If a court sentences a person to a term of imprisonment for an offence mentioned in subsection (1), the court must make an order that the person must not be released from imprisonment until the person has served the lesser of—

- (a) 80% of the person's term of imprisonment for the offence; or
- (b) 15 years.

(6) Subsection (5) does not apply if the court sentences the person to—

- (a) a term of imprisonment for life; or
- (b) an indefinite sentence under the Penalties and Sentences Act 1992; or

(c) a term of imprisonment and makes either of the following orders under the Penalties and Sentences Act 1992 for the person—

- (i) an intensive correction order;
- (ii) an order that the whole or a part of the term of imprisonment be suspended.

(7) In this section—

causing means causing directly or indirectly.

function or activity includes a sporting event.

strike, a person, means directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument.



PRACTICAL APPLICATION CONTINUED ...

DOMESTIC VIOLENCE LAWS: ALLEGED OFFENDERS HAVE TO PROVE WHY THEY SHOULD GET BAIL

SOURCE: GAIL BURKE, ABC NEWS ONLINE (ABC.NET.AU), 23 MARCH 2017 (EXCERPTS)

So far today police in Australia would have dealt with on average 687 domestic violence matters

Anyone charged with a serious domestic violence offence in Queensland [including those charged with strangulation, stalking and even animal cruelty] will now have to prove why they should be granted bail and allowed back into the community before they face court.

Queensland Parliament passed the Bail (Domestic Violence) and Another Act Amendment Bill 2017 in the early hours of this morning, which reverses the usual legal process where police and the prosecution would have to argue why a person should not be granted bail and kept in custody.

The Opposition said the new laws also provided more safeguards for domestic violence victims, including provisions for courts to order alleged offenders to be fitted with GPS tracking devices as a bail condition, and urgent appeal rights for victims. Opposition Leader Tim Nicholls, who introduced the legislation, said the changes provided more security for victims.

The private member's bill came after Teresa Bradford was killed by her estranged husband inside her Gold Coast home in January. David Bradford had been released on bail for choking and bashing the mother of four, with his release catching Ms Bradford off guard.

"Last year, 18 Queensland women died from domestic violence," Mr Nicholls said. "With more than 22,000 domestic violence protection orders flowing through the courts each year, it is time for this Parliament to act, it is time to do more and make a difference to these terrible statistics.

"[It's] a simple rebalancing of the scales of justice ... to tip the balance in the favour of community safety." He said it would save lives.

SOCIAL MEDIA: AN ENGINE THAT SUPERPOWERS BULLIES

SOURCE: DAVID PENBERTHY, THE ADVERTISER ONLINE (ADELAIDENOW.COM.AU), 10 SEPTEMBER 2017 (EXCERPTS)

In 2013, Tasmania's Mercury newspaper ran this piece on the day of the funeral of 15-year-old Chloe Fergusson, at the behest of her family who had no idea she was doing it tough:

"Chloe Fergusson gave the appearance of a typical teenage girl. The 15-year-old loved watching Home and Away, listening to pop music and was interested in fashion. She had aspirations to become a hairdresser or a beautician and always took immaculate care of her appearance. Like many teenage girls, Chloe would take "selfies" and post the pictures on Facebook. The youngest of six siblings, Chloe lost her mother after a long battle with breast cancer in 2006 when Chloe was just seven. The family pulled together and remain close.

"Yet none of her brothers or sisters was aware that for three tortured years Chloe was the victim of severe physical, verbal, mental and cyber bullying. Last Tuesday, Chloe caught the bus into town after school, as she did every weekday. Two people were waiting for her at the Elizabeth St bus mall. She was king-hit from behind, kicked and the assault filmed on a phone camera by the attacker's accomplice. Two days after the attack, Chloe was found in her room after taking her own life."

This week, another name was added to this list, that of Adelaide girl Libby Bell who, at the age of 13, made the same awful decision as Chloe. The cases are uncannily similar. Like Chloe, Libby had been subjected to physical and emotional abuse, with social media the preferred platform of her tormentors. The video of Chloe being attacked was posted in Facebook and remained there for two days.

PRACTICAL APPLICATION CONTINUED ...

Libby had a drink poured over her at a fast-food restaurant with video and stills from the attack posted on Facebook, Instagram and Snapchat. These posts attracted plenty of “likes”, with Libby concluding that nobody liked her, forcing her to make the worst decision a person can ever make.

Like the Fergusson family, the Bell family is now pushing for the introduction of specific anti-bullying laws in South Australia. The model for these laws comes from Victoria. They are known as Brodie’s Law, created after the suicide of a young woman, Brodie Panlock, who was bullied relentlessly at work. According to the Victorian Justice Department, Brodie’s Law makes serious bullying a criminal offence, with a maximum penalty of 10 years in jail.

QUEENSLAND POLICE GET NEW POWERS TO TACKLE TERRORISM

SOURCE: FELICITY CALDWELL, BRISBANE TIMES ONLINE (BRISBANETIMES.COM.AU), 5 SEPTEMBER 2017 (EXCERPTS)

New Queensland laws to help police fight terrorism, including powers to turn phones, high-tech fridges and other devices into surveillance tools, have passed Parliament. The laws give police more powers during and following attacks, including to search people or vehicles without a warrant during a declared terrorist emergency.

It would allow police to search mobile phones during a terrorist emergency to look for communication between offenders and footage of the attack. It would also give police the power to turn existing devices into surveillance devices during a declared emergency, including by remotely installing software, when the life, health or safety of a person was in danger.

Police Minister Mark Ryan said the debate on the bill came after the recent arrests in Sydney. “Unfortunately those events are not without precedent,” he said. “Within the last three years, there has been five terrorist attacks in Australia and 13 major counter-terrorism disruption operations undertaken in response to planned terrorist attacks. This serves as a stark and sobering reminder that threat of terrorism to our country and community is very real.” Mr Ryan said police needed the powers to respond to terrorism and other threats, while legislation needed to strike the balance between protection of the community and individual rights.

CANCER COUNCIL CALLS FOR LIFELONG BAN ON CIGARETTE SMOKING FOR THOSE BORN AFTER 2001

SOURCE: JACKIE SINNERTON, THE COURIER-MAIL ONLINE (COURIERMAIL.COM.AU), 4 FEBRUARY 2017 (EXCERPTS)

Polling shows most people support generational phasing out of the killer scourge, with a lifelong ban on cigarette smoking for those born after 2001. Findings from the Cancer Council’s Everyday Health Survey on Tobacco, released today on World Cancer Day, reveal that Queenslanders strongly support the progression towards a smoke-free life for their children and future generations. Only 19 per cent oppose the concept of a tobacco-free generation which would make it illegal to sell tobacco to anyone born during or after 2001.

Cigarette smoking kills 3700 each year in Queensland, and at least one non-smoker dies every week from inhaling second-hand smoke. The estimated cost to the community is \$6 billion. In the lead-up to the “ideal” total smoke-free state, the bulk of respondents wanted to see full bans around kids, at pubs and clubs, and in apartment blocks, as well as retail bans selling tobacco products to minors.

“There is no doubt we have the best smoke-free laws of any jurisdiction in the world but we can do better,” Cancer Council Queensland’s chief executive Professor Jeff Dunn said. “Alarming,ly, about 200,000 Queensland kids currently live in a household with a smoker. This is a scourge we must stamp out, and nearly all Queenslanders agree with us.”

1.3 THE DIFFERENCE BETWEEN A RULE AND A LAW

Our lives are governed by a myriad of customs, rules and laws. **Customs and rules** are important **behavioural controls** in our society but they **do not have the status or force of laws**. In some instances, however, when a majority of members of society have become concerned that customs or rules that exist for the good of the community are not being followed or enforced, the regulation of the particular behaviour will be given the status and force of the law. As you read the following explanations of customs, rules and laws, you will see how **anti-smoking sentiments in restaurants gradually evolved from mere customs to the current laws which now exist in Queensland**.

SOCIAL CUSTOMS

Socially acceptable habits, such as waiting in queues, tipping in restaurants, replying to party invitations by the RSVP date, and bringing a gift to a birthday party, are called **customs or norms**. In your home, you also have social customs, such as whether the family generally sits together at the table or in front of the television to eat dinner, how often the family eats takeaway food each month, and how to address adults (e.g. 'Mr.' or 'Mrs.' or on a first name basis).



Initially, it was customary (a common practice) to ask for a non-smoking table in a restaurant if you were in a group of non-smokers. If the non-smoking area was full, however, you had to put up with smokers sitting near you or leave the restaurant.

RULES

There are many **rules** which **regulate our lives in a more formal manner** than customs and which have been **specifically stated, often in written form**. School rules include not being late for school or class, not talking during assembly or when the teacher or another student is addressing the class, completing homework and assignments, and not physically or verbally abusing others. **Household chores** may be transformed from customs into rules by your parents. The consequences of failing to fulfil them may be deductions in pocket money or withholding of privileges such as television, computer access and going out with friends.

In the late 20th Century, as scientific evidence of the link between smoking and serious diseases became more obvious to the general public, **restaurants were pressured into making rules that banned smokers from lighting up**, either totally or unless they were in designated 'smoking' areas of the restaurant. Such rules could be enforced by restaurant managers refusing entry to smokers or asking them to leave the restaurant for smoking in no-smoking areas.

LAWS

Three features of a law that distinguish it from a custom or a rule are:

1. AUTHORITY

You or I cannot simply decree that a rule is a law. There was a time when individuals, such as kings and emperors, had such personal power, but today **authority to make laws in Australia** rests solely with **parliaments** and, in certain situations, with the **law courts**. These will be covered in Chapter 2. Unless a law is validly made by one of these two bodies with authority to make laws, it will not be recognised as a law or enforced by the courts.



2. CONSEQUENCES

Lex, without force, is impotent. (BLAISE PASCAL, 1623-1662)

The consequences of breaking or not observing a law are usually more serious than failing to comply with a custom or a rule. Laws involve **enforcement by courts or tribunals and other government agencies, such as the police**. Legal penalties such as imprisonment, fines and community service can be enforced by the institutions of the State when laws are broken. Breaches of customs and rules will not be punished in this way unless a law is also broken.

3. REGULATION

Legal rules **regulate the behaviour of all members of a society**, otherwise conflict and chaos results. Imagine a society without regulations about hurting others, conduct on the roads, legal currency (money), safe building practices, and the food preparation hygiene practices in shops and restaurants!

PRACTICAL APPLICATION

MEDIA RELEASE

**MINISTER FOR HEALTH AND MINISTER FOR AMBULANCE SERVICES,
THE HONOURABLE CAMERON DICK**

QUEENSLAND PASSES TOUGH NEW SMOKING LAWS TO PROTECT YOUNG AND OLD

SOURCE: THE STATE OF QUEENSLAND (DEPARTMENT OF THE PREMIER AND CABINET) (QLD.GOV.AU), 23 FEBRUARY 2016 (EXCERPTS)

The Palaszczuk Government has today passed the strongest anti-smoking laws in Queensland's history, reducing areas where smokers can light up and restricting tobacco sales. The Tobacco and Other Smoking Products (Smoke-free Places) Amendment Bill 2015 passed through the Queensland Parliament amid new Queensland Health figures revealing smoking rates in Queensland have dropped to their lowest yet. The figures show that as at the end of last year, only 12 per cent of adults were smoking daily, compared with 14 per cent in 2014, making for 50,000 fewer Queensland adult daily smokers.

PRACTICAL APPLICATION CONTINUED ...

The new laws will:

- ▶ Ban smoking at or near children's organised sporting events and skate parks
- ▶ Ban smoking in and around approved early childhood education and care services, including kindergartens and places offering after school hour care
- ▶ Ban smoking at all residential aged care facilities outside of designated areas
- ▶ Increase the smoke-free buffer at all Government, commercial and non residential building entrances from four to five metres
- ▶ Ban smoking at pedestrian precincts around prescribed State Government buildings, such as 1 William Street
- ▶ Ban smoking at specified national parks or parts of national parks, and at public swimming pools
- ▶ Ban smoking at all outdoor pedestrian malls and public transport waiting points
- ▶ Empower local government to ban smoking in any other public space
- ▶ Ban the sale of tobacco products from pop-up retail outlets, such as at music festivals

The new laws will come into effect on 1 September 2016.

LEGISLATION AND ENFORCEMENT

SOURCE: QUEENSLAND DEPARTMENT OF HEALTH (HEALTH.QLD.GOV.AU), 23 FEBRUARY, 2016 (EXCERPTS)

Queensland's tobacco laws are governed by 2 sets of legislation:

- ▶ *Tobacco and Other Smoking Products Act 1998*
- ▶ *Tobacco and Other Smoking Products Regulation 2010*

They are primarily enforced by Queensland Health Environmental Health Officers (EHOs), who can:

- ▶ issue individuals warnings and on-the-spot fines
- ▶ issue businesses improvement notices, warnings and on-the-spot fines
- ▶ initiate legal proceedings for breaches of the tobacco laws
- ▶ respond to complaints
- ▶ inspect premises
- ▶ provide advice about the tobacco laws.



If you are smoking in a no-smoking zone and approached by an authorised EHO, you are required by law to provide your correct name and address to the officer. They generally do not wear a uniform, but they will show an identification card before asking any questions. Police officers have powers to address tobacco sales to children and they alone enforce smoking bans in vehicles where children under 16 years are present. Police must observe the offence occurring in a vehicle in order to issue a fine. Queensland Parks and Wildlife Service Rangers have powers to enforce smoking bans in Queensland National Parks.

PRACTICAL APPLICATION CONTINUED ...

1. What are the three features of a law that distinguish it from a rule? [C]
2. What are specific examples of the three features of the new Queensland anti-smoking laws which are contained in the above sources? [C]
3. In your opinion, are the new anti-smoking laws just and equitable in terms of the people affected by them, both positively and negatively? Set out your views in a one paragraph article to be published in your local newspaper. [A] [R]

PRACTICAL APPLICATION

Consider excerpts of Section 339 of the *Criminal Code Act 1899* (Qld):

- **Preamble.** Whereas it is desirable to Declare, Consolidate, and Amend the Criminal Law:
Be it enacted and declared by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:

339. Assaults occasioning bodily harm.

(1) Any person who unlawfully assaults another and thereby does the other person bodily harm is guilty of a crime, and is liable to imprisonment for 7 years.

1. What is the source of the authority? [C]
2. What is the consequence that will flow from breaking this law? [C]
3. What type of behaviour is being regulated? [C]

One of the benefits of the force and coverage of a law over a rule can be seen in the following case

PRACTICAL APPLICATION

LEGAL FEARS SPUR SCHOOL PHONE BAN

SOURCE: NATASHA BITA, THE COURIER-MAIL (COURIERMAIL.COM.AU), 11 FEBRUARY 2017 (EXCERPTS)

DOZENS of schools are banning mobile phone, amid threats of legal action if students are exposed to online dangers while on the (school) premises.

Queensland Law Society spokesman Bill Potts yesterday warned it was "only a matter of time" before a parent or student sued a school over uncontrolled smartphone use. "Such phones are being misused every single day for sexting, grooming and bullying," he said. "Schools have an obligation to provide a safe place for their students."

Dozens of schools are restricting smartphone use, despite the state (Queensland) Education Department's refusal to impose a blanket ban.

The Sunday Mail revealed last week that kids are using phones to snap classmates in change rooms, watch porn and send suicide taunts.

France will ban smartphones in primary, junior and middle schools from September (2018).

PRACTICAL APPLICATION CONTINUED ...

1. What rule is being imposed by 'dozens of schools' throughout Queensland, according to the writer of this article? [C]
2. What reasons are given in this article for the importance of the school rule? [C]
3. If a 'blanket ban' were to be imposed by the Queensland Education Department, how would the three features of the law specifically relate to this case? [C]
4. Based on the opinion of Queensland Law Society spokesman, Bill Potts, why would it be wise for the Queensland Education Department to 'impose a blanket ban' in the form of a law rather than schools imposing their own rules? [C] [A]

It is important to be able to make a distinction between a rule and a law, in terms of the different consequences which may result from their application to the same real-life scenario, as illustrated by the following articles in relation to an alleged 'coward punch' in a 2017 Gold Coast game of junior soccer.

PRACTICAL APPLICATION

Read the following articles (excerpts) and then answer the questions in relation to them.

MUM OF TEEN 'COWARD PUNCHED' BY MAN IN JUNIOR SOCCER BRAWL SPEAKS OUT

SOURCE: RYAN KEEN, GOLD COAST BULLETIN (GOLDCOASTBULLETIN.COM.AU), 31 JULY 2017 (EXCERPTS)

THE mother of a 13-year-old knocked out by a man's alleged coward punch during junior soccer says her son struggles sleeping and may need counselling. She initially feared a brain bleed or damage, saying her son was blindsided by the punch and left unconscious as a brawl erupted during an under-15s fixture at Mudgeeraba Soccer Club.

The mother, speaking out ahead of tomorrow's Football Gold Coast disciplinary hearing into the ugly incident, said it had left her son with a "crooked jaw" at the time and feeling insecure. "I think he needs counselling because he cannot sleep. He never thought an adult would attack him — they are supposed to be there for you when something bad is happening. You are not even allowed to hit your own kids so for a stranger to hit one of yours kids, it's a nightmare."

Police are also investigating the brawl during the July 10 Mudgeeraba versus Ormeau fixture but have yet to lay charges.

The woman said it had been a "rough, unfair" encounter full of niggles in the lead-up to the second-half violence. Her eldest son aged 15 — playing for Ormeau — was being provoked and punched by an opponent when her 13-year-old son ran onto the field from the sideline, she said. "That boy was hitting my son and then my second-eldest son who is 13, standing next to me, went onto the field and he punched (the opponent), hit him in the face.

"The father of that boy (who was also the assistant coach of his son's team) came from the side, my son didn't see him, he knocked my son out. He was unconscious. He hit him hard, crazy hard. He saw stars," she said of her 13-year-old, adding her distressed eight-year-old daughter started crying. She said her husband then ran on and pushed over the man who allegedly king-hit her 13-year-old before Mudgeeraba and Ormeau parents then all joined in the melee.



PRACTICAL APPLICATION CONTINUED ...

JUNIOR COACH BANNED UNTIL 2019

SOURCE: RYAN KEEN, GOLD COAST BULLETIN (GOLDCOASTBULLETIN.COM.AU), 11 AUGUST 2017 (EXCERPTS)

A soccer coach accused of striking a teen who thumped his son at a junior match is banned until 2019. A Football Gold Coast hearing banned the Mudgeeraba assistant coach from coaching until December 31, 2018. The teen he hit who ran on from the sideline was banned from playing for two months. Mudgeeraba and Ormeau clubs are on good behaviour bonds for 12 months with any breaches risking a \$3000 fine. The match result between the Mudgeeraba and Ormeau under 15s sides was voided despite Mudgeeraba leading. The Mudgeeraba coach and club are appealing all three aspects of the decision.

1. Explain the specific ways in which rules were applied to different people and organisations in this case, including the consequences of the rules being broken in each different case. [C]
2. Do you think the rules were applied in a just and equitable way to the people and organisations who faced the Football Gold Coast hearing or do you think one or more of the appeals will be successful? [E]
3. How might the criminal law also be applied to this real-life scenario? What are examples in the above articles of the three features that distinguishes this criminal law from a rule? [C]
4. Do you think it is likely that criminal charges will be brought by the police against any of the people involved in this situation? Why/why not? [A]
5. Assume that you are an online journalist. You are to write an online blog in which you consider how effectively and fairly the rules and laws were applied in this case. [A] [E] [R]

HYPOTHETICAL

For each of the following incidents during a game of rugby league,

- a. identify whether a custom, a rule or a law, or a combination of them, has been broken; [A] and
- b. explain why each of the customs or rules you identify are not recognised as laws. [A]

1. A player refuses to shake hands with a player from the opposing team.
2. At half-time, a player punches his opponent in the face.
3. A player knocks out another player with a head-high tackle.
4. A spectator throws a can at a supporter wearing a jersey of the opposing team.
5. A player is offside during the play.
6. A player wears a non-approved sponsor's logo.
7. A player repeatedly picks his nose.
8. Despite having a year to run on an exclusive contract with one club, a player signs to play for a rival club.



1.4 CHARACTERISTICS OF AN EFFECTIVE LAW

If a law is to be considered effective in the sense that it **contributes to the well-being of all citizens in our society**, the following conditions or features must be present.

1. LAW SHOULD BE CLEARLY KNOWN TO THE PUBLIC

The law should be clear so that **citizens can understand it**. It also needs to be clear so that **judges can interpret and apply the law** in the way Parliament or the superior court meant. Lawyers also need the law to be clear so that they can correctly advise their clients. Ambiguity leads to uncertainty, causing dissatisfaction within, and distrust of lawyers and the law. The Australian Law Reform Commission has recommended that **plain English** be used in legislation and in legal documents. It is important to acknowledge, however, that law can be complex because of the **technical content** often required in areas such as building codes, taxation and company laws.



WHAT DO YOU THINK?



What are reasons why lawyers may have developed their own legal language ('legalese')? [R]

CONFIDENCE AND CERTAINTY IN THE LAW

We know that laws have to change to meet changing conditions and needs in society. However, this rate of change should not be too rapid or too frequent as this can lead to uncertainty and confusion. People need to have **confidence in the law** and this **requires stability and consistency**. When there are continual changes to an area of law, as there have been in recent years in the superannuation laws, people feel they cannot make confident decisions about their retirement. It leads to frustration. There have been many and regular changes to the taxation laws in Australia. As a result of frequent changes, taxation laws have become very complex and many people consider that because of this they need professional help to properly attend to their taxation affairs.

LAW SHOULD BE PROSPECTIVE (TAKE EFFECT IN THE FUTURE)

This does not mean that every person in Queensland needs to know every law that exists. **It means that every law in force in this State can be known if a person wishes to find out what the law is** at that point in time. So, before you open a business or get married, for example, you can find out about the laws that regulate or apply to your future actions. It would seem most unfair if conduct, that was lawful when you did it, was later made unlawful because an Act of Parliament or a court decision could be back-dated so as to apply to your action.

Laws that have their effect **back-dated** in this way are called **retrospective**, as opposed to prospective. Generally, retrospective laws are viewed as unjust and therefore are rare in democratic countries such as Australia. However, there were some taxation laws passed in 1982 that had retrospective effect. Also, in 1989, the *War Crimes Amendment Act* (Cth) was passed by the Federal Government to make actions, that had occurred 50 years earlier in Europe, criminal offences. Some people believe that the morally indefensible acts that took place in Nazi-occupied Europe legitimised the retrospective operation of this act. Others believe that, regardless of how evil an act was, it is a dangerous and unfair practice to ever pass retrospective legislation.



PRACTICAL APPLICATION

RETROSPECTIVE LEGISLATION AND THE RULE OF LAW

SOURCE: ROBERT SIZE, RULEOFLAW.ORG.AU, 30 SEPTEMBER 2015 (EXCERPTS)



Ch 1.1

Is it possible to break a law that has not yet been made? In Australia the answer is **yes**. Both State and Federal Parliaments have the power to create retrospective legislation: laws that are made *ex post facto* – after the fact – so that they apply to events in the past.

This power sits uneasily with the Rule of Law principle, which requires that: The law is capable of being known to everyone, so that everyone can comply. A law with retrospective application seems by its nature incapable of being known and complied with. In addition a person cannot know of and comply with a law that does not yet exist. But that may not always be the case.

This article explains why Australian Parliaments can validly enact retrospective laws, identifies some common situations where retrospective laws are used, and digs deeper into whether or not such laws can coexist with the rule of law.

AUSTRALIAN CASE LAW

The High Court first considered the validity of a retrospective law in 1915 in the case of *R v Kidman HCA 58 (1915)*. In that case, Kidman challenged the validity of the *Crimes Act 1915 (Cth)* under which he had been found guilty for committing fraud in connection with goods supplied to His Majesty's armed forces in 1914. Kidman failed. The High Court held that although the Australian Parliament's power is limited by the Constitution, the Australian Constitution (unlike its American counterpart) imposes no limitation upon the ability to enact retrospective laws.

A more extreme and recent example is section 9 of the *War Crimes Amendment Act 1988 (Cth)*. This section provided that a person who committed a war crime between 1 September 1939 and 8 May 1945 was guilty of an indictable offence. In other words, the Act created a crime out of conduct that had occurred nearly 50 years before its passing.

The validity of this retrospective law was challenged in *Polyukhovich v Commonwealth HCA 32 (1991)*. Like Kidman, Polyukhovich contended that the Parliament did not have the power to pass such a law. He failed as well. The High Court affirmed Kidman and held that the Commonwealth can validly enact retrospective laws.

In *Kidman*, Justice Higgins recognised that retrospective laws are in most cases inexpedient and unjust. It is for this reason a Court will not interpret a law as having retrospective application unless the law's retrospective application is unambiguously clear. Nevertheless, the fact remains that there is no limitation upon the ability to enact a retrospective law, and they are used today in a number of areas.

In most cases there will be some sort of mitigating factor meaning that the law, although retrospective, is able to comply with the rule of law. Taxation laws, for example, are often passed with retrospective effect but are typically backdated to the date of an announcement by the Government that the law will be created in the future. As a result, potential perpetrators are *put on notice* in time to change their behaviour. The law can thus be known and complied with and is therefore consistent with the rule of law.

Trickier are the sort of laws passed in both *Kidman* and *Polyukhovich*. Neither Kidman nor Polyukhovich had been put on notice by the Government that their conduct would become illegal in the future. But should they have known better anyway? According to Justice Deane in *Polyukhovich*: "the wrongful nature of the conduct ought to have been apparent to those who engaged in it." In other words, the immorality of committing a war crime was so significant and so obvious that there was no injustice in retrospectively making it illegal.

PRACTICAL APPLICATION CONTINUED ...

INTERNATIONAL CONTEXT

This position is reflected in Article 15 of the *International Covenant on Civil and Political Rights*, which prohibits retrospective criminalisation unless the person's conduct, "at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations." In such situations a retrospective law could coexist with the rule of law.

FURTHER READING

For a more detailed account of retrospective laws in Australia, see Chapter 9 of the Australian Law Reform Commission's recent Interim Report into Commonwealth laws that encroach unreasonably upon traditional rights, freedoms and privileges. For a recent example of a retrospective law, see *Duncan v ICAC*. In that case, Travers Duncan unsuccessfully challenged the validity of a NSW Act that retrospectively validated ICAC findings that had been declared invalid by the High Court in *ICAC v Cunneen*.

1. Explain how it is legally possible in Australia to break a law that has not yet been made (i.e. is retrospective in its application). [C]
2. Explain why the power of Australia's parliaments to make laws with retrospective application 'sits uneasily with the Rule of Law principle'. [C]
3. Explain how, with references to specific cases as examples, Australian case law allows Australia's parliaments to pass (enact) valid retrospective laws. [C]
4. Do you believe that retrospective laws can co-exist harmoniously with the rule of law in Australia? Give specific examples to make your response to this question as convincing as possible. [A] [E]

2. LAW MUST BE ACCEPTABLE TO THE COMMUNITY

For a law to be effective, citizens must be willing to abide by it. Laws are acceptable when the need for a particular law is understood and when it accords with our **individual and community notions of justice**.

An example of a law which raised issues about the balancing of community safety and individual civil or human rights, has been Queensland's *Vicious Lawless Associations Disestablishment Act 2013*, which declared 26 motorcycle gangs known to police to be engaged in criminal activities, such as illegal drug dealing, as criminal organisations whose members faced being locked up in maximum security jails for a minimum of 15 years unless they became police informants.

The 2017 same-sex marriage national postal survey clearly showed that over 60% of Australians were in favour of legalising same-sex marriage throughout Australia (federally). This, in turn, gave a strong message to the members of both houses of the Parliament of Australia to vote in favour of the legalisation of same-sex marriage due it now officially being acceptable to the majority of citizens in our country.

Sometimes, however, it is not the law itself which is brought into question in terms of its acceptability to the community, but rather the decision of police officers and prosecutors to charge a person with a



Ch 1.1

criminal offence and subject that person to a criminal trial. Consider the following 2018 jury trial of a Gold Coast police officer for the crime of misconduct in public office.



WHAT DO YOU THINK?



FORMER COP CLEARED AFTER LEAKING VIDEO OF HANDCUFFED MAN BEING BASHED IN SURFERS PARADISE

SOURCE: TOM FORBES, ABC NEWS ONLINE (ABC.NET.AU), 14 FEBRUARY 2018 (EXCERPTS)

Former Gold Coast sergeant Rick Flori has been found not guilty of misconduct after admitting he leaked CCTV footage showing fellow officers bashing a handcuffed man in custody.

Noah Begic was arrested by police during a night out in Surfers Paradise on January 29, 2012. The 21-year-old chef was handcuffed and driven into the basement of the Surfers Paradise Police Station car park.



The footage shows one officer drop a knee into Mr Begic's shoulder as he lay on the concrete floor, and then the chef was punched to the head twice. The CCTV then shows officers placing Mr Begic into the back of a police wagon where he is punched four more times in the head.

The court heard Mr Flori was not working on the night of the incident, but he later downloaded the footage and gave it to a journalist. The sergeant, who resigned from the service last year, pleaded not guilty to two charges of misconduct in public office when the trial began eight days ago, but one of the charges was discontinued on Tuesday.

To find Mr Flori guilty, jurors were told that they had to be satisfied that he was a member of the public office, that he accessed and released the footage, and that he did so to dishonestly cause a detriment to a fellow officer.

The senior officer on duty the night of the bashing was Senior Sergeant David Joachim, and the footage shows him washing Mr Begic's blood from the floor of the car park after the incident. Jurors heard Mr Joachim was promoted to a senior position ahead of Mr Flori.

During the trial, Mr Joachim, who retired from the police service in 2013, testified that he and Mr Flori had not got along. "He was not a friend," he said. "I found him rather officious since I was a DDO [District Duty Officer]."

During the Crown's final address to the jury, prosecutor Todd Fuller said Mr Flori released the CCTV to discredit the senior officer after being overlooked for the promotion. "This is a course of conduct against David Joachim," Mr Fuller said. "He knew he wasn't entitled to release it [the footage]."

Mr Flori's barrister Saul Holt told the jury that his client did not have a vendetta against Mr Joachim. "This is an act of whistleblowing and not an act of vendetta," he said. Mr Holt said his client wanted to expose police misconduct which was a problem among some Gold Coast-based officers at the time. "Sunlight is the best disinfectant," he said. "Those who blow the whistle do so at a massive personal risk."

During his final address to jurors, Mr Holt said that his client did not dispute that he leaked the footage, which was a breach of police protocols. "Sometimes the rules must give way to public interest," Mr Holt said. "We have to have a police service in which we trust."

Leaving court Mr Flori said he felt vindicated. "I was very happy that it was going to a jury of my peers and the end result is the way it should be I believe," Mr Flori said. "I don't regret a minute of it and I'd do the same thing again — over and over again. "I'd take a job [in the police force] but the only one would be the commissioner's job."



WHAT DO YOU THINK? CONTINUED...



1. With what crime was former police officer, Rick Flori, charged and made to stand trial? [C]
2. According to Mr Flori's barrister, Sam Holt, in his final address to the jury, why did Mr Flori plead not guilty despite admitting that he had leaked the footage of a handcuffed man being bashed by police officers? [C]
3. In his final address to the jury, what did prosecutor Todd Fuller say made Mr Flori's conduct a crime? [C]
4. What was the verdict of the jury? [C]
5. If you were a member of the jury in the trial, would you have found Flori guilty of misconduct in public office? What facts do you believe are material (significant) to your verdict of guilt or innocence on the part of Mr Flori? [A]
6. Do you believe it was reasonable for Mr Flori to be charged and made to stand trial for misconduct in public office even though his actions led to the public becoming aware of police misuse of power? In other words, was this an acceptable application of the criminal law in the light of the jury verdict (note: it was not a majority verdict, but rather an 11-1 majority verdict)? Conduct research and select relevant sources of information which provide insights into the viewpoints of the opposing parties and other stakeholders in the community about whether or not Mr Flori ought to have been charged with a crime and subjected to a criminal trial. [S] [A] [E]

3. LAW SHOULD APPLY EQUALLY TO ALL

Treat all men alike. Give them the same law. Give them every chance to live and grow.

AMERICAN INDIAN CHIEF JOSEPH, 1840-1904



Ch 1.1

For a law to enjoy the **confidence and support of the people**, it should apply to all citizens equally. Members of parliament, judges and public servants should not be exempted from the law. Nor should media celebrities be treated more leniently or more harshly than others. This characteristic of an effective law is encapsulated in the concept of the rule of law, which is explained in the context of several cases in Chapter 1.1.

In Queensland, there have been many examples where actions of public servants, judges and members of the Parliament have been investigated by the Crime and Misconduct Commission and by Commissions of Inquiry. In some cases, individuals have been charged with, and convicted of, serious offences. Ministers of the Queensland Government were jailed following charges arising from the Fitzgerald Inquiry (an inquiry conducted by Tony Fitzgerald, a Judge, into corruption in Queensland, particularly in the Police Force in the 1990s). In 2007, a former Queensland Government Minister, Merri Rose, was jailed for 18 months, suspended after three months, for trying to blackmail Premier Peter Beattie into giving her a \$150,000 executive position with Tourism Queensland.





WHAT DO YOU THINK?



Do you agree with one of the reasons given in the following policy position of the Queensland Law Society based on its concern that mandatory sentencing laws do not apply equally to all members of Australian society? Make sure that your opinion is based on your analysis and evaluation of the legal and social arguments, together with the case examples, provided by the Queensland Law Society to justify its position? [C] [A] [E]

MANDATORY SENTENCING LAWS POLICY POSITION

SOURCE: QUEENSLAND LAW SOCIETY (QLS.COM.AU), 2017.

Queensland Law Society (QLS) has long maintained a strong stance against any form of mandatory sentencing.

The Northern Territory experience of mandatory sentencing in property law offences offer the following examples of injustice where the facts of offending become irrelevant:

- ▶ A 23 year old Indigenous woman, who was a first offender, was sentenced to 14 days' imprisonment for unlawful entry and stealing a can of beer. She was employed at the time. The magistrate observed that, but for the mandatory requirement, a non-custodial order would have been made.
- ▶ A 16 year old with one prior conviction received a 28 day prison sentencing for stealing a bottle of spring water.
- ▶ A 17 year old first offender received a 14 day prison sentence for stealing orange juice and lollies.
- ▶ A 15 year old Indigenous youth was sentenced to 20 days' imprisonment for stealing less than \$100 worth of stationery from his school. He died in custody while serving his sentence.
- ▶ A 21 year old broke into a smoko room on Christmas day and stole biscuits and cordial to the value of \$23. He received one years' imprisonment because he had two previous convictions for property offences.

QLS is concerned that mandatory sentencing laws can disproportionately affect minorities. Mandatory sentences can impact disproportionately on the most marginalised members of society. Those groups who are over-represented in receiving criminal charges such as homeless people, young people, children in residential care, substance-addicted individuals, Aboriginal and Torres Strait Islander people or people with mental illness or intellectual disability, are often impacted most heavily by mandatory sentencing. This inevitably reinforces over-representation of these groups in the corrective system.

4. LAW SHOULD BE CAPABLE OF BEING ENFORCED



If laws are not or cannot be enforced, they risk being ignored and lose their effectiveness to regulate society. The law in Tasmania making homosexual acts between consenting adults illegal was being openly violated and not enforced by the police. Imagine the difficulty the police had in gathering evidence of such victimless crimes within the confines of people's own homes. Its effectiveness as a law was open to doubt. For this reason and because social and moral changes had occurred in Australian society, the validity of this law was tested in the High Court of Australia and led to the Parliament of Tasmania passing an amendment to allow private homosexual acts between consenting adults.



WHAT DO YOU THINK?



Should all laws against offences in the home be repealed (abolished), due to the rights to privacy and freedom of choice of citizens and the difficulties of enforcement by police officers and other government agencies? In answering this question, consider the existing offences of domestic violence, rape or sexual assault of a spouse, and possession of drugs. Should smacking and smoking in the home also be made crimes? [E] [A]



RESEARCH



The Prohibition law in the United States of America is often used as an example of a law which was rejected by a very large majority of its citizens. Find out about the law relating to prohibition of alcohol in the United States in the early 20th Century and how and why it was created. At the same time, find out what serious problems in American society arose as a result of the public's general reluctance to obey the law. [C] [S] [A] [E]



REVIEW

1. What is meant by the concept of the rule of law? Explain its meaning with specific references to a real-life case. [C]
2. Explain the purpose of laws within society. [C]
3. Using smoking in restaurants in Queensland as an example, explain the distinction between customs, rules and laws. [C]
4. What are characteristics of an effective law? [C]
5. Give an example (either real-life or hypothetical) of each characteristic of an effective law, explaining how the characteristic is important to the effective application of the law in relation to each selected scenario. [C]

TOPIC 1: LEGAL FOUNDATIONS

CHAPTER 2: SOURCES OF LAW IN THE AUSTRALIAN LEGAL SYSTEM

FOCUS SUBJECT MATTER

2.1 DIFFERENT MEANINGS OF 'SOURCES OF LAW'

2.2 LAW IN AUSTRALIA BEFORE BRITISH SETTLEMENT

2.3 LAW IN AUSTRALIA AFTER BRITISH SETTLEMENT

2.4 THE AUSTRALIAN CONSTITUTION

2.5 PARLIAMENTS: SOURCES OF STATUTE LAW

2.6 COURTS: SOURCES OF COMMON LAW

2.7 THE ROLE OF CUSTOMARY LAW IN AUSTRALIA'S LEGAL SYSTEM

2.8 THE ROLE OF INTERNATIONAL LAW IN AUSTRALIA'S LEGAL SYSTEM

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ what is meant by 'sources of law' in Australia;
- ▶ the impact of British settlement on Indigenous Australians and their systems of law;
- ▶ the legal basis of British sovereignty in Australia: the doctrine of terra nullius;
- ▶ the nature, features and powers of the Australian Constitution;
- ▶ the importance of the separation of powers doctrine in the Australian legal system;
- ▶ the law-making powers and functions of Australia's parliaments and local authorities as the main sources of our laws;
- ▶ the law-making and interpreting powers and functions of Australia's courts;
- ▶ the nature, purposes and features of Indigenous customary law; and
- ▶ the influence of international laws on the making and interpreting of laws in Australia.

2.1 DIFFERENT MEANINGS OF 'SOURCES OF LAW'

The phrase 'sources of law' is used in two ways and it is important to distinguish between these two different meanings. **First**, it is used to refer to **the authoritative source of a law**, that is, whether a law has been made by parliament (statute law) or by judges (common law).

The **second** way in which the phrase 'sources of law' is used is by referencing to the **historical development of a law or a legal system**. It traces back to the origins of a law or legal process in much the same way as a genealogist traces back a family history. For example, if you trace back the origins of s23B of the *Marriage Act 1961* (Cth), a section prohibiting marriage between family members who are too closely related, you will find the ancestors of s23B are contained in a series of Acts going back through the centuries to English legislation, then to the mediaeval canon (church) law, and back further to pre-Christian Jewish law.

2.2 LAW IN AUSTRALIA BEFORE BRITISH SETTLEMENT



Aboriginal and Torres Strait Islanders (now widely referred to as **Indigenous Australians**) have lived in Australia for thousands of years. The word 'aborigine', which comes from the Latin *aborigine* meaning 'from the beginning', shows their **longstanding relationship with this continent**. As we know from the previous chapter, when people gather and live together, rules inevitably arise, which can take on certain characteristics to become laws. Aboriginal people developed a complex system of law which we recognise today as **Aboriginal (Indigenous) customary law**.

FEATURES OF ABORIGINAL AND TORRES STRAIT ISLANDERS CUSTOMARY LAW



Ch 2.8

The Indigenous people in Australia organised themselves into **extended family units**, consisting of 60 or more people, with each group being a clan that was often part of a larger grouping, called a tribe. **Each clan was named after the area of land where they normally lived** and this land was held in sacred trust from one generation to another. Along with the spiritual bond that existed with the land came detailed rights and responsibilities that were known and obeyed by the clan members. There were strict rules governing the relationships between clan members, known as **kinship**, as well as rules dealing with other relationships.

There were **hundreds of tribal areas throughout the continent** with many different languages spoken – possibly as many as six hundred different dialects or languages. For this reason and because of the vast geographical differences, **the traditions, social structures, laws and beliefs could vary greatly**.

2.3 LAW IN AUSTRALIA AFTER BRITISH SETTLEMENT

When Captain Arthur Phillip arrived at Sydney Cove in 1788, he hoisted the Union Jack and declared this continent to be British. From that moment **the laws of England were to apply**. Indigenous Australians, even in the remotest parts of Australia, became subjects of King George III of England and were bound by his laws. They, of course, had never heard of George or England!

There was **no recognition of Indigenous laws**. No treaty was signed. There was **no negotiation with the Indigenous people** in relation to their losing ownership and control of the land they had lived on for thousands of years. In fact, it was not until another two centuries had passed that 'English law' would give due expression and legal validity to Aboriginal and Torres Strait Islander customary law, beginning with the landmark native title High Court decision of 1992 in *Mabo No. 2*.



THE LEGAL BASIS FOR BRITAIN'S PROCLAIMED SOVEREIGNTY OF AUSTRALIA

The 18th Century was an era of extensive colonisation by the powerful European nations of England, Spain, Portugal, France and Holland. They developed international doctrines or laws that were to apply to their colonisation activities. One such doctrine was that of *terra nullius*. This translates as 'land belonging to no one'. It would apply when a country was uninhabited or had no sovereign (ruler) and no system of land ownership.

The British who came to Australia knew there were Aboriginal people living here. The British considered Aboriginal and Torres Strait Islander social organisation and culture to be very primitive and that the Aboriginal people were therefore incapable of owning land. For this reason, the doctrine of *terra nullius* was applied to Australia. Nowadays, it is well accepted that land is central to Indigenous culture and law and that Indigenous culture is rich and diverse.

Where *terra nullius* was found to exist, that country could be legitimately taken over and owned by a colonial power, with all the land and resources legally going to that colonial power and the Indigenous inhabitants becoming its subjects. If the country was not *terra nullius* then the colonial power would have to negotiate with the inhabitants and draw up a treaty which may involve purchasing land from the natives, or take the land by conquest.

The original, confidential instructions given by the British Admiralty to Captain Cook before his historic voyage of discovery of the 'Great South Land' were as follows (as cited by Reynolds, H., 1992, *The Law of the Land*):



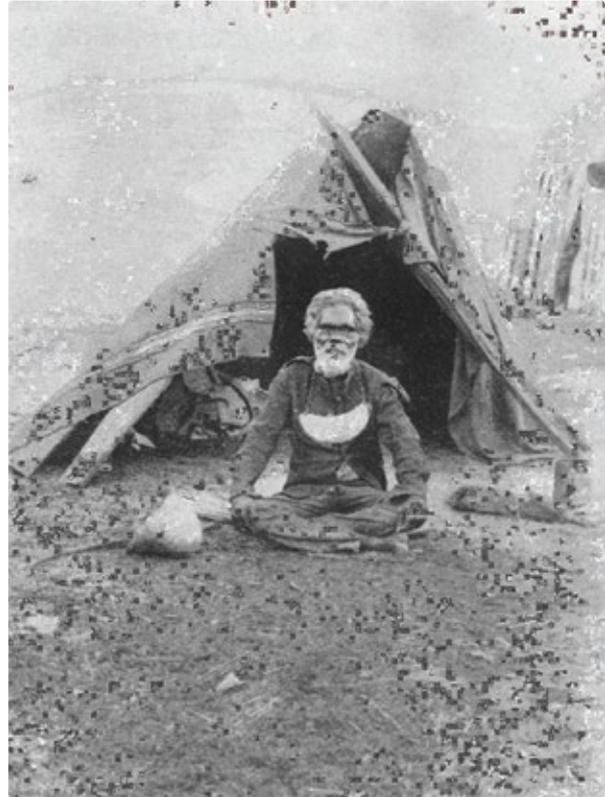
(O)bserve the genius, temper, disposition and number of the natives, if there be any, and endeavour by all proper means to cultivate a friendship and alliance with them, making them present of such traffic, and showing them every kind of civility and regard ... You are also with the consent of the natives to take possession of convenient situations in the country, in the name of the King of Great Britain; or if you find the country uninhabited, take possession for His Majesty by setting up proper marks and inscriptions, as first discoverers and possessors.

CAPTAIN JAMES COOK (COPY OF PORTRAIT BY NATHANIEL DANCE, NATIONAL LIBRARY OF AUSTRALIA).

THE IMPACT OF ENGLISH LAW ON INDIGENOUS AUSTRALIANS

Captain Cook did not negotiate with the Indigenous inhabitants and claimed for Britain what was to become known as Australia on the basis that it was *terra nullius*. As observed by Reynolds (1992):

As many as half a million people, living in several hundred tribal groupings, in occupation of even the most inhospitable corners of the continent, had, in a single instant, been dispossessed. From that apocalyptic moment forward they were technically trespassers on Crown land even though many of them would not see a white man for another thirty, another fifty years. Even the sons and daughters of those dispossessed might not meet their expropriators until middle age. English legal witchcraft was so powerful that it wiped out all tenure, all rights to land which had been occupied for 40,000 years, for 1,600 generations and more. The white man's technology had brought him to the southern continent. His jurisprudence delivered the ownership of a million and a half square miles of someone else's land and it could be received with a clear conscience in the belief that the dispossessed would respond to the 'amity and kindness' of the first settlers. It was a stunning takeover.



Above Right: Bilin Bilin – Jackey King of Logan and Pimpama (1815-1900) – a Yugambah man who observed the Europeans as they moved through his country in the early 1800s. He negotiated agreements with the missionaries, explorers and timber cutters. He helped them to survive and demanded that they respect his family and land. (Collection: John Oxley Library, Brisbane)



WHAT DO YOU THINK?



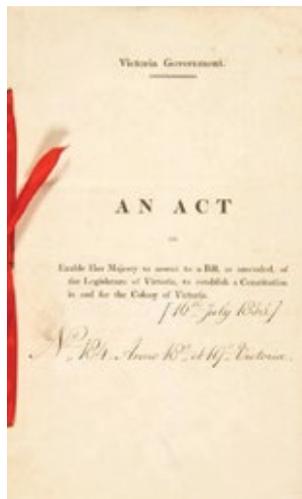
1. What do you think the writer meant by 'English legal witchcraft' in the above description of the "stunning takeover"? [C]
2. Were Captain Cook's actions legally and morally justified in claiming the continent for the British Crown? [C] [A] [E]
3. Should there have been a treaty made with the Aboriginal people? If yes, on what legal basis and what matters should have been covered by the treaty? If no, explain why not. [A] [E]
4. What rights do you think the Indigenous people should have had after the British made New South Wales their colony? [A] [E]

2.4 THE AUSTRALIAN CONSTITUTION

The Australian Constitution (*Commonwealth of Australia Constitution Act 1900*) is the **primary piece of legislation in Australia**, giving all levels of government throughout the country their powers of existence and their authority or jurisdiction to make laws for the people they represent. It greatly affects all our lives and is a document which we should all know more about.

A constitution is **the set of rules that specify the powers, responsibilities and roles of the governing bodies within a state or a country**. You may be familiar with constitutions of sporting clubs or other

groups to which you belong. Federation meant that there was a need for a set of rules governing the new Commonwealth of Australia and its relationships with the states and territories, culminating in the drafting of the Constitution.



Each Australian State also has its own constitution. *The Constitution of Queensland 2001* (an amalgamation or consolidation of several past Acts of Parliament) is the document that gives powers to the Queensland Parliament (law making powers), the Executive arm of government (the Cabinet is responsible for administering the laws through each Minister's Department or portfolio) and the Judiciary (judges and courts are vested with power under the Constitution to interpret the laws made by the Parliament).

England, however, does not have a written constitution. Because of its long history, English citizens and members of parliament rely on what is known as constitutional convention, that is, what has become the customary practice through years of experience.

The original five functions of the Constitution were:



1. To recognise the existence of the six colonies of 1900 and continue their individual constitutions, powers and laws, except where changed by the new Constitution.
2. To create a new central government and its agencies and to outline their powers and responsibilities.
3. To regulate relations between the new Federal Government and the six States.
4. To establish an Australian common market in the form of free trade and commerce between the States, including a common external customs tariff.
5. To guarantee some basic rights for Australian citizens.



It is the Constitution which tells us which powers are given to the Commonwealth and which are to remain with the States. The question of powers (authority to act) was an important one when the Constitution was being written. You can imagine that the States were keen to jealously guard and retain most of their powers. At the same time, they needed to give up powers to the new Federal Government.

There are three different types of powers that exist as a result of the Australian Constitution: exclusive, concurrent and residual.

EXCLUSIVE POWERS

Examples of exclusive powers in the Constitution, which may be exercised only by the Commonwealth Parliament, are as follows.

- ▶ Section 115 of the Constitution prevents a State from making its own money.
- ▶ Section 90 gives exclusive power to the Commonwealth to make laws on customs and excise duties.
- ▶ Section 114 prohibits States from having their own armed forces.
- ▶ Section 52 gives the Commonwealth exclusive power to make laws for its territories, including the Australian Capital Territory.

If a State Parliament or a local council makes a law dealing with any of the Commonwealth's exclusive powers, that law would be declared invalid and without legal effect by the High Court of Australia.

CONCURRENT POWERS

Most lawmaking powers in the Constitution are concurrent which means they **can be exercised by both the Commonwealth and State Parliaments**. If, however, a State passes a law that conflicts with, or has a different outcome from, a Commonwealth law on the same concurrent area of law, s109 of the Constitution provides that the **Commonwealth law will override that of the State**.



Section 109 – When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

It should be noted that **the Commonwealth Parliament does not have to pass laws using its concurrent powers**. If it does not, then state laws relating to these powers remain effective. An example of this was that the Commonwealth Parliament did not pass laws with respect to **'divorce and matrimonial causes'** (see ss51(xxii) on next page) until the passing of the *Matrimonial Causes Act 1959* (Cth) which set out the grounds for divorce for all Australians (this, in turn, was superseded by the no-fault divorce law contained in the Commonwealth *Family Law Act 1975*). Before 1959, each state had been governed by its own valid laws relating to this concurrent lawmaking power.

Section 51 of the Constitution specifically sets out powers which can be exercised by the Commonwealth (or by the States in relation to most of the lawmaking powers if the Commonwealth chooses not to pass laws). Some examples of the Commonwealth 'Heads of Power' in s51 are as follows.



- (i.) Trade and commerce with other countries, and among the States:
- (ii.) Taxation; but so as not to discriminate between States or parts of States:
- (v.) Postal, telegraphic, telephonic, and other like services:
- (vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
- (ix.) Quarantine:
- (x.) Fisheries in Australian waters beyond territorial limits:

- (xi.) Census and statistics:
- (xii.) Currency, coinage, and legal tender:
- (xviii.) Copyrights, patents of inventions and designs, and trade marks:
- (xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:
- (xxi.) Marriage:
- (xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:
- (xxvii.) Immigration and emigration:
- (xxix.) External affairs:
- (xxxi.) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
- (xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
- (xxxvii.) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

PRACTICAL APPLICATION



1. Does the Commonwealth Parliament or the Queensland Parliament have power under s51 to issue fishing licences on Stradbroke Island? [C]
2. What are five powers listed in s51 that, in your opinion, should be exercised only by the Commonwealth and not the states? What are your reasons? [A] [E]

RESIDUAL POWERS

Under s107 of the Constitution, all of the law making powers that the states had as colonies before 1901 are preserved, unless exclusively taken away by the Constitution. The Commonwealth Parliament is prohibited under the Constitution from passing laws dealing with any of these residual state powers that are not stated in s51 or in the ‘exclusive power’ sections of the Constitution.

SEPARATION OF POWERS IN THE AUSTRALIAN LEGAL SYSTEM

At the start of Unit 1, the first meaning of the fundamental concept of the 'rule of law' in the Glossary in the Queensland Legal Studies 2019 Syllabus (p. 66), 'rule of law' was given as:

the doctrine that all people are equal before the law, and that the government is subject to the law

The two additional meanings of 'rule of law' in the Syllabus Glossary are as follows:

a concept implying the subordination of the three arms of government (the executive, the legislature and the judiciary) to legal process, and the equality of all before the law

and

the absence of arbitrary executive [government] power

An important feature of Australia's democratic government established by the Constitution is the separation of powers doctrine (known as the Westminster principle as the English Parliament is situated in Westminster in London), which aims to **keep separate the powers of making, implementing and interpreting law.**

1. The **making of law** is called **legislative power** and rests with the representative governments of the Commonwealth and States, when assembled as parliaments.
2. The **implementing or carrying out of law** is called **executive power** and is handled by the Executive or Cabinet, consisting of the Governor and the Ministers of the Government in the States, and by the Governor General and the Commonwealth Ministers federally. There is an overlap between the legislative and executive powers in our electoral system, as the Executive is made up totally of Ministers elected from the ranks of the political party which gains the greater number of seats in parliament after an election. Police forces and other agencies of enforcement, for example, are directed by the Minister responsible to parliament for the effective maintenance of law and order. This party system of government means that a relatively small group of Cabinet Ministers, largely to the exclusion of other members of parliament, controls what laws will be proposed and passed, as well as being responsible for overseeing public servants in their execution of their duties. This makes a fiction of the purity of the Westminster principle, embodied in Commonwealth and State Constitutions, of the separation of government powers.
3. The **interpretation of law** is called **judicial power** and is carried out by the the courts and tribunals. Judges are prohibited from being members of parliament or of the executive arm of government. The *Boilermakers'* case (*Attorney-General (Commonwealth) v R; ex parte Boilermakers Society of Australia* (1957) 95 CLR 529) is an important High Court case authority that stresses the vital importance of maintaining the independence of judges from the influence of the parliament or the executive in their passing of judgments based upon their interpretation of the law.

These powers of government were separated by the Australian Constitution to avoid injustice and power imbalance which could arise if too much authority is held by one sector.





WHAT DO YOU THINK?



1. In the early 1800s, the Judge Advocate in the colony of New South Wales had the responsibility of:

- ▶ gathering evidence against an accused person;
- ▶ drawing up the charges against the accused; and
- ▶ judging the case and giving the decision and punishment.

How might this have breached the doctrine of separation of powers? [C] [A]

2. In each of our Australian parliaments, the political party, or coalition of parties, that wins the majority (over 50%) of seats in the parliament forms the government, effectively meaning that one political party has the power both to pass and implement laws for its term of office.

In your opinion, is this overlapping of the legislative and executive arms of government a justifiable breach of the separation of powers doctrine in the interests of efficiency and stability of government? [A] [E]

CASE STUDY

Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32 (31 August 2011)

In 2011, the High Court of Australia ruled on the validity of a Federal Government Act of Parliament in relation to boat people seeking refugee status in Australia, dubbed by the media as 'The Malaysia Solution'. The facts, legal issue and decision are set out below.

Facts: The plaintiffs were to be sent to Malaysia from Australia pursuant to an arrangement between the Australian and Malaysian governments that Malaysia would arrange for their care at an agreed humanitarian standard, while their claims to be refugees were assessed by the United Nations High Commissioner for Refugees (UNHCR). For them to be sent to Malaysia, it was necessary for the Australian Minister for Immigration to make a determination nominating Malaysia as a third country for refugee processing in accordance with the criteria set out in s198A(3) Migration Act 1958 (Cth). This section of the Migration Act states:

S198A(3) The Minister may:

(a) declare in writing that a specified country:

- (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
- (ii) provides protection for the persons seeking asylum, pending determination of their refugee status; and
- (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- (iv) meets relevant human rights standards in providing that protection; and

(b) in writing, revoke a declaration made under paragraph (a).

The Minister made the necessary declaration. However, before the plaintiffs could be sent to Malaysia, they made an application for the Minister's declaration to be declared invalid and for an injunction to stop the process from proceeding. In the Federal Court of Australia, the plaintiffs were successful on an interim basis, and the judge required the parties to send the matter to the High Court as a 'case stated' for the High Court to make a determination about the validity of the declaration nominating Malaysia under the Migration Act.

Evidence was led that Malaysia could not satisfy the requirements of s198A(3) which was accepted by the court as reliable and credible. Malaysia was not a signatory under the United Nations' Convention relating to the Status of Refugees 1951.

CASE STUDY CONTINUED...

Legal Issue: Was the decision of the Minister declaring that Malaysia met the requirements of s198A(3) valid, thereby allowing the plaintiff to be sent to Malaysia?

Decision: The Justices of the High Court considered the arrangement between the Malaysian and Australian governments, and the facts necessary for the Minister to make a valid declaration. In a unanimous decision they decided that the Minister did not have the power under the arrangement with Malaysia to make a valid declaration pursuant to s198A(3). The factual circumstances which were the basis of the Australian/Malaysia arrangement were not sufficient to give the Minister the power to make such a declaration.

1. Is the High Court allowed to make decisions about whether or not governments in Australia must act according to the Constitution of Australia and the laws which have been passed by Parliament? [C]
2. Is the above case an example of such a decision? What is the term used to describe the independence of the legislative, executive, and judicial branches of government? [C]
3. What law was originally made and by which parliament? [C]
4. What were the main grounds of appeal against the law? [C]
5. What decision was made by the High Court of Australia and on what legal grounds? [C]
6. What stakeholders' legal rights were upheld by the High Court decision? [A]
7. Based on your reading of this case study and the excerpts from the online legal commentary below, do you believe that the High Court decision was just and equitable in terms of its impacts of the stakeholders affected by it? [E]

THE DOCTRINE OF SEPARATION OF POWERS AND THE HIGH COURT DECISION REGARDING THE GILLARD GOVERNMENT'S 'MALAYSIA SOLUTION'

SOURCE: ALEXANDER MILNE, LOVEGROVE SMITH & COTTON LAWYERS ([HTTP://WWW.LSCLAWYERS.COM.AU](http://www.lsclawyers.com.au))

The High Court decision in Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship outlines the importance of the independence of the Judiciary and the Doctrine of Separation of Powers. It is a phenomenon usually peculiar to lawyers to be able to read a lengthy and convoluted court judgement and feel inspired. However this is a decision which should make Australians of all political persuasions very proud of the system of independent Judiciary in this country.

This decision shows the Doctrine of Separation of Powers in action. Separation of Powers is the term which is used to define the independence of the Legislative, Executive and Judicial branches of government. Particularly important is the independence of the Judicial arm, which acts to avoid an unhealthy concentration of power in the hands of any currently elected party. The Doctrine means that the government itself is subject to the law, and decisions made by the government can be reviewed by the High Court and overturned if they are made in excess of the Executive's power.

The alternative is the experience where the courts act in cahoots with the governing party, or where the courts simply do not have the power to restrain the governing party. These situations historically are much more conducive to authoritarian rule. In these systems citizens are not protected from arbitrary and unjustified decisions at the whim of the government.

For all the posturing by the [former] government that this is an outrageous example of Judicial Interventionism, the reality is that our policy makers will be bound by this ruling that they do not have the power to institute this policy. The armchair critic should remember that the principles of Administrative Law and the Separation of Powers are the same principles which would protect us if threatened by an unreasonable exercise of government power in much the same way that the 800 asylum seekers have been protected from this unreasonable exercise of government power. This should be seen as evidence that the system currently works, even where government decision makers at the highest level are involved. It should be used as impetus to ensure that this backbone of stable and controlled government is maintained vigilantly.

2.5 PARLIAMENTS: SOURCES OF STATUTE LAW

In Australia, there are three levels of parliaments responsible for making laws:

1. *FEDERAL (COMMONWEALTH) PARLIAMENT*
2. *STATE AND TERRITORY PARLIAMENTS, INCLUDING QUEENSLAND PARLIAMENT*
3. *LOCAL AUTHORITIES (COUNCILS AND SHIRES)*

The **source** of Australia's Federal, State and Territory parliaments is the *Constitution of the Commonwealth of Australia*, which came into effect when Australia's colonies were federated as one nation on 1 January 1901. State parliaments, in turn, delegate some of their lawmaking powers to local councils and shires.

THE PROCESS OF STATUTORY LAW-MAKING

The **most important source of law in Australia** is statute law, which is the name given to laws made by a Parliament. Such law is known also as **legislation** or as an **Act of Parliament**. The process of making laws in this way is called **legislating** or **enacting**.

Statute law has become **more significant than judge-made law** for the following reasons:

- ▶ The large amount of legislation that is passed each year by Commonwealth and State Parliaments means this is the more common method of making law.
- ▶ Statute law overrides judge-made law if there is an inconsistency between the two.
- ▶ Statute law does not have the same limitations as judge-made law. Provided the Parliament has authority to legislate on an issue, it can pass valid legislation on it. This is very different from judge-made law which requires an actual case to be decided in a court hearing before a new legal precedent can be made.

The main duty of a parliament is to make laws. In section 4 of this chapter, we looked at the **division of lawmaking powers between the Commonwealth and the States** that were set out in the Commonwealth Constitution at Federation in 1901. The powers to pass laws were divided so that State Parliaments could pass laws in all matters that had not been exclusively given to the Federal Parliament. In turn, the **Queensland Parliament delegates many of its more local lawmaking powers to Queensland's local councils and shires**.

The term, **delegated legislation**, is also commonly used to describe **regulations** that are made by the Governor-in-Council (essentially the government minister responsible for the area of lawmaking, in consultation with senior public servants and members of the Cabinet) to put into effect the provisions of an Act of Parliament. **These specific laws do not need to be approved by the parliament**. A very large number of Acts now bestow regulation making power on the Governor-in-Council so that regulations can be made and changed quickly.

In Queensland, for example, regulations made under the authority of the *Explosives Act 1999* (Qld) contain over 100 sections dealing with a wide variety of situations involving explosives. It is not enough for a citizen merely to consult the Act. For instance, to find out that it is illegal for the driver of a vehicle containing explosives to allow the vehicle to remain stationary in a public place within a town or city, a citizen must find s114 of the *Explosives Regulations 2003* (Qld), which, in turn, refers the reader to the *Australian Explosives Code and the Australian Dangerous Goods Code*. Most citizens do not know how to find Acts of Parliament, let alone the more detailed regulations which refer to various codes and other documents.



Ch 2.4



WHAT DO YOU THINK?



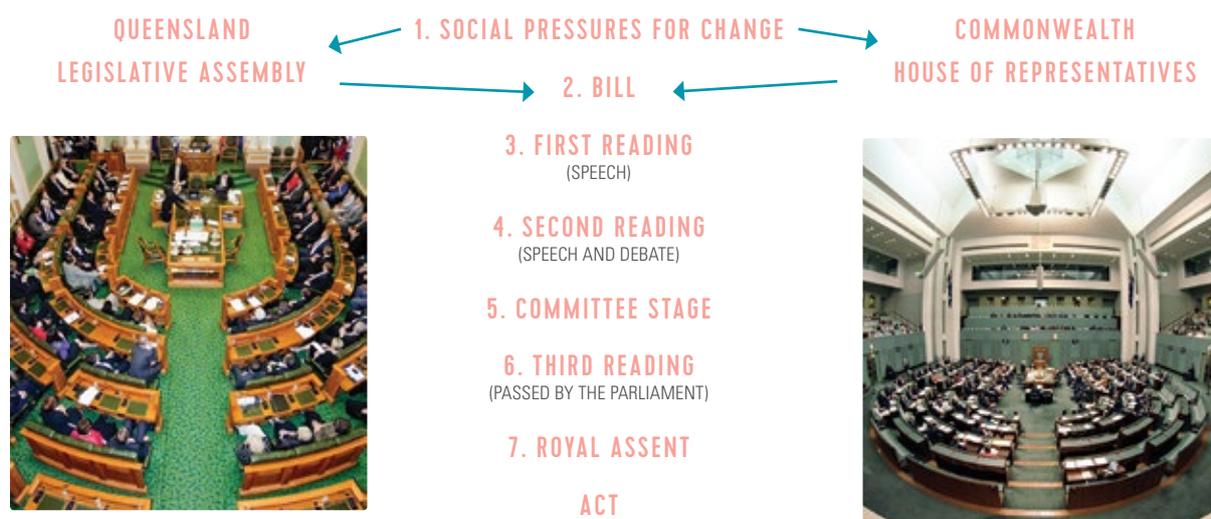
Do you think the increased efficiency in the making of regulations justifies the increased difficulty in finding out what the law is in a certain area? [E]

Each of the nine Australian Parliaments (the Federal Parliament, the six State Parliaments and the two Territory Parliaments) has the following **legislative powers**:

- ▶ **Pass new laws.** An example is the *Summary Offences Act 2004* (Qld), which superseded the *Vagrants, Gaming and Offences Act 1931* (Qld), retaining laws against acts such as wilful exposure and being drunk in a public place, while adding offences such as trespass without permission on business premises and possession of an implement that could be used in a burglary or assault without a good explanation. These new offences are designed to assist police to tackle lower-level offences. The *Federal Euthanasia Laws Act 1997* (Cth) was passed by the Federal Parliament to abolish the Northern Territory's *Rights of the Terminally Ill Act 1996*, which had contained the world's first laws legalising euthanasia. In 2010, non-commercial (altruistic) surrogacy was legalised for the first time in Queensland with the passing of the *Surrogacy Act* (Qld).
- ▶ **Amend (change) existing laws.** In 2006, the Federal Parliament passed the *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act*, which changed the law to allow embryonic stem cell research (therapeutic cloning). An example of a change to Queensland criminal laws is the 1997 amendment to the *Criminal Code*, which added a specific section on graffiti offences. The *Criminal Code* was also amended in 1997 to introduce the crime of computer fraud.
- ▶ **Repeal (remove or cancel) laws.** The section of the *Criminal Code* allowing the death penalty was repealed in 1922. Section 655 of the *Criminal Code* (Qld), which stated that an offender could be sentenced to whipping, was repealed in 1986, which means that whipping no longer exists as a possible sentence for convicted persons in Queensland. The *Vagrants, Gaming and Other Offences Act 1931* (Qld) was repealed in 2004, abolishing archaic laws such as carrying dark lanterns.



STEPS TO CREATE AN ACT OF PARLIAMENT (STATUTE/LEGISLATION)



1. SOCIAL PRESSURES FOR CHANGE

For there to be new or amended legislation, there must be demand or desire for it. Much of the legislation is a product of a **government's desire to implement its own policies**. The Liberal-National Coalition, upon its re-election to Federal Government in 2004, with a majority of seats in both houses of the Parliament, moved quickly to implement its election policy of giving employers and employees greater flexibility to negotiate workplace agreements by drafting the controversial WorkChoices legislation, which became an Act of Parliament in 2005. Social pressures, however, caused WorkChoices to be publicly described as 'dead and buried' by the Liberal Party leader, Tony Abbott, in the lead-up to the 2013 Federal Election.

Public opinion can, of course, have considerable influence on the policies adopted by political parties. Pressure for new or amended laws can also come from other sources. Officers of the Public Service may make recommendations on how laws could be improved. For example, if the Taxation Department finds a particular loophole in the taxation legislation, the Commissioner of that Department may recommend an amendment to close the loophole.

Royal Commissions and law reform groups, from time to time, make recommendations for legislative change. Royal Commissions are set up to inquire into a particular issue and then report on their findings to Parliament, usually with recommendations that will involve some changes to existing legislation. The Royal Commission on Aboriginal Deaths in Custody made recommendations, some of which were adopted by State governments, while others were not. Law reform groups review whole areas of law and make recommendations that they consider will be of benefit to citizens. An example was the 2005 Queensland Public Hospitals Commission of Inquiry, including investigations into the medical practice of Dr Jayant Patel at Bundaberg Base Hospital. Public submissions were also invited from across Queensland by the 2011 Queensland Floods Commission of Inquiry.

Pressure or lobby groups, which are groups of citizens or organisations seeking to persuade members of Parliament to make or amend laws, can be powerful influences on governments. Examples include human and animal rights campaigners, environmental organisations, business associations, unions and welfare groups, as well as international organisations such as the United Nations. For example, in 2007, the World Health Organization (WHO), an agency of the United Nations, called for a global ban on smoking at work and in enclosed public places. The United Nations agency said a ban would help limit non-smokers' exposure to second-hand smoke, which can kill through heart disease and serious respiratory and cardiovascular illness.

Lobbying for change often takes many years before new laws are passed, if at all. Indeed, it took William Wilberforce 18 years of regularly introducing anti-slavery motions in the British Parliament and the concerted efforts of his fellow abolitionists to raise public awareness of their cause with pamphlets, books, rallies and petitions, before the British trade of African black slaves was finally abolished in 1807. It was not until 1833 that the British Parliament passed an Act giving freedom to all slaves in the British Empire.

PRACTICAL APPLICATION

1. Identify the lobby groups represented by the following statements. [C]
2. Based on your reading of these statements, do you believe the Queensland Government should pass legislation to amend the *Criminal Code* and totally ban the smacking of children? [A] [E]

IS IT OKAY TO SMACK YOUR CHILDREN?

DR JOE TUCCI, CEO, Aust. Childhood Foundation, Sydney: Children don't have to be hurt in order to learn a lesson. They learn through repetition. Adults don't pick things up the first time round, neither do kids. Smacking might stop them from doing what they're doing but it doesn't shape their behaviour, which is what you're trying to do.

GABRIELLE WALSH, Australian Family Association, Melbourne: As a parent of seven kids, I believe it's a useful tool if used as a last resort in a range of strategies, and certainly not in anger.

LIZ GARDNER, Nurse, QEII Family Centre, Canberra: We are mandated [legally required] to report any smacking. If we felt it was abuse, we would report it.

PROFESSOR MATT SANDERS, Clinical psychologist, founder Positive Parenting Program (Triple P), St Lucia, Brisbane: The problem is that when parents get angry, they can whack harder. They can bruise the kid. We would never recommend it. It models aggression. And no one else can whack your children. By law, teachers can't whack your kids. It creates a form of inconsistency.

RESEARCH

1. What are some current pressure (lobby) groups in Queensland or Australia? [C]
2. What are examples of specific issues about which pressure (lobby) groups try to influence members of parliament? [C]

2. BILL

Whatever is the background leading to the desire for new legislation, the **proposed law** must first be **introduced to Parliament in draft form**. This is called a **Bill**, which is drafted by one of the Parliamentary Counsel (qualified lawyers who are experts in drafting legislation). It remains a **Bill** during the whole parliamentary process of debate, analysis, amendments and assent.

Usually, **Bills are introduced into Parliament by the government minister** who is responsible for the relevant area of government (called a portfolio), with the approval of cabinet. For example, the *Fair Work Act 2009* (Cth) was passed by a majority vote in the Federal Cabinet (comprising the Prime Minister, Mr Kevin Rudd, and his appointed Coalition Ministers) before being presented to the House of Representatives.

However, an individual member who is not a minister, nor even a government member, can introduce a **Bill**. This is called a **'Private Member's Bill'**. Over the years, Private Members' Bills have become less common as there is no guarantee that the Bill will be passed when it lacks the support of the party in power. However, many Private Member's Bills have been important because they have

raised controversial matters, where members of parliament have been allowed by their parties to vote according to conscience rather than party policy. An example was the *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006*, which was presented to the Federal Senate by Liberal backbencher, Kay Patterson.

The last person to be hanged in Australia was Ronald Ryan. Following his execution, capital punishment was abolished in Victoria as a result of the passage of a Private Member's Bill.

In 1996, a Bill, which was introduced into the Federal Parliament by then backbencher, Kevin Andrews MP, with the purpose of opposing and overturning the Northern Territory's pro-euthanasia laws, was another example of a Private Member's Bill. It involved a **conscience vote** by all the members of the Parliament, which meant that the political parties allowed their members to vote according to their own view of euthanasia rather than in accordance with a particular party view. A large majority of the Parliament voted in favour of the controversial Bill after the following steps had been taken. The 2006 Bill for the legalisation of embryonic stem cell research was also passed by a conscience vote in each house of the parliament.

3. FIRST READING

Notice is given to the Parliament a few days earlier that the member intends to introduce a Bill. The **first formal stage** is the First Reading in the House of Representatives or Legislative Assembly. All that occurs is the member who is putting forward the Bill states: 'I move that this Bill be read a first time,' and the **long title of the Bill is read out**, followed by a **brief statement as to the Bill's purpose** by the Minister or other member of parliament responsible for introducing it to the parliament. There is usually no further discussion at this stage of the parliamentary process.



4. SECOND READING

At this stage, the **detailed discussion of the Bill begins**. The member who proposed the Bill makes a speech explaining the benefits for the community if the Bill becomes law. A member of the opposition may oppose the Bill and will seek to amend it, thereby delaying the Bill's passage through Parliament. **Speeches made in parliamentary debates** are recorded in official reports, known simply as 'Hansard'. These reports are named after Thomas Curson Hansard, a printer, who started an official report of British parliamentary debates in 1803.

5. COMMITTEE STAGE

At this time, **detailed examination of each section of the Bill takes place**. This is the most important stage as there is debate and thorough consideration of the Bill. The wording of the Bill is carefully examined to make sure that the meaning is clear and unambiguous.

Parliament is called the committee at this stage because the speaker of the Legislative Assembly steps down and is replaced in the Chair by the **Committee chairman**. The Bill is debated by all the members of the Parliament. At the end of this committee stage, the Speaker resumes the Chair and Parliament is considered to be back in session. **The Speaker requests Parliament to accept the report of the committee**. If accepted, the Bill continues its progress through the Parliament.

6. THIRD READING

As soon as the Bill passes through the Committee Stage, a motion is put to the parliament that the Bill be read for the third time. The clerk reads the long title. **If a majority of the members present in the house of parliament vote in favour of it, the Bill is considered as passed**. In the Federal Parliament and every state parliament, other than Queensland with its uniquely unicameral (one house) parliament, the same process needs to be followed in the upper house of the parliament.

7. ROYAL ASSENT

This occurs when the **Speaker takes the passed Bill to the Governor or Governor-General for signing**. Once signed, the Bill becomes an Act of Parliament and its provisions become law.

A section of an Act will usually state when it will commence or come into force (take effect as law). It can be from the date of signing by the Governor, or from a stated future date. It may state that it will come into effect on a date to be proclaimed, which means that there is not an exact starting date, but Parliament will proclaim a precise date at a later time. In rare situations, Acts have come into effect from a past date, that is, retrospectively. The commencement date of an Act of Parliament will always be notified in the government gazette. The Act will be printed by the Government Printing Office. Copies can be purchased by any member of the public. Acts are also held in law libraries, lawyers' offices, and in many government departments and Internet sites (e.g. AustLII: www.austlii.edu.au).

2.6 COURTS: SOURCES OF COMMON LAW

In this section 2.6 of the chapter, we will be using the term 'common law' to describe the **law made by judges**. Common law is different from statute law. Statute law, as we have seen, is the law made by parliaments. Common law is not made by parliament. In our system, in the decisions they give in certain cases that come before them, judges have the authority to make law. This type of law is called **common law** or sometimes **case law** (because it is made through cases) or **judge-made law**. The process by which judges make law is known as **judicial precedent**.

The term 'common law' does have **other meanings**. For example, it is used to describe the entire legal system which developed in England. This system was passed on to Australia and other former colonies of the British Empire, such as the United States of America, Canada, South Africa, India and Kenya. As these were based on the same English model, they are referred to as **common law countries**.

There are other systems of law, such as the Islamic and Hindu legal systems. In most European countries, there is a civil law system which is contained in detailed statutes, called codes. This is often compared and contrasted with the common law system as the civil law countries do not have judge-made law.

HOW DID COURTS BEGIN TO MAKE LAW?

Before the Norman conquest in 1066 AD, **most of the law in England was a form of local customary law**. It was applied by local community assemblies, often called moots, and the law differed from one community to another. By the 13th Century, a **centralised system of courts** had been introduced and judges travelled from community to community **administering the same law and the same legal procedure for all of England**. Hence, the term ‘common law’.

At that time, **there was no parliament**. The king would occasionally lay down an edict or decree. Disputes between citizens were mostly decided by the common law judges. **These judges tried to ensure that their decisions were fair and consistent**. So, if a matter had been resolved in a certain way by Judge X, then Judge Y would give the same decision if a similar matter had to be resolved by her or him in a court at a later time. These dual goals of fairness and consistency in judicial decision making remain at the heart of the common law method today.

WHAT IS JUDICIAL PRECEDENT?

What commenced as a custom has now developed into a **formalised and enforced system**, whereby **judges are obliged to follow the decision of earlier cases in higher courts when the factual circumstances are essentially the same**. The term ‘**judicial precedent**’ is used to describe this process. The process is ‘**judicial**’ because it is made in courts by judges, either on their own or as a **majority** (e.g. 3-0 or 2-1 for Court of Appeal decisions). It is called ‘**precedent**’ because it **establishes a pattern to be followed by later judges**. In fact, if an Australian judge does not follow a clearly binding decision, he or she will not be acting according to the common law, and the decision could be overruled or reversed on appeal. The whole **purpose of precedent** is to enable judges to decide cases with similar facts in a like manner. A **minority or dissenting judgment** (containing legal reasons given by a judge who disagrees with the majority judges) is **not legally binding** on judges in later cases.

Precedent is something you will have encountered already in your life. **Families and schools often apply an informal sort of precedent**. For instance, if your parents allowed your older brother to go to Schoolies Week at the end of Grade 12 two years earlier, due to his fulfilling their conditions that he had to achieve at least a B grade average on his Senior Certificate, you would expect, on the basis of that precedent already established in your family that you, too, if you have fulfilled the same conditions, would be allowed to go at the end of Grade 12. Similarly, if a student is suspended for two days for being caught for the first time smoking in the toilets this week, a precedent has been set that will be applied to another student in the school who is caught doing the same thing for the first time the next week, otherwise there is likely to be an outcry from students, parents and teachers of an injustice due to the inconsistent application of the school rule.

Two important questions that need to be asked to determine whether a judge must follow (is legally bound by) the decision made by a court in an earlier case dealing with similar legal principles are as follows:

1. Is the earlier court case of an **equal or a higher rank in the same court hierarchy** as the later court case? and
2. Are the **facts in the later case substantially (materially) the same** as those in the earlier court case?

If both of these questions are answered with a ‘yes’ (in the affirmative), the **ratio decidendi** (Latin for ‘reason for deciding’) of the earlier court decision is a precedent or case authority that is legally binding on the court deciding the later case. This means that the judge/s in the later case must make the same decision as the judgment handed down in the precedent case (called ‘applying the precedent’). If, however, one or more facts in the later case are substantially (materially) different from the facts of the earlier case, a different decision to the precedent case may be made (called ‘distinguishing the precedent’). We shall briefly consider each of the above questions in more depth.

CASE STUDY

R v Kaporonovski [1972] Qd R 465; *Kaporonovski v R* (1973) 133 CLR 209

Facts: Bajric insulted Kaporonovski. In anger, Kaporonovski grabbed hold of Bajric's hand and pushed it towards his face. Bajric was holding a glass of beer in that hand at the time. The glass broke and smashed into his face, causing profuse bleeding and a severe injury to Bajric's eye. Kaporonovski was charged with doing grievous bodily harm. At his trial in the District Court, Kaporonovski argued (among other things) that it was an accident. At that time, the law in Australia on accident as a criminal defence was uncertain. This case laid down a legal principle which is still followed today.

The Criminal Code (Qld) s23 states: '... a person is not criminally responsible for an act which occurs independently of the exercise of his will, or for an event which occurs by accident.'

Legal Issue: For the purposes of accident, what is 'an act' and what is 'an event'? Was the 'act' the breaking of the glass, was it the insult that led to pushing Bajric's arm, was it the glass cutting his eye, or was it all of these external elements considered together? Similarly what

was the 'event'? Was it the breaking or the pushing of the glass or was it the injury itself? There were cases from a range of courts including the High Court that supported different conclusions.

Decision: Kaporonovski was convicted of grievous bodily harm in the District Court. The Queensland Court of Criminal Appeal supported this conviction, holding that 'accident' could not excuse him. The High Court of Australia also affirmed the decision but laid down the rule (*ratio decidendi*) which has applied ever since to 'accident'. The 'act' is the physical action over which a person has control. In this case, the act was forcibly pushing a glass into another's face. An 'event' is the consequence of that act. In this case, it was the grievous bodily harm suffered by Bajric. For an event to be an accident, the grievous bodily harm would need to be a consequence (result) which was not intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person. On these facts, an ordinary person would have reasonably foreseen serious injury (the event) occurring as a result of a broken glass being smashed into his face (the act).

1. What was the legal issue in this case? [C]
2. Which courts heard the case? [C]
3. What is the *ratio decidendi* about the excuse of accident? [C]
4. Which courts are bound by this decision? [C]
5. How would it be possible to change the principle (*ratio*) laid down in this case? [C]
6. What has been the significance of this case for criminal law in Australia? [A]



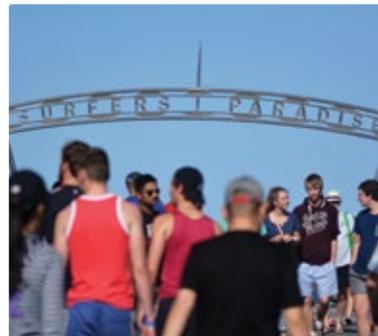
Cases decided in English Courts have been very important in the development of the common law in Australia. From 1788 to 1975, all Australian Courts, including the High Court of Australia, were bound by decisions of the Privy Council, which is a Court in England presided over by England's most senior judges (called Law Lords). It heard appeals from the countries of the British Empire and later the Commonwealth, including Australia. In 1986, however, **Australia abolished all rights of appeal from Australian courts to the Privy Council.** Now, no English courts are in the hierarchy of courts in any Australian State or Territory, although their decisions are still considered as **persuasive authorities** in areas of law without binding precedents made by Australia's superior courts.

If we add the idea of a **court hierarchy** to the earlier example of **Schoolies Week**, the practical meaning of precedent becomes clearer. If it was the neighbours or another family from your school, and not your parents, who allowed their oldest child to go to Schoolies Week, then there would be **no precedent established by your family.** Of course, the other parents' decisions may influence your parents in their

decision, but would not have the same force as a decision made in your own family hierarchy. In legal terms, **decisions outside the same hierarchy** can have ‘persuasive’ effect rather than ‘binding’ force in later court cases.

At this stage, you should be aware that courts can exercise more than one jurisdiction. In other words, courts can have the **authority to hear the following two types of matters:**

- a. **Original jurisdiction**, meaning those types of cases which commonly are **heard for the first time at the level in the court structure**. These courts are sometimes referred to as courts of first instance or trial courts. These are the courts that listen to the evidence given by witnesses, supervise cross-examination of the witnesses, and then reach a decision.
- b. **Appellate jurisdiction**, being the authority to hear cases **brought on appeal from a lower court in the hierarchy**. These courts hardly ever hear any fresh evidence. They decide whether the decision in the lower court was made in accordance with the law. In Queensland the most important appellate court is the Court of Appeal. This is presided over usually by three or five judges of the Supreme Court.



It is also important to realise that the **High Court of Australia** can over-rule itself in a later case, as can the **Court of Appeal in Queensland**. That is, both these courts can **change principles of law which they have previously decided by overturning the decision** (sometimes referred to as reversing the decision). This is how the law changes in the common law system. If these appeal courts could not overrule their earlier decisions, then the law could not develop.

COURT REPORTS

For a judge to follow previous court decisions which are binding, he or she must be able to find what other judges have decided. This is possible because **all important decisions judges make, including their reasons, are reported in an official system of court reports**. These written decisions are what you need when you look up a case. Cases from the Queensland Supreme Court are recorded in the Queensland Reports (QdR) and the decisions of the High Court of Australia are found in the Commonwealth Law Reports (CLR) or the Australian Law Journal Reports (ALJR). An excellent website to use in order to find decided court cases, whether in the Federal or State jurisdictions of Australia, is the Australasian Legal Information Institute (AustLII - <http://www.austlii.edu.au>).

2. ARE THE FACTS SUBSTANTIALLY (MATERIALLY) THE SAME IN EACH CASE?

Only the legal principle specifically applied by the judge/s in making a decision in an earlier court case (the precedent or case authority) - known as the *ratio decidendi* - is **binding on later court cases** in the same hierarchy of courts. Any other facts or legal principles commented upon by the judge in the precedent case but not specifically applied in the making of the decision - the *obiter dicta* (Latin for ‘incidental things said’ or ‘sayings by the way’) - are **not binding** on the lower or equally ranked court.

COURT HIERARCHY IN AUSTRALIA

A guide to the original and appellate jurisdictions exercised by the main Queensland and Federal courts is set out in the following diagram. Most courts have original jurisdiction over both civil and criminal cases. Simple offences are heard by a magistrate alone, while indictable (more serious) offences are usually heard by a judge with, or without, a jury in the District Court or Supreme Court. The courts have limits set as to the amounts they can order to be paid to successful parties in civil suits. You should appreciate, however, that the choice of a court can be very complicated. It can be legally challenged and the consequences of choosing the wrong court can be extremely expensive for an unsuccessful litigant. Legal advice should, therefore, be obtained before commencing a court action.

JURISDICTIONAL HIERARCHY OF QUEENSLAND AND FEDERAL COURTS

High Court - the highest court in Australia. All appeals to the Privy Council in England were abolished in 1986.

Appellate jurisdiction

- ▶ Full Court (5 or 7 judges) hears appeals from decisions of 1 or 3 judges of the High Court.
- ▶ Civil and criminal appeals from Federal, Family and State Supreme Courts, but only when the leave (permission) of the High Court is obtained.

Original jurisdiction

- ▶ Interpreting the Commonwealth Constitution.
- ▶ Disputes between States or Territories
- ▶ Disputes between a State or Territory and the Commonwealth.



Supreme Court - the highest court in Queensland

Appellate jurisdiction

- ▶ Court of Appeal (3 justices) hears appeals from the decisions of a single Supreme Court or District Court judge.

Original jurisdiction (Trial Division)

- ▶ Unlimited jurisdiction.
- ▶ All indictable offences with penalty of 14 years imprisonment or greater other than those heard by District Court. These include murder, attempted murder, manslaughter, treason and drug trafficking.
- ▶ Civil claims where amount claimed is above \$750,000.
- ▶ Judicial review

Federal Court

Appellate jurisdiction

- ▶ 3 or 5 judges hear appeals from the decisions of a single Federal Court judge.
- ▶ 1 judge hears appeal from the Federal Circuit Court.

Original jurisdiction

- ▶ Reviewing decisions made by Federal Government officers.
- ▶ Breaches of Federal legislation.

Family Court

Appellate jurisdiction

- ▶ 3 or 5 judges hear appeals from decisions of a single Family Court judge.
- ▶ 1 judge hears appeals from Federal Circuit Court.

Original jurisdiction

- ▶ Divorce proceedings.
- ▶ Residence and contact of children of a marriage or de facto relationship.
- ▶ Distribution of property of a marriage.

District Court

Appellate jurisdiction

- ▶ Civil and criminal appeals are generally made from Magistrates Court decisions, tribunals and some statutory bodies.

Original jurisdiction

- ▶ Indictable offences with maximum penalty of up to 20 years imprisonment, such as rape, arson, armed robbery, assault occasioning grievous bodily harm, and dangerous driving causing serious injury or death.
- ▶ Civil disputes where amount claimed is between \$150,000 and \$750,000.
- ▶ District Court judges also sit in a different capacity in the following courts:
 - * *Planning and Environment Court – unlimited monetary jurisdiction to deal with legal actions made against government and local council decisions relating to planning of development and environmental impacts of such development.*
 - * *Children's Court of Queensland – a special District Court set up to deal with indictable (serious) criminal offences and large compensation claims involving children under 17 years of age.*

Federal Circuit Court (formerly the Federal Magistrates Court)

Original jurisdiction

- ▶ Judicial review of administrative decisions made by Federal Government officers.
- ▶ Bankruptcy applications.
- ▶ Family law disputes – same as Family Court's original jurisdiction (the large majority of family law disputes are now commenced in this court – generally a quicker and less expensive option).
- ▶ Breaches of Federal legislation.
- ▶ Human Rights and matters.



(Magistrates Court, George Street, Brisbane)

Magistrates Court

Original jurisdiction

- ▶ Minor criminal (summary or regulatory) offences such as simple assault, drink driving, possession of illegal firearms, dangerous driving, disorderly behaviour, shoplifting, wilful damage to property, failure to pay a traffic fine, failure to pay a restaurant or hotel bill.
- ▶ Indictable offences heard summarily (without a jury and generally not requiring all witnesses to be called to give evidence in court) if the maximum penalty is three years imprisonment or less (some exceptions).
- ▶ Committal hearings.
- ▶ Civil disputes where amount claimed is up to \$150,000.
- ▶ Magistrates also sit, 'wearing different hats', as the following courts:
 - * *Queensland Civil and Administrative Tribunal (claims of up to \$25,000) - allows people to recover small debts and resolve disputes between neighbours (eg. dividing fences, excessive noise), consumers and tradespeople, tenants and landlords, parties involved in car accidents and other small claims (replaces former courts such as the Minor Debts Court and Small Claims Tribunal).*
 - * *Coroner's Court – conducts hearings (called coronial inquests) into deaths that have occurred in unusual circumstances, as well as investigating the causes of fires and explosions even where no-one has been injured or killed.*
 - * *Children's Court – a special Magistrates Court that deals with cases where the accused or defendant is under the age of seventeen.*
 - * *Industrial Magistrates Court – resolves disputes between employers and employees.*
 - * *Murri Court (reinstated in 2014) - a special sentencing court for Indigenous offenders*
 - * *Drug Court (reinstated in 2017) - a special court designed to facilitate drug-addicted criminals to complete intensive drug rehabilitations orders/programs*

PRACTICAL APPLICATION

TRANSGENDER SURGERY - TEENAGERS CAN SKIP COURT APPROVAL

SOURCE: SARAH CRAWFORD, THE DAILY TELEGRAPH (COURIERMAIL.COM.AU), 16 MARCH 2018 (EXCERPTS)

A LANDMARK Family Court decision has made it easier for teenagers to undergo radical surgery to change gender. A judge has ruled a 16-year-old with the pseudonym “Matthew” who was born female but identified as male did not need court approval to undergo a double mastectomy. That decision yesterday goes further than a previous Family Court ruling that had paved the way for teenagers to start hormone treatment to change gender without having to go to the courts.

Teenagers now need only the consent of their parents and doctors for life-changing surgery and not just the puberty-blocking hormone treatment. It comes after a panel of five Family Court judges last November determined Sydney teen “Kelvin”, who was born female but had identified as a boy since the age of nine, did not need court approval for hormone treatment.

Justice Judith Rees said that the case of Matthew, who wanted to undergo “stage three” treatment — surgery — for gender dysphoria, was distinct from the case of Kelvin, who had applied only for “stage two” hormone treatment. In Matthew’s case, Justice Rees determined that “no application” for stage three treatment “was necessary” because Matthew had demonstrated he suffered from gender dysphoria and his doctors assessed him as having the maturity to understand the ramifications of having a double mastectomy.

Justice Rees quoted several of Matthew’s doctors who said the surgery was necessary for his mental health. Dr S reported: “The procedure will reduce psychological pain, as his breasts are a prominent reminder of his female

gender which is incongruent with his self-identification as male. This is likely to reduce his dysphoria, improve his self-esteem and social confidence as well as reduce his suicidal ideation.”

Since 2004 there have been around 60 applications by young people to change genders and none have been rejected.



1. What decision was made by the Family Court judge, Justice Judith Rees, in “Matthew’s” case in 2018? [C]
2. How did the 2018 decision in Matthew’s case go further than the previous Family Court ruling in “Kelvin’s” case in November, 2017? In other words, how was it similar to, and yet different from, the decision in Matthew’s case? [C]
3. Which of these two landmark Family Court rulings (decisions/judgments) has the greater authority? Briefly explain your answer in relation to the doctrine of precedent and the jurisdictional hierarchy of the courts in Australia. [C]
4. What key reasons (*ratio decidendi*) were given in Justice Rees’ judgment for determining that no application for stage three treatment (gender changing surgery) was necessary in Matthew’s case? [C]
5. What expert evidence was relied upon by Justice Rees in Matthew’s case to prove that Matthew was entitled to the stage three treatment without having to apply for court approval? [C]

PRACTICAL APPLICATION CONTINUED...

6. How might the following information provided in a different version of this article have influenced the legal analysis and social evaluation by the relevant Family Court justices in the landmark decisions in Kelvin's case and Matthew's case? [A] [E]

Judges had previously been told that the lengthy and costly procedure of teenagers needing to apply to the courts to undergo the medical treatments was causing young people with gender dysphoria to suffer.

Since 2004 (until 2018) there have been about 60 applications by young people to change gender. None has been rejected.

The Matthew judgment means transgender teenagers will find it easier to get approval for surgeries such as chest reconstructions, hysterectomies and phalloplasty.

CASE STUDY

Appeal to the High Court of Australia: The Queen v Baden-Clay [2016] HCA 35

Read the High Court of Australia's website summary statement below in relation to the appeal by the Queensland and then answer the questions following the statement.



Ch 9.11

THE QUEEN V BADEN-CLAY [2016] HCA 35

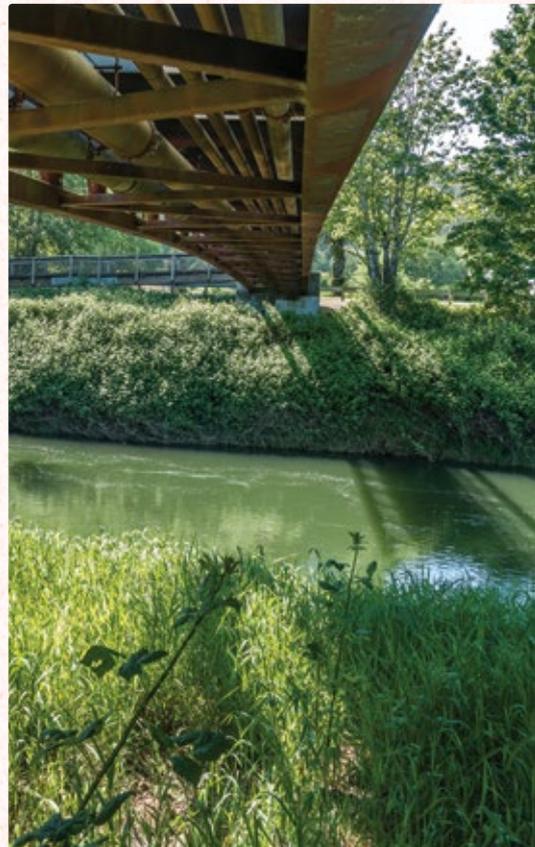
SOURCE: HIGH COURT OF AUSTRALIA (HCOURT.GOV.AU), POSTED 31 AUGUST 2016 (EXCERPTS)

Today the High Court unanimously allowed an appeal from the Court of Appeal of the Supreme Court of Queensland. The High Court held that the Court of Appeal erred in concluding that the jury's verdict of guilty of murder was unreasonable on the basis that the prosecution had failed to exclude the hypothesis that the respondent unintentionally killed his wife.

On 15 July 2014, following a trial in the Supreme Court of Queensland before Byrne SJA and a jury, the respondent was found guilty of the murder of his wife. The respondent gave evidence that he, his wife and their three daughters were at home on the night of 19 April 2012. The respondent said that he went to bed at about 10pm, leaving his wife in the living room; the next morning, she was not at home.

He said that his wife often went for an early morning walk. He said that after a period of time, he attempted to contact his wife, went driving around the suburb looking for her, and finally called 000 to report her missing. On 30 April 2012, the deceased's body was found under a bridge on a bank of Kholo Creek.

The respondent had been involved in a sexual relationship with another woman, Ms Toni McHugh, since August 2008. His wife believed that the affair had ended in



CASE STUDY CONTINUED...

2011. On 16 April 2012, on the advice of a counsellor, the respondent's wife spent some time "venting and grilling" the respondent about his affair with Ms McHugh. On the day before the deceased's disappearance, Ms McHugh told the respondent that she would be attending a conference that the deceased was also planning to attend.

The respondent appealed against his conviction to the Court of Appeal on the ground that the jury's verdict was unreasonable. The Court of Appeal upheld the appeal, set aside the respondent's conviction on the charge of murder, and substituted a verdict of manslaughter. The Court held that, although it was open to the jury to find that the respondent had killed his wife, the evidence did not allow the jury to be satisfied beyond reasonable doubt that the respondent intended to kill her, or to cause her grievous bodily harm. In particular, the Court accepted the respondent's submission, made for the first time on appeal, that the prosecution had not excluded the hypothesis that there was a physical confrontation between the appellant and his wife in which he delivered

a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm.

By grant of special leave, the Crown appealed to the High Court. It was common ground on the appeal that the respondent killed his wife. The High Court held that the hypothesis on which the Court of Appeal acted was not available on the evidence. At the trial, the respondent denied that he had fought with his wife, killed her and disposed of her body. His evidence, being the evidence of the only person who could give evidence on the issue, was inconsistent with that hypothesis. Further, the jury were entitled to regard the whole of the evidence as satisfying them beyond reasonable doubt that the respondent acted with intent to kill or cause grievous bodily harm when he killed his wife. The Court ordered that the respondent's conviction for murder be restored.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.

1. What was the verdict of the jury in the original Supreme Court trial? [C]
2. What decision was made by the Queensland Court of Appeal? [C]
3. What were the reasons and key facts relied upon by the Queensland Court of Appeal in making its decision? [C]
4. What decision was made by the High Court of Australia? [C]
5. What were the reasons and key facts relied upon by the High Court in making its decision? [C]
6. What legal effect did the High Court's decision have on the Respondent (original Accused/Defendant), Gerard Baden-Clay, compared with the legal effect of the Queensland Court of Appeal's decision? [C]

THE PROCESS OF STATUTORY INTERPRETATION BY THE COURTS

Although judges do not play a role in the making of statute law, they do have the **important task of applying the statute law to the cases in dispute in their court**. Another important role for judges is interpreting the meaning of statutes when applied to particular cases. As English is a language where words can have more than one meaning and where punctuation and phrasing may slightly alter meaning, there are times in a case when the judge has to decide which meaning should apply.

The **fundamental rule** is that judges are required to interpret the statute by **determining what parliament would have intended at the time the law was passed**. Definition sections can be helpful here. So too, are the sections which set out the objects and purpose of the Act. The judge will look carefully at the Act as a whole in order to understand what parliament did intend.

Even simple words such as 'health' or 'farm animals' can require interpretation by judges. At times, in the highest court in the State, judges can disagree as to the meaning of certain words and phrases. You will see this in the following two case studies.

CASE STUDY

R v Tranby (1991) 52 A Crim R 228

Facts: Tranby had bitten off half the ear lobe of a female victim. Her hearing had not been impaired. Tranby was convicted of the offence of doing grievous bodily harm. The Criminal Code defined grievous bodily harm as ... 'bodily injury of such a nature ... as to cause or be likely to cause permanent injury to health'. He appealed to the Supreme Court of Queensland on the ground that no injury to health had occurred as the victim could still hear.

Legal Issue: The court had to determine the meaning of health and then decide whether a cosmetic injury did amount to an injury to health.

Decision: Two of the three judges decided that there was not an injury to health and Tranby was acquitted of the offence (found not guilty) of doing grievous bodily harm. Both of the majority judges looked at dictionary definitions and earlier cases and concluded that gross disfigurement

to a person's face was not an injury to health. In their judgment, they observed, 'In ordinary usage, it is very doubtful that the removal of part of the body that performs no useful function would be described as an injury to health,' and 'the term focuses on the functioning of the body, which may be impaired by disease or illness ... but health is not impaired by removal of a body part which serves no function'.

The dissenting judge, however, agreed with the summing up of the trial judge who said that 'health' meant the "state of being hale, sound or whole in body" and that, if the body is not whole, it can amount to an injury to health.

The decision in Tranby's case was controversial. Parliament amended the Criminal Code to include cosmetic injury as coming within the definition of grievous bodily harm.

Assume that you are a High Court judge and that this decision in *R v Tranby* has come to you on appeal. Which legal meaning would you give to 'health' in your interpretation of the relevant statute (Criminal Code)? [A]

CASE STUDY

Mattison v Multiplo Inc. (1977) 1 NSWLR 368

Facts: A man, as he was erecting a poultry shed, fell and suffered a serious injury. To obtain compensation under the *Workers' Compensation Act*, he had to prove that he had been engaged in the work of 'erecting, constructing or demolishing ...

- a) fences
- b) yards or enclosures for horses, cattle, sheep or other animals on farms.'

Legal Issue: Did the parliament intend that chickens should be covered by the Act through its use of the words, 'other animals on farms'?

Decision: Two of the three judges (the majority) held on appeal that 'other animals' did extend to poultry as the additional words 'on farms' formed a class of farm animals to which chickens commonly belong. In contrast to this majority decision, the dissenting judge felt that, as the animals specifically listed in the Act were hoofed animals, the section was limited to animals with hooves such as

goats, pigs and donkeys. Chickens, in his opinion, were not intended to be other farm animals for the purpose of this Act.



HYPOTHETICAL

You be the judge in the following hypothetical cases of Alex and Chloe.

Hypothetical *Litter Act*

Section 1: It is an offence to throw down or drop litter in any public place.

Section 2: Litter means any bottles, cans, packages, paper, glass, food or other rubbish.

Alex's case

Alex, as he rushes to catch the bus, accidentally leaves his Legal Studies textbook and empty plastic lunch box on the seat at the bus stop.

Has Alex committed an offence under the *Litter Act*? [A]

Chloe's case

Chloe parks her car in the carpark at Coles. It leaks petrol and won't start when she returns. She decides to leave it there for a couple of days.

Has Chloe committed any offences under the *Litter Act*? [A]



COMMON LAW IS SUBJECT TO STATUTE LAW

As the supreme lawmaking bodies in Australia, made up of democratically elected representatives of the people, **parliaments have the right to pass legislation (statute law) to confirm, clarify or override the common law that has been made by judges** in court cases brought before them. The *Civil Liability Act 2003* (Qld), dealing mainly with negligence claims, and the *Native Title Act 1993* (Cth), setting up a formal system for Aboriginal native title land claims to be made, are examples of the Queensland Parliament and the Federal Parliament, respectively, responding to the decisions of the courts that had set precedents (case authorities) for other courts to follow. Specifically, s49A of the *Civil Liability Act 2003* (Qld) was passed in Queensland to override (reverse) the decision of the High Court of Australia which had recognised the existence of a duty of care on doctors in controversial wrongful birth cases.



2.7 THE ROLE OF CUSTOMARY LAW IN AUSTRALIA'S LEGAL SYSTEM

NATIVE TITLE AND CUSTOMARY LAW

*Above all, I remember his deep commitment to correcting historical wrongs ...
and to achieving recognition of traditional land rights of his family and his people.
He was, in the best sense, a fighter for equal rights, a rebel, a free thinker, a restless spirit,
a reformer who saw into the future and far into the past.*

(TOM CALMA, ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER, 2009)

Aboriginal laws were not accepted or respected by the British settlers in Australia. The doctrine of *terra nullius* was **finally considered by the High Court of Australia** in the landmark case below.

CASE STUDY

Mabo v Queensland (Mabo No 2) (1992) 107 ALR 1, 66 ALJR 408

Facts: Eddie Mabo and four other Torres Strait Islanders who lived on the Murray Islands, went to court seeking a declaration (a legal ruling which states the true legal position) on whether they had native title (ownership) of their islands. The case was first heard by the Supreme Court of Queensland and then by the High Court of Australia.

Legal Issue: Was there a form of Aboriginal ownership of land (native title) that would be legally recognised by our courts and, if so, did the people of the Murray Islands have this title?

Decision: In June 1992, ten years after Eddie Mabo first began legal proceedings for the declaration, the High Court delivered its judgment by a majority of six to one, holding that the Murray Islanders did have native title to the islands. The court found that Australia was not unoccupied on settlement, that *terra nullius* should not have been applied and was a flawed doctrine at best, and that the Murray Islanders had continued their ownership of the land to the present time.

Consider the following extracts from two of the High Court judgments in **Mabo No 2**. The first is made by Justice Brennan on the doctrine of *terra nullius*:

The common law of this country would perpetuate an injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the Indigenous inhabitants of Australian colonies as peoples too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.

The second is from the joint judgment of Justices Deane and Gaudron:

The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions ... that re-examination compels their rejection. The lands of this continent were not terra nullius or 'practically unoccupied' in 1788. The Crown's property in the lands of the Colony



CASE STUDY CONTINUED...

of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.

1. Why did Mr Justice Brennan consider that the doctrine of *terra nullius* would perpetuate an injustice if it were to continue? [C]
2. Why did Justices Deane and Gaudron describe this as 'the darkest aspect of the history of this nation'? [A]
3. Write a one minute speech that you would give to the King of England in the 18th Century explaining why *terra nullius* should or should not apply to Australia. [A] [E] [R]



The process of **determining the nature and extent of native title** has continued since *Mabo No. 2*. *The Native Title Act* (Cth) was passed in 1993 followed by a series of cases, including *Wik Peoples v Queensland* (1996) 187 CLR 1. The Wik peoples from Cape York in far north Queensland were claiming native title over land that had been previously leased by the State Government to farmers for pastoral use. The High Court decided by a 4-3 majority that **pastoral leases did not necessarily extinguish native title**. This means that, **in some cases, native title rights will co-exist with the rights of pastoralists**. Native title rights are determined by the traditional use that Aboriginal people have been making of the land up to the time of their claim and may include **limited occupation and access rights for fishing, hunting and ceremonies**

THE MURRI COURT AND CUSTOMARY LAW

The purpose of the Queensland Murri Court is to involve Indigenous elders in the process of sentencing Indigenous offenders who plead guilty to minor criminal offences in the Magistrates Court. Impetus was given to the original establishment of the Murri Court in 2002 after calls for recognition of Aboriginal customary laws were made by lobby groups, including the following plea in the 1999 report of the Aboriginal and Torres Strait Islander Womens' Task Force on Violence:

Elders throughout Queensland are calling for the use of cultural lore to address the escalating crime in communities and the over-incarceration (imprisonment) of the Indigenous people in both adult and juvenile centres. Crime prevention strategies are considered to be deficient with little relevance to traditional lore which provides the most effective deterrent.

After being abolished by the Liberal-National Queensland Government in 2012, the Murri Court was reinstated in 2016 by the Labor Government as reported in the following online article

PRACTICAL APPLICATION

REINSTATEMENT OF THE QUEENSLAND MURRI COURT – COMMUNITY HOPEFUL AS MURRI COURT REOPENS

SOURCE: ELLA ARCHIBALD-BINGE, SBS ONLINE (SBS.COM.AU/NITV/NITV-NEWS), 14 APRIL 2016 (EXCERPTS)

The Murri Court has been reinstated in Queensland in a move law experts say will help reduce ‘appalling’ Indigenous imprisonment rates.

The first of 13 courts reopened in Rockhampton yesterday as part of an \$8.7 million dollar program unveiled by the state Labor government. A community initiative involving Aboriginal elders in the sentencing process, the Murri Court was axed by the Newman government in 2012, amid protests from local elders and legal experts. Aboriginal and Torres Strait Islander people account for 32 percent of Queensland prisoners, making them 11 times more likely to be imprisoned than the wider population.



Queensland Attorney-General Yvette D’Ath says she hopes the reinstated system will help break the incarceration cycle. “It is really important that we give our courts... the opportunity to look at diversionary programs to ensure that we are rehabilitating those who come before the courts,” she says. “It’s not just about incarceration, it’s about actually looking at the circumstances and where it is seen as appropriate ensuring that we can stop recidivism through rehabilitation and other programs.”

The reinstatement of the Murri Court system has been welcomed by the Queensland Law Society. “Courts like the Murri Court and the Drug Court have been successful in reducing re-offending and incarceration, and it is good to see them on the way back in Queensland,” says Queensland Law Society president Bill Potts.

Members of the local Indigenous community agree. Darumbal Elder Dean Edmund says the court provides community-based penalties as an alternative to prison sentences. “(It) gives us greater involvement... in the top of the justice system rather than scrambling around as victims at the bottom,” he says. “When offenders come in they see elders in the courtroom situation and have more respect for the laws. While there is no Murri Court a lot of offenders are going to court for minor crimes or petty crimes.”

1. What is the Murri Court, which was reinstated in 2014 as part of Queensland’s court system? What are its main functions and purposes? How is the Murri Court an example of the integration of customary law into our legal system? Conduct research to select sources which assist you in answering these questions. [C] [S]
2. What are the main reasons given by the Queensland Attorney-General, Yvette D’Ath, the Queensland Law Society President, Bill Potts, and Darumbal (Indigenous tribe) Elder, Dean Edmund, for agreeing with the reinstatement of the Murri Court in Queensland? [C] [A]
3. Conduct research of relevant and up-to-date sources to locate viewpoints of stakeholders in Queensland who do not agree with the reinstatement of the Murri Court. Who are the stakeholders opposing this court’s reinstatement in Queensland and what are their main reasons for their viewpoints? [S] [C] [A]
4. Based on your examination of the opposing viewpoints and the reasons and evidence given for them, do you believe the Murri Court should have been reinstated as a separate sentencing court in Queensland, taking into account the legal criteria of just and equitable outcomes for the different parties and stakeholders affected by this legal issue? [A] [E]

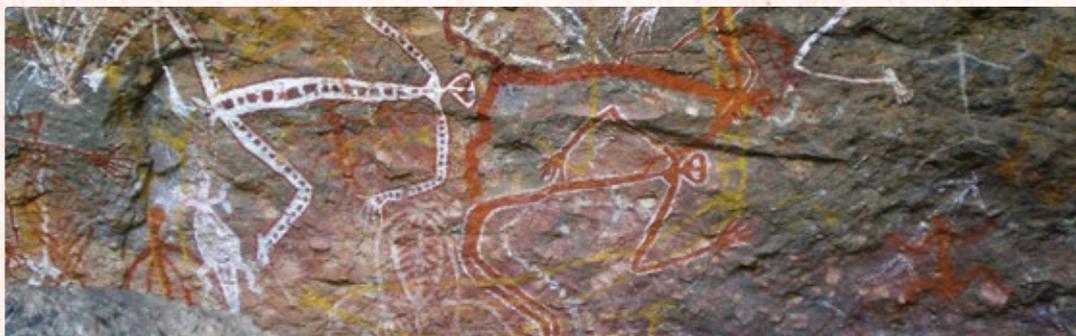


WHAT DO YOU THINK?



WHY AUSTRALIA WON'T RECOGNISE INDIGENOUS CUSTOMARY LAW

SOURCE: ASMI WOOD, SENIOR LECTURER IN LAW, AUSTRALIAN NATIONAL UNIVERSITY (LAW.ANU.EDU.AU), 14 JUNE 2016 (EXCERPTS)



While the Australian Law Reform Commission's (ALRC's) 1986 report on the use of customary law for Aboriginal people was a great initiative, it was, in hindsight, a notion well before its time. Although 30 years have elapsed since the report was published, its recommendations have, by and large, been ignored.

Few in Australia understand the context and true meaning of customary law. Denials of its validity are often based on ignorance or on specific examples devoid of context; the severity of "spearing" for example, as being contrary to human rights norms. This is akin to rejecting the common law based solely on, say, the use of lethal injections to execute prisoners in the United States.

Most people against recognising Aboriginal customary law think there's only one law in Australia. This is clearly wrong both conceptually and in practice. As Australia is a federation made up of multiple jurisdictions, it necessarily has a multiplicity of laws. What they are really saying is that Australia should exclude Aboriginal and Torres Strait Islander customary law (and arguably all non-Anglocentric laws). Consciously or otherwise, their rejection is based on first contact between settler and Indigenous Australians.

International law of the 1700s required that, for settlement, a tract of land be "substantially uninhabited". Herein lies the genesis of Indigenous invisibility in Australia. In practice, "substantially uninhabited" meant it was inhabited by a people who would not cultivate the proverbial yard of land, and who were not governed by laws. This notion of terra nullius is clearly a legal fiction, devoid of both truth and ethics. The ultimate source of the prevailing prejudice and ignorance in Australia, *terra nullius*, is utterly unconnected to the reality of the presence on this continent of the longest continually living human cultures. But the notion is firmly ensconced and entrenched in the Australian Constitution nonetheless.

Aboriginal and Torres Strait Islander societies could not have survived if they were lawless. In fact, the word law is so prevalent in Indigenous parlance and imagination that one must plug one's ears to not notice Aboriginal and Torres Strait Islander love for law. The early settlers' lust for land provided an effective such plug, one which stilled their consciences and humanity as they attempted to destroy a civilised, law-abiding people. Despite these efforts, customary law always was, and still is, observed on the Australian continent.

What, then, constitutes customary law? With several peoples, languages and cultures sharing the continent, there are clearly many different laws. For our purpose here, we can recognise that law is an abstract concept: that it is essentially about the regulation of people, their societies, and relations with their neighbours (broadly defined). Specifics may vary, but there's a large variety of laws nonetheless. Consider speed limits in the Australian Capital Territory and New South Wales, for instance. The notion of regulating speed through law is common to both jurisdictions, even if maximum speeds are different.



WHAT DO YOU THINK? CONTINUED



Despite the fact that it's an obvious untruth, the notion *terra nullius* is entrenched in the Constitution and, until 1992, was firmly a part of Anglo-Australian law. But among the custodians of the common law are judges who set about doing what they could to recognise Indigenous custom, rights and interests.

In 1971, Chief Justice Blackburn of the Northern Territory Supreme Court recognised that the Gove Peninsula in the northeastern corner of Arnhem Land was occupied by a people truly given to the rule of law, a civilised law that was not the common law. But the NT Court was bound by Privy Council precedent in the NSW case *Cooper v Stuart*. That case had established the notion of *terra nullius* in law and covering the whole continent. The NT Supreme Court decision was frustrated.

Still, the Supreme Court's recognition arguably allowed federal Attorney-General Bob Ellicott to examine the possibility of a broader recognition of Indigenous customary law, prompting the ALRC report. But the consequences of *terra nullius* appear to have prevailed and the report was, for the most part, shelved.

Legislative changes in the 1980s allowed the High Court in 1992 to recognise Indigenous Australians as the first people of the continent in the landmark Mabo case. Parliament followed suit by establishing a legislative framework for native title claims. Since 1992, common law has admitted the existence of Indigenous customary laws, which inhered in another normative system. But, to date, the use of Indigenous custom in matters such as sentencing, including through in circle courts, remains sparse, patchy and inadequate.

Formal recognition of Aboriginal and Torres Strait Islander people in the Constitution will pave the way for negotiations and a sustained dialogue between the civilisations, including for significant levels of self-determination. Self-determined communities, within some contemporary constraints, can determine the laws they will use. When these discussions result in the use by Aboriginal and Torres Strait Islander people of their customary law, we can proudly say that we are truly reconciled.

1. What is the central point or argument (thesis) of the writer of this article in relation to the issue of Indigenous customary law practices occurring separately from, or in conjunction with, our existing legal system in Australia? [C]
2. What are the main reasons and evidence given by the writer to justify her thesis? [A]
3. Conduct research into sources in which stakeholders oppose the writer's call for formal recognition of Aboriginal and Torres Strait Islander people in the Constitution so that Indigenous communities can then determine their own laws for their communities of people. Who are the main arguments and evidence given to justify these opposing viewpoints? [S] [A]
4. Weighing up the opinion of the writer of this article and opposing viewpoints, do you believe Indigenous customary law should be applied to Indigenous people separately from Australia's mainstream laws? [E]

2.8 THE ROLE OF INTERNATIONAL LAW IN AUSTRALIA'S LEGAL SYSTEM

The Australian Government has formally committed itself to passing laws that uphold the international laws to which it is a signatory as a member of the United Nations, including, but not limited to, the *Universal Declaration of Human Rights 1948*, the *International Covenant on Civil and Political Rights 1966*, the *Convention on the Rights of the Child 1989*, the *Convention Against Torture and Other Cruel Inhuman 1951* or *Degrading Treatment or Punishment 1984* and the *Convention Relating to the Status of Refugees 1951*.

Australia is a founding member of the United Nations. Successive Australian governments have regarded the United Nations as an essential forum through which to influence world affairs, promote a stable international framework, defend Australia's security and sovereignty, pursue trade and economic interests and promote Australian values. International law and the contribution of the United Nations (UN) are important in deciding which rights should be supported and enforced in Australia. The UN creates monitoring agencies to report on how nations are meeting their international human rights obligations. The UN is not an international parliament empowered to make laws which all nations are bound to follow. It is a forum for debate and discussion. The discussion can result in **treaties**, which are contracts between nations (also called conventions, covenants, charters and declarations). When a nation signs and then **ratifies** (formally accepts) some or all terms of a treaty, these should become part of that nation's (domestic) laws. So when Australia ratifies a treaty, the Federal Government has an obligation to pass national legislation to bring it into effect and to ensure that the laws of the six states and two selfgoverning territories also conform with human rights requirements.

When, in 1990, Australia signed and ratified the *Convention on the Rights of the Child 1989* (CRC) our family law needed to be reformed to reflect, for example, the important principle of the 'best interests of the child'. The amendments were made in 1995. As a result, an Australian court must ensure that any parenting order has the best interests of the child as the '**paramount consideration**' *Family Law Act 1975* (Cth). Australia did add one **reservation** (a formal objection which excludes the term from applying) to the CRC. The reservation was to Art. 37(c) which requires signatory nations to have separate imprisonment for children, and adults. The reservation entered means that in Australia children under the age of 18 can be held in an adult prison. In Queensland, a 17 year old person is considered an adult for the purposes of the criminal law and can be sent to an adult prison.



WHAT DO YOU THINK?



1. The CRC defines a child as any human being under the age of 18, unless the age of majority (when you are legally an adult capable of making your own decisions) is attained earlier under a state's own domestic legislation. Do you think Queensland's criminal law is in breach of Art. 37 of the Convention? [A]
2. Do you think the provision 'unless the age of majority is attained earlier' under a state's own laws, enables countries to disregard the 18 year old cut-off? What about nations which have loose definitions of an adult, such as 'having attained puberty'? [A]



In Australia, under s 61 of the *Constitution*, **only the Federal Government can enter into treaties**. States and Territories were not given the power to do so although they may be consulted during the treaty negotiation process. Whilst the approval of Parliament is not required for the conclusion of a treaty, necessary legislation must be passed in the usual way if the treaty is to have any effect on Australian law. Importantly, in Australia, **for a signed treaty to have effect it must be incorporated into Australian national/domestic legislation**. Once signed, it can be registered with the Secretariat for the United Nations.

Treaties can deal with specific issues such as protection of birds migrating between Korea and Australia (*Agreement between the Government of Australia and the Republic of Korea on the Protection of Migratory Birds of 2007*) or issues that impact upon most nations, such as the *Antarctic Treaty of 1959*.

REVIEW

1. Describe (explain the meaning of) each of the following key terms in this chapter using legal terminology: [C]

jurisdiction | code | statute law | common law | customary law | separation of powers
legislative arm of government | executive arm of government | judicial arm of government
division of powers | residual power | concurrent power
exclusive power | the Australian Constitution

2. Describe the: [C]

- a. sources of law in the Australian legal system;
- b. separation of powers doctrine in the Australian legal system; and
- c. court hierarchy in Australia.

3. Explain: [C]

- a. the process of statutory law-making, and the role of states, territories and the Australian Government; and
- b. the process of statutory interpretation and the role of courts.

4. Analyse the role of customary law and international law in Australia's legal system to determine the nature and scope of the issues involved and then examine different viewpoints. [A]

TOPIC 1: LEGAL FOUNDATIONS

CHAPTER 3: OVERVIEW AND ANALYSIS OF AUSTRALIA'S CRIMINAL JUSTICE SYSTEM

FOCUS SUBJECT MATTER

3.1 FOUNDATION PRINCIPLES OF AUSTRALIA'S CRIMINAL JUSTICE SYSTEM

3.2 INQUIRIES INTO CRIMINAL LEGAL ISSUES

3.3 KEY PROCESSES IN AUSTRALIA'S CRIMINAL JUSTICE SYSTEM

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ an overview of foundation principles of Australia's criminal justice system and their links to the legal foundations of the rule of law made by parliaments and interpreted by courts in order to achieve just and equitable outcomes;
- ▶ selected inquiries analysing a range of criminal legal issues in order to determine the nature and scope of each issue and then examine different stakeholders' viewpoints; and
- ▶ an overview of the key criminal justice system processes of investigation (Topic 2), trial (Topic 3), and punishment and sentencing (Topic 4).

3.1 FOUNDATION PRINCIPLES OF AUSTRALIA'S CRIMINAL JUSTICE SYSTEM

Due to the focus of the remaining topics of Unit 1 being on the foundations, features and processes of Australia's criminal justice system, it is vital to understand the following **foundation principles that underpin the overall purpose of our criminal laws, which is to uphold the rule of law made by our parliaments and interpreted by our courts in order to achieve justice and equity** for the parties and other stakeholders to whom the law applies.

At the heart of our criminal justice system is the **investigation, hearing (trial) and punishment of people in our society who commit crimes**. A **crime** is defined in the Macquarie Dictionary as:

an act committed or an omission of duty, injurious to the public welfare, for which punishment is prescribed by law, imposed in a judicial proceeding, usually brought by the State.



Ch 3.3

This definition comprises the **three key processes or links in the chain of our criminal justice system**:

- ▶ **Topic 2:** The criminal investigation process 'usually brought by the State'.
- ▶ **Topic 3:** The criminal trial process ('a judicial proceeding').
- ▶ **Topic 4:** Punishment or sentencing 'prescribed by law'.

The following **foundation or fundamental principles of our criminal justice system are rooted in the legal criteria of 'just and/or equitable outcomes'** which are defined in the Syllabus Glossary (paraphrased/reproduced below) for evaluating each of the above inextricably linked processes undertaken by the State in response to an alleged crime:

- ▶ **'just' (outcome):** legally right, conforming (to) that which is lawful, fair and proper in the circumstances (paraphrased, p. 61, Syllabus Glossary)
- ▶ **'equitable' (outcome):** even and impartial; balance between the rule of law, and the rights and freedoms of individuals and society; impartial and fair outcome where the statute is silent (p. 57, Syllabus Glossary).

PRESUMPTION OF INNOCENCE

Under the criminal law of Queensland, it is presumed that an accused person is **innocent until proven guilty**. This is one of the most basic and important principles in our system of criminal law. It is called the **presumption of innocence**. This presumption is reflected in the onus and standard of proof requirements in criminal trials.



WHAT DO YOU THINK?



Read the article below about the presumption of innocence as a foundation principle of criminal law in western democracies such as Australia and the United States, and then answer the questions following it.

WE NEED TO LET THE LAW DO ITS WORK

SOURCE: JANE FYNES-CLINTON, THE COURIER-MAIL (COURIERMAIL.COM.AU), 9 JANUARY 2018 (EXCERPTS)

WHATEVER happened to innocent until proven guilty? When did the power shift to the court of public opinion? Our system of civil structures still determines the truth yet we are often quick to prejudge, particularly online.



WHAT DO YOU THINK? CONTINUED



Where allegations of sexual misconduct are concerned, the tide has most definitely turned and the public is judge, jury and executioner. All on the untried and untested say-so of others.

Allegations of sexual harassment have become a social media trend, prompted by the Harvey Weinstein claims and fuelled by the #metoo wave that led to Time magazine prizes, and continue to prompt a lot of social justice backslapping. If a man spoke out (or tweeted, posted or hashtagged) about unwanted treatment from a female co-worker, would the response be the same? I think not. It would likely be met with sniggers and smiles: not black dresses at the next major awards event.

The lack of equality in treatment is startling. We need to pause and take a breath. When claims of sexual impropriety are aired, mud sticks. Claims made by alleged victims are immediately accepted as truth. But, as well, the moment a person calls for caution about a woman's claims, they are called misogynistic, ultraconservative and accused of victim blaming, when that is not so at all.

The allegations against Kevin Spacey have been numerous, but the court of public opinion is not where he should be tried. The law has spent decades finetuning the protection of innocent until proven guilty. For example, it's the reason Queensland has laws (under the Criminal Law (Sexual Offences) Act) that prevent the identification of a person accused of a serious sex offence from being named until after they have been through the committal process and have been ordered to stand trial.

It is also the reason, under most states' laws, victims are not allowed to be identified unless they consent to identifying themselves. Tearing others down with untested allegations hurts more than just the accused. It offends against one of the core principles of a civil society - the presumption of innocence. This presumption is said to be a "golden thread" that runs through the fabric of our system of justice.

And it is incredibly easy to ruin a Hollywood celebrity: all you need is a social media post about him doing something lewd that you did not like and he is dispatched with the press of a button. Some celebrities have been brought down by multiple claims. Weinstein, Kevin Spacey and Matt Lauer among them. But some are tarnished and erased by a single post about a memory from decades before.

It seems to me that #metoo is in danger of morphing from being socially progressive to becoming a tool for public shaming, an additional layer of stigma slapped on those accused of wickedness. The law is required not to prejudge, but we seem to have built a standard, particularly online, where we can and should presume the worst. We must recover the benefit of the doubt.

Our legal system and standards are not static structures and ideas; they have been nipped and tucked over time to reflect what societies have deemed to be the civilised ways of doing things. But online, people seem to be pushing this aside as legal mumbo-jumbo and are not blinking before tweeting "he is revolting" on hearing someone else's untested claim.

1. Identify the legal issues in this article and set out each one separately in your own words. [C] [A]
2. Set out the facts from the article which describe and/or raise each legal issue you have identified. What words does the author use which assist you to understand her opinion about these facts and legal issues? [C] [A]
3. Which issue does the author identify as the most important, if any, in the article? Explain how you came to this conclusion. Does the author have a point of view about this issue? Outline her point of view and how she expresses it. [C] [A] [E]
4. Do you agree with the point of view the author expresses about the issue she identifies as the most important? Does the author set out other points of view which do not agree with her own? Consider what other people in the community might think about her point of view (do some media research of your own) and state what these points of view are. Write a concluding paragraph arguing for your own position. [C] [A] [E] [R]

ONUS OF PROOF

Subject to a few exceptions, it is the task of the prosecution in a criminal trial to prove that the accused person is guilty of the offence with which he or she is charged. **The prosecution has the onus (responsibility) of persuading the arbiter (decider) of fact** (the jury in a criminal trial, the magistrate in summary proceedings) that the offence has been committed. A straightforward statement of the law on this point is contained in a famous English case of *Woolmington v DPP* [1935] AC 462:

‘Throughout the web of the English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’

However, this fundamental presumption of innocence has been **reversed in some statutes**. Then the person is presumed to be guilty and it is up to them to prove their innocence. One example is in the *Transport Operations (Road Use Management) Act 1995*, so that if a blood alcohol level above a prescribed limit is proved, then the person is presumed to have been driving whilst under the influence of alcohol. Another example is the defence of insanity, whereby every person is presumed to be of sound mind. If an accused person wishes to prove they were insane at the time they did a certain act, then they have the onus of proving that state of mind. The result is that the onus of proof is effectively transferred from the prosecution to the defence.

STANDARD OF PROOF

It is not necessary for the prosecution to prove conclusively that the accused is guilty. The actual standard of proof is proof **‘beyond reasonable doubt’**.

Attempts have been made from time to time by trial judges to explain to juries the meaning of the term ‘beyond reasonable doubt’, or to adopt alternative phrases by way of explanation. Some of these include ‘a rational doubt’; ‘a doubt founded on a reason’; ‘comfortable satisfaction’; ‘some real as opposed to fanciful doubt’; and ‘beyond a skerrick of a doubt’. Generally, the judges in Australia have decided that the phrase ‘beyond reasonable doubt’ **should be used in every criminal case but not explained further**. A famous Australian judge, Sir Owen Dixon, said it was a mistake to depart from this ‘time-honoured formula’. He considered that it was used by ordinary people and understood well enough by the average person in the community.



CASE STUDY

R v Punj [2002] QCA 333

Facts: Punj was convicted of two offences: forgery and attempting to pervert the course of justice. He appealed against his conviction. One of his grounds of appeal was the trial judge's explanation of what 'beyond reasonable doubt' meant. The jury had been told:

'Now, I am not going to use other words to explain the expression 'beyond reasonable doubt', but I can illustrate it perhaps this way. We often use expressions in our everyday lives whereby we think something has happened but we are not really sure about it, don't we? We are very suspicious about something, we think it is very likely that so and so committed an offence, it is on the cards, expressions like that, or probably someone committed an offence. All of those ideas have with them, don't they, the idea that we are not really sure, we just think probably or likely or something of that sort, so in all of those cases, what someone is saying is well, I've got a reasonable doubt about it, even though I have got suspicions or whatever. Do you see?'

Legal Issue: Could the jury have relied on concepts such as 'not really sure' and 'very suspicious' which may have deprived the appellant of the benefit of doubt set by the standard of what the jury thought was reasonable?

Decision: The unanimous decision of the Court of Appeal was that the jury had been misdirected on the meaning of 'beyond reasonable doubt'. A retrial was ordered. Jerrard JA. and Atkinson J. stated in their joint judgment that: 'no assistance should be volunteered by individual trial judges to jurors in explaining the concept of proof beyond reasonable doubt.'

Generally, it is the prosecution who must prove the accused guilty. In the special instances, such as the defence of insanity, where the onus of proof is reversed and is on the accused, the standard of proof is usually less onerous. The accused need only establish the matter 'on the balance of probabilities'. The 'balance of probabilities' is, as you will remember, the standard, which normally applies to civil cases. It means that the person deciding the case (the jury in a criminal trial or the magistrate in a summary trial) must be satisfied that what the accused is saying is probably more true than not.

You can see that being satisfied beyond reasonable doubt is a stricter test than being satisfied on the balance of probabilities.



WHAT DO YOU THINK?

1. You have been selected for jury service. Would you feel comfortable in deciding what 'beyond reasonable doubt' meant or would it be helpful to have the judge explain it to you? In your answer, discuss the different meanings that could be attributed to the phrase. [A]
2. Do you agree with the Roman maxim: 'It is better for ten guilty persons to go unpunished than for an innocent one to be condemned'? [A]
3. Reversal of the onus of proof happens infrequently. Why do you think this might be? Give your reasons. [A]
4. It is harder to prove an allegation beyond reasonable doubt than it is to prove it on the balance of probabilities. Do you agree? Give your reasons. [A]

AUSTRALIA'S ADVERSARIAL SYSTEM

TRIAL BY BATTLE: A FORERUNNER TO THE ADVERSARIAL SYSTEM

Used by Norman landlords in the Middle Ages to settle disputes amongst themselves, trial by battle was in the form of jousting on horseback or with hand-held weapons such as swords while on foot. It became acceptable to hire champions to fight on behalf of the disputing parties.

Can you see the early origins of our present court system in this approach?

- ▶ **Like a boxing contest**, each party fights out the dispute in court by deciding what is the best evidence available to prove their own case and defeat their adversary's arguments.
- ▶ Once evidence is presented by one party, the other party attempts to counter-punch with questions in cross-examination intended to inflict serious damage upon the opposing case.
- ▶ The judge has a duty to act as an independent umpire to ensure the combatants have a 'clean' fight (fair trial) by enforcing strict rules of court procedure and evidence.
- ▶ The judge or jury, after watching the whole fight, decides who is the winner according to the rules (laws that apply to the case) and the umpire's decision is final (it is legally binding, subject to a possible appeal to a higher court).

THE INQUISITORIAL SYSTEM

To appreciate the nature of Australia's adversarial system of court hearings, it is important to realise that it is not the only system in operation today. Court hearings in many parts of Europe, such as France, are based on the inquisitorial system. Such a system usually **involves the judge conducting his or her own investigations into the evidence, both before and during the court hearing**. Thus, to a large extent, the judge takes over the roles of the disputing parties and their legal representatives in unearthing and investigating much of the relevant evidence.

Under the inquisitorial system of trial, evidence is frequently collected by the presiding magistrate and the accused may be examined by the magistrate several times before a charge is formally laid. The distinction between law enforcement (police) and law administration (judiciary) is not as clear as in our system. The judge, by inquiring into the matter before the trial begins, plays a central role in deciding what issues are important and what evidence should be presented at the trial. As there is no jury in the inquisitorial system, the judge makes decisions about legal and factual issues in the case, including the question of the guilt of the accused.



WHAT DO YOU THINK?



Assume that both the adversarial and inquisitorial systems of criminal justice have as their core objective a desire to conduct a trial fair to accused persons and victims.

1. Do the principles (concepts) of presumption of innocence, onus of proof and standard of proof assist our adversarial criminal justice system to conduct fair trials? [E]
2. Conduct research into the inquisitorial system. Does it use the principles in question 1 above when it investigates a crime and subsequently conducts a trial? [S] [E]
3. Do you think either system appears to favour the defendant/accused more than the other? [E]
4. Conduct research to locate a range of sources which provide opposing viewpoints about the relative merits of the two systems. Based on your weighing up of the opposing arguments and evidence used to substantiate them, which system do you believe best provides a fair trial to accused persons and victims? [C] [S] [A] [E]

3.2 INQUIRIES INTO CRIMINAL LEGAL ISSUES

Fuelled by the 24/7 news cycle on television and the internet, many current legal issues have arisen from breaking news stories, often erupting into controversies where the opposing perspectives of a range of interested and affected individuals and groups in our society (called ‘stakeholders’, as they have a ‘stake’ – a significant interest, or sense of ownership – in the resolution of the relevant legal issues) are put forward as alternative ways for our legal system to bring about outcomes of justice and equity for the stakeholders involved. This, at times, includes issues about how the legal system operates, but, more often, it is about what laws we should have that affect the lives of individual Australians. The media plays a significant role in giving a legal issue ‘currency’ (that is, giving it ‘current’ status in the minds and hearts of Australian citizens). In turn, this often leads to pressure publicly being applied to Australia’s parliaments and courts, which are the twin pillars (sources) of our legal system, to respond to the issue by reforming the legal system in a way which fairly balances the legal rights and responsibilities of the different stakeholders and the wider community.



The article, ‘Social Media: An Engine That Superpowers Bullies’ (10 September 2017) on pages 16 and 17 of the Practical Application in Chapter 1.2 demonstrates the media’s influence in helping the families of Chloe Fergusson and Libby Bell, teenagers who tragically took their own lives due to being relentlessly bullied, in their push for the introduction of specific anti-bullying laws in the states of Tasmania and South Australia respectively based on a Victorian law known as ‘Brodie’s Law’. As reported in this online newspaper source, Brodie’s Law was ‘... created after the suicide of a young woman, Brodie Panlock, who was bullied relentlessly at work. According to the Victorian Justice Department, Brodie’s Law makes serious bullying a criminal offence, with a maximum penalty of 10 years in jail.

This article leads to the forming of the following INQUIRY FOCUS question, which is an essential ‘big picture’ preliminary step in ‘Figure 3: Stages of inquiry process – An inquiry approach illustrated’ on page 10 of the Syllabus Glossary.



INQUIRY FOCUS



SHOULD BULLYING OF SCHOOL CHILDREN BE MADE A CRIMINAL OFFENCE IN QUEENSLAND OR SHOULD IT BE TREATED AS A MEDICAL/HEALTH AND EDUCATIONAL ISSUE?

Note: This is just one of a number of different legal issues that could be investigated in relation to the topic of bullying in schools. For example, the central question might be: ‘Should bullying in Australia’s schools be a criminal offence that must be reported to police by school authorities? A broader issue for investigation could be framed: ‘Is bullying in Australia’s schools dealt with effectively and fairly by our legal system in terms of the rights and responsibilities of the parties and other stakeholders affected by it?’



Ch 1.2



Bullying is ‘... repeated verbal, physical, social or psychological behaviour that is harmful and involves the misuse of power by an individual or group towards one or more persons,’ according to the Australian Government’s ‘Bullying. No Way!’ website (<http://bullyingnoway.gov.au>) This **definition** is taken from the Australian Government’s National Safe Schools Framework (accessed at <http://www.deewr.gov.au/Schooling/NationalSafeSchools/Documents/NSSFramework.pdf>).

As to the need to take steps about bullying, according to a new Census at School snapshot from the **Australian Bureau of Statistics**, Australian students are more worried about stopping bullying than any other social issue. The **Australian Human Rights Commission** says bullying is “endemic” and that tackling the problem must be a priority. The latest **Kids Helpline** Annual report highlights the extent of the issue, with the Helpline receiving almost 4000 requests for bullying-related counselling during 2012, mostly from students aged under 15. According to the Helpline report, bullying was the No. 1 topic of the 245,000 views on the website. This grim picture was further darkened by sobering statistics issued by the manager of **Queensland’s Child Death Register at the Commission for Children and Young People**, Reyelle McKeever, that a record seven (out of a total of 17) child suicides in the state in 2012-2013 are likely to have been caused by bullying. According to Ms McKeever, 13 of the 63 child suicides in Queensland since 2010 had been attributed to bullying, with Australia topping a 2013 list of 24 countries in relation to bullying on social networks.



PRACTICAL APPLICATION

During the past decade, increased media coverage of bullying in Australian schools, such as the shocking footage on YouTube in 2011 of a bullying victim, Casey Heynes, picking up one of his bullies and smashing him onto a concrete path at school, has highlighted that it is an important human rights issue that urgently needs to be addressed.

1. Conduct research into the above case, including viewing relevant footage of the incident and subsequent television interviews, to find out the important facts that led to Casey Heynes reacting so violently to being bullied at his school. [C] [E]
2. Was Casey Heynes’ reaction to the bullying legally and morally justified? [A] [E]
3. Research, investigate and report on other examples in the media of school bullying. [C] [A]
4. In each of the examples you have found, what rights of the parties were infringed by the bullying? What responsibilities did the parties have to each other? [A]
5. For each example you have found, what is the fairest way of the law dealing with it? [E]

As to the reporting of bullying, **who should promote and enforce the right to be safe from bullying?** Is it enough for **students, parents, your teachers** and your **principal** to say bullying is wrong or is there a need for **governments** at the state and/or federal levels, to make it a criminal offence with serious penalties? In formulating a response, you might look at recommendations for reform of various interest or lobby groups and organisations, such as the **Queensland Council of Civil Liberties** or the **Australian Human Rights Commission**? What about the **United Nations**? Does it, either directly or through its relevant conventions or other formal declarations, have something to say about this issue and, in any event, does it have any real influence over the responses of authorities in Australia?

There is no specific law against bullying, according to Senior Teaching Fellow in the Faculty of Law at Bond University, Louise Parsons. Specifically, there is no **crime of ‘bullying’** in any state of Australia, as observed by the former Chief Justice of the Family Court of Australia and current Chairman of the National Centre Against Bullying (NCAB), Alastair Nicholson, although **successful court actions in the common law tort of negligence** were brought against Australian school authorities in 2002 and 2007 for failure to protect victims of bullying. Serious injuries suffered as a result of bullying may also be the subject of a criminal charge, such as assault.

Of particular relevance to human rights affected by bullying in schools is the *Convention on the Rights of the Child (CRC) 1989*, which was the first international treaty to recognise children’s rights independently from, and in addition to, human rights enjoyed by adults. The **Australian Government ratified the CRC in 1990**, which means that it has committed itself to protecting children’s rights set out in the Convention and to being accountable to the international community **by assuming a duty to report to the United Nations Committee on the Rights of the Child every five years** on its progress in implementing the CRC to protect the rights of children throughout Australia.



As stated on the UNICEF website (<http://www.unicef.org/crc/>), **the CRC focusses on the human rights of children**, sensibly recognising that people under 18 years of age often need special care and protection that adults do not. The four core principles of the Convention are protection from discrimination; devotion to the best interests of the child, right to life, survival and development; and respect for the views of the child. **Every human right contained in the Convention is ‘... inherent to the human dignity and harmonious development of every child.’**

The following article (this is like a section in an Act of Parliament) in the CRC is relevant to each country’s duty to educate children:

Article 29.1: State parties agree that education of the child shall be directed to:

- (a) the development of the child’s personality, talents and mental and physical abilities to their fullest potential;
- (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) the development of respect for the children’s parents, his or her own cultural identity, language and values ...;
- (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; .





In addition, the *United Nations' Universal Declaration of Human Rights (UDHR) 1948*, which the Australian Government has also ratified, sets out essential human rights for all people of the world, including children, of course, with the following articles of relevance to the issue of bullying:

Article 1: *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

Article 3: *Everyone has the right to life, liberty and security of person.*

Article 5: *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

Here are two civil court actions in negligence referred to earlier in relation to bullying in Australian schools.

The first legal recognition of the rights of a victim of school bullying in Australia was in the 2001 Victorian case of *Emonson v Trustees of the Christian Brothers*. In this landmark court case, based on a common law claim of negligence, then 18 year old Aaron Emonson was awarded \$60,000 against his school for breach of its duty of care to him, because school staff had been repeatedly alerted by his parents to the almost daily occurrences of violent bullying against their son. This bullying had caused him physical and mental injuries. According to Emonson's solicitor, his client had '... been belted on the arm with a piece of wood in a woodwork class; there had been another occasion where he had been hosed down with a water hose, and had been required to remain at school for the balance of that day in saturated clothing; there had been another incident where he had been choked with a length of material from carpet cord and throughout that period the parents had made various requests of the school to deal with the problem and the response was far less than adequate ... He had not progressed well at school and as a result he ceased his schooling at the end of Year 10.' There had also been an email sent by a St Patrick's teacher in 1998 describing specific instances of problems of bullying in the school and complaining of difficulties in trying to deal with the problem.

Another successful court case brought against an Australian school for failing to protect a student from bullying was as follows.



CASE STUDY

Cox v State of New South Wales [2007] NSWSC 471

Facts: The plaintiff, Benjamin Cox, was 18 years old when his negligence claim was brought against the Education Department of New South Wales in the New South Wales Supreme Court in 2007. He suffered extensive bullying as follows:

- ▶ The bullying began in 1994 with a bigger boy, TH, pinching things from him, scaring him and shoving him into walls. These acts caused Benjamin to come home crying and suffer from nightmares and headaches. His school work also deteriorated. Mrs Cox, Benjamin's mother, reported the incidents to a school teacher, who promised to keep an eye on him.
- ▶ In February 1995, however, due to the bullying continuing, Mrs Cox complained to the principal of the school who told her that TH suffered from attention deficit disorder. The principal promised Mrs Cox that she would keep the two boys separate during school times.
- ▶ On 23 February 1995, the school called in Mrs Cox to tell her that TH had apparently tried to choke or strangle her son, leaving red burn marks on his neck. Mrs Cox then complained to officers of the Department of Education about the schools' inaction in this matter. An officer of the Department, Mr Wilson, said he believed that bullying builds character and that it was a good thing for her son to be bullied.
- ▶ At a later time, after more instances of bullying of her son by TH, Mrs Cox spoke to the school's vice-principal, who told her that TH's parents would be required to supervise their son at school during recess, as well as before and after school. There was no evidence that this occurred. The plaintiff developed a stutter and suffered panic attacks whenever Mrs Cox left the house. His school work deteriorated further and he suffered from social isolation and insecurity, headaches, nightmares and sleeping problems.
- ▶ In July 1995, TH attacked the plaintiff again, leaving welts across his back, and threatened to do further harm to him. When Mrs Cox complained again to the vice-principal, she was told that TH would be placed on detention and one of his parents would be required by letter to supervise him at school. Once again, there was no evidence provided at the court hearing of any of these measures occurring.
- ▶ On 8 August 1995, Mrs Cox was called into school to be informed that TH had tried to shove a jumper down her son's throat, dislodging one of his teeth and causing

his lip to be swollen and bleeding. In the meeting, the principal and vice-principal promised that a letter would be sent to TH's parents advising that he would be placed on detention.

- ▶ Mrs Cox also reported this latest incident to police, who visited TH's home. At school after the incident, TH threatened to kill Benjamin if the police came to TH's house again. Benjamin was so terrified by this threat that he never returned to that school. The school principal, when enquiring of Mrs Cox about her son's absence and told by her that her son could not be exposed to any more violent bullying and attacks, replied, '... you lose some kids and you keep some'. In another conversation with Mr Wilson at the Department of Education, after Mrs Cox had enrolled her son at another school but he had refused to go, Mrs Cox was again told by Mr Wilson of his belief that bullying builds character.

Benjamin (the plaintiff) went to two more schools before he eventually completed Year 6. At secondary school, he suffered from severe anxiety which meant that he did not complete his schooling. As a young adult at the time of the court hearing, Benjamin was deemed by psychiatrists to be unemployable due to his lack of education and his mental illnesses, including depression, anxiety disorder, separation anxiety disorder and possibly post-traumatic stress disorder, which were unlikely to improve or be cured.

Legal issue: Did the NSW Education Department (defendant) breach its duty of care to Benjamin Cox (plaintiff)?

Decision: In his judgment, Justice Simpson condemned responses of the school and Department of Education to the incidents and Mrs Cox's complaints as 'dismally inadequate' and that they 'grossly failed in their duty to the plaintiff' to do what was reasonable to protect the plaintiff from physical and mental harm. He found that there was no dispute that the plaintiff suffered a severe psychiatric condition as a result of the bullying that was not reasonably dealt with by the school or the Department of Education.

Although evidence was brought by the defence of other possible causes of Benjamin's condition, including allegations of his family having a history of psychotic disorders, Justice Simpson held that Benjamin's condition was caused by the negligence of the defendant and that he was unemployable as a result of the negligence of the defendant. Consequently, the State of New South Wales

CASE STUDY CONTINUED...

was ordered to pay approximately \$1 million in damages.

1. Who were the stakeholders in this case and how were they impacted? [C] [A]
2. What international human rights were breached in this case, with reference to important facts of this case? You can refer back to the summary of the international documents, to which Australia is a ratified member, as well as looking up the CRC and UDHR online in order to

identify all human rights that are relevant to the facts of this case. [A]

3. What legal principles were applied to the facts of the case to justify the judge's decision? [A]
4. Do you agree with the judge's legal reasoning in this case? In other words, do you believe that the judge's decision was legally correct? [A]

After analysing the above case studies in negligence, you should ask the question whether or not this response of the common law is adequate to protect victims of bullying.

In other words, you must:

- ▶ **focus on the effectiveness and fairness of the existing law in achieving its purpose** (in this inquiry, you would ask whether or not our legal system, in its present form, adequately protects school students from bullying, taking into account the efforts of the Australian Government in encouraging schools, parents and students to embrace the 'Bullying. No Way!' mantra in establishing bullying policies and procedures, as well as the negligence court cases which have been brought against educational authorities for failing to meet their duty of care to students);
- ▶ **weigh up the relative merits or strengths of the various stakeholders' responses** to the legal issue being investigated (e.g. Is the current common law of negligence achieving justice for the parties involved in bullying or should greater powers be given to schools and police to enforce anti-bullying codes of conduct in schools?); and
- ▶ **step out of your comfort zone and make a clearly, logically and persuasively communicated decision/conclusion as to your own point of view about what recommendations for reform of the law are necessary to achieve just and equitable outcomes for society and its relevant stakeholders.**

Remember, it is important to determine, for yourself, **which of the various stakeholders' arguments 'provide sound reasons or evidence to support a statement':**

If fifty million people say a foolish thing, it is still a foolish thing. (ANATOLE FRANCE)

In evaluating whether or not possible decisions or recommendations 'are justified using evidence and reasoning', make sure you balance your subjective view of an issue **with an objective view of opposing stakeholder responses and arguments** by applying the wisdom in the following statement to your deliberations:

What I believe in my heart must make sense in my mind. (RAVI ZACHARIAS)

While it is important to weigh up the rights and responsibilities of the various stakeholders, don't forget to justify your recommendations for reform with reference to **what is in the best interests of society as a whole in order to bring about justice and equity for all:**

If we have no peace, it is because we have forgotten that we belong to each other. (MOTHER TERESA)

HYPOTHETICAL

The Australian Government has a website, called 'Bullying. No Way!', which, it says, '... provides information and to help school leaders and teachers to create and sustain safe and supportive school communities.' The Introduction to the 'Teachers' section of the website further states: 'The National Safe Schools Framework provides schools with a set of guiding principles and strategies to help them provide a safe and supportive school community for students and the broader school community ... The school processes for managing bullying, harassment, discrimination and violence are a key aspect of providing a safe and supportive school environment. Dealing with minor or major incidents in a constructive and supportive manner is critical. It is not mandatory (compulsory), however, for Australian schools to have and implement a 'Safe Schools' strategy for dealing with issues such as bullying and, as noted above, there is no legislation (Act of Parliament) that defines what bullying is.

In 2013, in response to a perceived deficiency in our legal system, a key legal issue rigorously debated by students of Senior Legal Studies from various Queensland schools in the Legal Studies Queensland Youth Parliament was whether or not a section in the mock 'Youth School Students Safety Bill', making it compulsory for schools to report all instances of bullying to police, should be passed as law (hypothetically, of course!). The reality of this issue hit home when, within weeks of the 2013 Youth Parliament being held, an article was published in *The Courier Mail* (Danks, 2013), in which the former Chief Justice of the Family Court of Australia and current Chairman of the National Centre Against Bullying (NCAB), Alastair Nicholson, called for the creation of a summary criminal offence of bullying with a maximum penalty of three months' jail as a way of deterring bullies and assisting schools in the education of students.

Read the extracts from the following hypothetical Bill that was debated in the 2013 Legal Studies Youth Parliament in the Legislative Chamber of Queensland Parliament House, Brisbane, and then answer the questions that ensue.

Queensland Youth Parliament Mock Youth School Students Safety Bill 2013 (extracts)

(A Mock Bill for use in Youth Parliaments)

A Bill for an Act to promote safety for Queensland School Students and to amend the Education (General Provisions) Act 2006.

Clause 3 (1) The purpose of this Act is to enhance protection for Queensland school students by:

- (a) the introduction of compulsory reporting to police by school principals of all instances of bullying in schools; and
- (b) the introduction of random drug testing at schools for school students and staff.

Definitions

Clause 5

Bullying means an act of intentionally causing harm to others through the verbal harassment, physical assault or other forms of intimidation including stalking and using electronic means.

Harm includes both bodily harm and psychological harm. Anxiety experienced by a person also constitutes harm.

Obligation to report bullying of a person under 18 years at school

Clause 6

(1) Subsection (2) applies if a staff member of a school becomes aware, or reasonably suspects, that any of the following have been bullied by another person who is an employee or student at the school –

- (a) a student under 18 years attending the school; or
- (b) a person with a disability who is being provided with special education at the school.

(2) The staff member must give a written report about the bullying, or suspected bullying, to the school's principal or a director of the school's governing body immediately.

Maximum penalty – 20 penalty units.

(3) Any person who has received a report under subsection (2) must provide the report to a police officer.

Maximum penalty – 20 penalty units.



HYPOTHETICAL CONTINUED...

1. What is the purpose of this proposed Act? [C]
2. What new legal requirement would be imposed on school principals throughout Queensland to fulfil the purpose of the Bill, if it were passed? [C]
3. What legal issues, including possible breaches of human rights, might arise for alleged bullies, their victims and others who may be involved in making complaints of bullying? [A]
4. What injustices in the existing legal system in relation to bullying in schools do you think this new requirement seeks to address? [E]
5. Is the Mock Youth School Students Safety Bill 2013 a just response to the problem of bullying? Does it promote and enforce the respective human rights of alleged child bullies and their victims? [E]

CASE STUDY

Unreported Queensland Children's Court Sentencing Hearing, 11 September 2014

Facts: A 15-year-old school student pleaded guilty to assault occasioning bodily harm in relation to an incident that occurred at a Sunshine Coast state high school in May, 2013. It was his first criminal offence. At the time of the incident, when he was 14, he made an unprovoked crash tackle on a then 12-year-old boy and landed on the younger boy, smashing his victim's femur and causing back injuries. The victim's leg was broken so badly that

it required an operation in which a 20cm plate and eight screws were inserted to hold it together.

Legal Issue: What was an appropriate sentence for the judge to impose on the school bully?

Decision: The judge imposed a sentence on the 15-year-old boy of a six months good behaviour bond with no conviction recorded.



WHAT DO YOU THINK?



Stakeholder perspective (father of school bullying victim)

When interviewed by Peter Hall of *The Courier Mail* outside the Children's Court after the above case's sentencing hearing on 11 September, 2014, the victim's father said the bully had only been given a few days suspension by the school, which had put up "a wall of silence" in the wake of the incident.

"I'm happy the judge was less tolerant. He said there was no denying the seriousness of the injuries," he said. "I hope it's a wake-up call for the school and the boy who tackled my son, who only weighed 32kg at the time. It has been very tough for my boy, but we wanted to push on with it (the case) because it could help others. Schools just are not dealing properly with these things. The victims are forgotten, often forced to change schools or be schooled at home."

The father said he had been shocked by the lack of support from the school and department after the incident. He said he would continue with civil action against Education Queensland and the parents of the attacker. Both parties deny liability. Education Queensland said the school involved did not tolerate violence or bullying.

1. Why do you think the bullying victim's father said he was happy with what the judge said in the sentencing hearing? [E]
2. Do you believe the sentence imposed on the bully was fair in terms of balancing the rights and responsibilities of both the perpetrator and the victim of this bullying? [E]
3. Based on the outcome in the above case and your evaluation of the following sources, should a law be introduced to make it mandatory (compulsory) for schools to report all incidents of bullying to police or should the problem of bullying in schools be treated as a medical health and educational issue? [E]

MOVING TRIBUTES FOR FORMER FACE OF AKUBRA 'DOLLY' AMY JAYNE EVERETT

SOURCE: THE COURIER-MAIL (COURIERMAIL.COM.AU), 10 JANUARY 2018 (EXCERPTS)

A TEENAGER, who was once the face of iconic Australian brand Akubra, has died suddenly, with her father saying bullying convinced her she had little choice but “to escape the evil in this world”.

In an emotional online tribute, Tick Everett said he wanted to speak out about the death of his daughter, ‘Dolly’ Amy Jayne Everett, to ensure no other “precious lives” were lost and so her life “was not wasted” because of bullies.

“Firstly, if by some chance the people who thought this was a joke and made themselves feel superior by the constant bullying and harassment see this post, please come to our service and witness the complete devastation you have created,” he wrote.

“The second is for the strong ones, lets (sic) stop the bullies no matter where, but especially in our kids, as the old saying goes. You will never know what have untill (sic) it’s gone.”

Akubra also released a statement on its Facebook page, attached to a beautiful photograph of Dolly taken eight years ago.

“This is not an easy post to write. We were shocked and distressed to hear of the passing of “Dolly” - the young girl many of you will recognise as the face of our past Christmas adverts,” the post said.

“Dolly could be anyone’s daughter, sister, friend. We need to make sure that anyone in crisis knows there is always someone to talk to. Be a friend, check up on your mates.”

If you are thinking about suicide or experiencing a personal crisis help is available. No one needs to face their problems alone. Phone Lifeline on 13 11 14.

BULLYING A MEDICAL ISSUE, SAYS CRUSADING QUEENSLAND DOCTOR

SOURCE: LAUREN MARTYN-JONES, THE SUNDAY MAIL (COURIERMAIL.COM.AU), 18 MARCH 2018 (EXCERPTS)

QUEENSLAND doctor James Scott is on the frontline of a global effort to have bullying recognised as a cause of serious health problems.

Dr Scott, who is no stranger to adversity, having survived a 43-day ordeal lost in the Himalayas in his early 20s, has spent the past two years fighting for the medical world to acknowledge the damaging consequences of childhood bullying and victimisation.

The child and adolescent psychiatrist will now bring his expertise to the Premier’s Anti-Cyberbullying Task Force.

This week, Dr Scott and the 13 other specialists who comprise the Government Task Force charged with establishing a new framework to tackle the growing social crisis, met in Brisbane for the first time.

Dr Scott said his interest in trying to get greater medical recognition of the effects of bullying was sparked a decade ago from his clinical practice.

“Some 10 years ago I was looking at the kids coming in with suicidality and depression and the only risk factor I could see was that they were being bullied at school, and quite often kids were coming in from the same school,” he said.

If Dr Scott and his research team at the Queensland Centre for Mental Health Research are successful, bullying will be accepted by the Global Burden of Disease as a risk factor for mental illnesses like anxiety and depression.

This would make bullying only the second psychosocial risk factor identified as cause of health problems, after child sexual abuse, and governments across the globe would be forced to divert more resources to tackling the problem.

Dr Scott played down suggestions that his personal experience 25 years ago surviving more than 40 days lost in the Himalayan winter helps him better understand the despair and hopelessness of many young bullying victims.

"I have had a wealth of life experience, as will have every other member of the taskforce," he said.

"I think everyone on the taskforce will have some lived experience of difficulties."

Premier Anastacia Palaszczuk said it was wonderful to have Dr Scott on board and looked forward to working with him.

"They (parents) need to have those conversations, that's the first step," she said.

Queensland's Isolated Parents Association president Kim Hughes has meanwhile called on the Queensland Government to consider expanding the Task Force to include a representative from the state's regional and remote communities.

Leading cyber safety educator Susan McLean said it was also disappointing there was no one on the Task Force from the eSafety Commission or with specific expertise in cyber safety.



INQUIRY FOCUS



DO QUEENSLAND'S NEW 'ONE PUNCH KILL' LAWS ACHIEVE THE PURPOSES FOR WHICH THEY WERE CREATED AND FAIRLY BALANCE THE RIGHTS AND RESPONSIBILITIES OF THE DIFFERENT PARTIES AND OTHER STAKEHOLDERS AFFECTED BY THEM?



Ch 1.1
Ch 9.10

Read the following sources relating to the sentencing of the first person to be charged under Queensland's new 'one punch' killing law and answer the focus questions that follow them.

ONE-PUNCH KILLER ARIIK MAYOT SENTENCED TO NEARLY SIX YEARS' JAIL OVER ATTACK ON LINDSAY EDE

SOURCE: ANDREW KOS, ABC NEWS (ABC.NET.AU/NEWS), 7 MARCH 2017 (EXCERPTS)

The first person to be charged under Queensland's new one-punch laws has been sentenced to just under six years' jail for killing an Ipswich man, who he says "did not deserve to die".

A remorseful Ariik Mayot, 20, pleaded guilty in December to hitting 54-year-old grandfather Lindsay Ede on a Goodna Street in June 2015.

Mayot was the first person in Queensland to be charged with unlawful striking causing death, which carries a maximum penalty of life in prison.

"I have to live with the fact I took someone's life. I am so sorry, I am not asking for forgiveness," Mayot said in a statement read by Chief Justice Catherine Holmes. "What I did, it never gets out of my head. I will never be able to make up for it. "He didn't deserve to die — I felt sick reading the victim impact statements from the family."

The court heard Mayot, who is from a large Sudanese family, experienced racism and bullying when he was younger.

When Justice Holmes handed down the sentence she said she accepted Mayot's assertion that Mr Ede may have called him a "black bastard" before the attack.

He was heading to the police station to report for breach of bail when he crossed paths with Mr Ede.

Mr Ede was on his way to his brother's home in Goodna, which was less than a kilometre away.

His brother Terry Bishop said the victim had a gentle soul.

"How cruel are you to even have thrown a punch at my brother - what did he ever do to you?" he said in his victim impact statement. "To my family you are a murderer. "He loved walking as it was his only time out from caring for his frail partner."

Family and friends of Mr Ede walked into the Supreme Court in Brisbane together on Monday, wearing "one punch kills" T-shirts.

Speaking outside court, Mr Bishop said he was "very disappointed" with the sentence.

"[It's a] very sad day to be honest — I think my brother's life was worth more than that," he said. "At the end of the day it didn't really matter how much he got sentenced, because it was never going to be enough, but at least 15 [years] would've been nice, even 10 [years], but it'll never bring back Lindsay."

Mr Ede's partner of 17 years, Gloria Stephens, said he was "one of the best". "There is a hole in my life that can never now be filled, I am incomplete," she said in a victim impact statement read in court.

Mr Ede's daughter Kylie Beckett described him as "a loving, caring, kind hearted man.". "I would give anything for him to be with us again ... I miss him greatly."

Mayot will serve at least five years behind bars. He has already served almost two years so will be eligible for parole in 2020.

GOVERNMENT SAYS IT WILL NOT APPEAL SENTENCE OF ONE-PUNCH KILLER ARIIK MAYOT

SOURCE: TRENTON AKERS, THE COURIER-MAIL (COURIERMAIL.COM.AU), 6 APRIL 2017 (EXCERPTS)

THE State Government will not appeal the landmark sentence handed to one-punch killer Ariik Mayot, who was jailed for six years last month. The sentence, handed down by Chief Justice Catherine Holmes, was the first under the new "unlawful striking causing death" charge, designed to create tougher penalties for "coward punch" attacks. Mayot, 20, attacked Ipswich grandfather Lindsay Ede unprovoked in 2015, causing him to crack his skull on a footpath.

A spokeswoman for Attorney-General Yvette D'Ath said she had sought the opinion of the Director of Public Prosecutions before making her decision. "The ODPP has advised that there are not sufficient grounds for a successful appeal," she said. "The ODPP has also advised that the new provisions meant that the offender would spend more time in prison than he would have had he been simply charged with manslaughter."

Despite the charge carrying a maximum penalty of life in prison, Mayot could walk free as early as 2020 as he has already served two years.

Paul Stanley, who educates children about coward punch dangers through his charity the Matthew Stanley Foundation, said the sentence was inadequate. His 16-year-old son Matthew was killed in 2006 by a one-punch attack at a party. "My son's killer got 2.5 years. What value do you put on a life?" he said.

Shadow Attorney-General Ian Walker said the sentence created a "low bar" when it came to sentencing others charged with the offence, such as Armstrong Renata who allegedly killed Brisbane teenager Cole Miller in January last year.

Online comments:

Axel (7 April, 2017): When oh when will the judiciary start to not only uphold the law BUT enforce the law and community expectations? This crime carries a 'life sentence,' but it would seem that the only ones getting 'life' are the victims family and friends.

Rob (6 April, 2017): A pathetic sentence.

Lynne (6 April, 2017): The message to one punch perpetrators is the Queensland gov is soft. Victims of this type of murder are the forgotten ones, this was the first case to be an example of the new laws acting as a deterrent and it has once again gone soft on the perpetrator. What about the family of man who was killed, this was not justice for them. Queensland is soft on this type of crime and they had an opportunity to set an example to one punch victims and their families and failed completely.

QUEENSLAND'S ONE PUNCH LAW IN SPOTLIGHT

SOURCE: KATHERINE GREGORY, ABC RADIO NATIONAL AM PROGRAM (ABC.NET.AU/AM), 7 MARCH 2017 (EXCERPTS)

Supporters of Queensland's one-punch law say the jail sentence handed down to the first man convicted under its legislation is far too light.

Twenty year old Ariik Mayot will serve less than six years in jail for striking and killing a 54 year old man in 2015.

But a prominent criminal lawyer says the sentence is appropriate, and instead questions the new law's ability to act as a deterrent against one punch assaults.

ONE-PUNCH DEATHS: WA STATE GOVERNMENT TO INTRODUCE NEW LAWS TO DOUBLE MAXIMUM PENALTY TO 20 YEARS

SOURCE: KATE CAMPBELL, LEGAL AFFAIRS REPORTER, SEVEN PERTH NOW NEWS (PERTHNOW.COM.AU), 10 SEPTEMBER 2016 (EXCERPTS)

THE maximum penalty for one-punch deaths in WA will be doubled to 20 years under proposed new laws. This means WA would go from being the most lenient state to among the toughest on this cowardly crime. Attorney-General Michael Mischin said new family violence legislation to be introduced into State Parliament imminently would amend the Criminal Code offence of unlawful assault causing death. He said the current laws failed to adequately reflect the seriousness of the crime. Instead of the current 10-year maximum jail sentence, anyone convicted of fatal violence in the home, on the streets or in the pubs would face up to 20 years.

WA was the first state to introduce these laws in 2008 in response to a spate of one-punch deaths. Mr Mischin said the doubling of the penalty was to reaffirm that "one punch is one punch too many". "These cases are not abating in the way that the government would like to see. This significant doubling is intended to make people think twice about resorting to violence," he said.

As well as dealing with one-punch attacks, the law had also been used in family violence cases when more serious charges could not be proven due to a lack of evidence. Mr Mischin was prompted to act in part by the case of mother-of-two Saori Jones, who died after being punched by her partner Bradley Wayne Jones in 2010. Jones was sentenced to five years for unlawful assault causing death, prompting community outrage and calls for tougher laws.



Mr Mischin said, “The often abhorrent circumstances in which these assaults are committed and in how the victim dies has led the State Government to the view that the current 10 year maximum penalty does not adequately reflect the gravity of the offenders’ conduct, the value of the victim’s life and the need to provide a sufficient deterrent. Given that the penalty for manslaughter has been increased from 20 years imprisonment to life imprisonment, the Government will increase the maximum sentence for the offence of unlawful assault causing death from 10 years to 20 years. The increased penalty is part of the Liberal National Government’s commitment to discourage and condemn the use of violence generally. It will also provide further protection to those under threat of violence at home — predominantly women and their children — by holding those who resort to violent acts accountable for any fatal consequences of their resort to brutality.”

In NSW, the maximum penalty is also 20 years but that rises to 25 years, with a mandatory eight-year jail, if you fatally hit someone when you are drunk or drug-affected. In 2012, the WA Opposition introduced “Saori’s Law” into Parliament to increase the maximum penalty for fatal violence in family and domestic situations to 20 years. Those laws were knocked back by the Barnett Government, with Mr Mischin saying at the time it was “populist” and “misconceived”.

Earlier this year, WA Chief Magistrate Steven Heath said the current legislation was not working and increasing penalties was not the answer. In his submission to Senate inquiry into the need for national alcohol-fuelled crime laws, Mr Heath said each state’s so-called one-punch death laws were developed without any research about their effectiveness. “There has been an emphasis on increasing penalties and creating new offences but historically there is nothing to suggest that increasing penalties alone is an effective way to reduce offending,” he said.



INQUIRY FOCUS CONTINUED



1. State in your own words the issues which each of these sources raise. Outline the facts used by each author that supports his/her point of view about the particular issue. Are the facts relevant and persuasive? Give your reasons. [C] [A]
2. Conduct research and select relevant and up-to-date sources which provide opposing viewpoints in relation to this contemporary legal issue. For example, as a starting point, research the viewpoints of the following stakeholders: Bill Potts (Queensland criminal defence lawyer), Tina Good (Queensland homicide victims’ support group) and Simon Turner (Director of the ‘Just Let it Go’ Foundation) [S]
3. Examine the opposing viewpoints and consequences which are presented in these sources and in sources which you have selected during your research, referring to evidence which supports these opposing perspectives and outcomes. [A]
4. Based on your weighing up of the competing arguments and substantiating evidence, make a decision as to what is the most persuasive viewpoint in relation to this issue. [E]
5. Present the alternatives available to respond to this issue which, in your opinion, are just and equitable. Provide recommendations for law reform which you believe will result in just and equitable outcomes for the community. Set out the facts and principles which support your views. [E] [R]



INQUIRY FOCUS



SHOULD THE QUEENSLAND PARLIAMENT STRENGTHEN WILFUL DAMAGE LAWS TO INCREASE THE CRIMINAL PENALTIES GIVEN TO GRAFFITI OFFENDERS?

In Queensland, graffiti (the unauthorised act of marking other people’s property without their permission) is a crime under s469 of the *Criminal Code Act 1899* (Qld):

469 Wilful damage

(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence which, unless otherwise stated, is a misdemeanour, and the person is liable, if no other punishment is provided, to imprisonment for 5 years.

Some of the legal consequences of Queensland's anti-graffiti laws are summarised below in a 'Graffiti Prevention Education Program' factsheet published online by the Gold Coast City Council (accessed April, 2018):

- ▶ If the property in question is in a public place, or is visible from a public place, and the destruction or damage is caused by (a) spraying, writing, drawing, marking or otherwise applying paint or another marking substance; or (b) scratching or etching, the offender commits a crime and is liable to imprisonment for 7 years.
- ▶ The court may order the offender to perform community service, including, for example, removing graffiti from property; and/or may order the offender to pay compensation to any person.
- ▶ Graffiti offences are treated seriously by police, all levels of government and the justice system. Juvenile offenders (aged 12-17 years) may be sentenced to a term in a detention centre, given a graffiti removal order or given a period of probation (note: a person aged 17 or over is tried as an adult). Regardless of the penalty imposed by a court, a graffiti offender may be ordered to remove the graffiti and/or pay compensation to the owner of the property that was vandalised.

PRACTICAL APPLICATION

Read the following sources relating to the application of Queensland's wilful damage laws as a means of dealing with graffiti, and then answer the focus questions relating to them in order to determine the nature and scope of the issues involved and also to determine the different viewpoints of the parties and other stakeholders affected by them.

GRAFFITI

SOURCE: QUEENSLAND GOVERNMENT (QUEENSLAND POLICE SERVICE, WWW.POLICE.QLD.GOV.AU), LAST UPDATED 10 JANUARY 2017 (EXCERPTS)

Graffiti is wilful damage under Queensland law.

In response to community concern about graffiti, the Queensland State Government introduced graffiti specific legislation giving local councils and government the power to rapidly remove graffiti.

The Summary Offences Act 2005 was amended in 2008 to give Queensland councils and government powers to remove graffiti that is visible to the public. This extends to both public and private places. For example, publicly visible graffiti on the side of a privately owned building, can now be removed by council or government officers acting in accordance with the legislation. More Information can be found on the Queensland Police Service Graffiti Removal Powers site.

The Queensland Police Service offers information on Crime Prevention Through Environmental Design (CPTED), and training for local councils and community groups on ways to reduce crime, including graffiti offences, through changes to the urban environment.



PRACTICAL APPLICATION CONTINUED...

NEW LAWS TO JAIL GRAFFITI VANDALS FOR SEVEN YEARS

SOURCE: KATHERINE FEENEY, BRISBANE TIMES (BRISBANETIMES.COM.AU), 10 APRIL 2013 (EXCERPTS)

Graffiti vandals will be jailed for up to seven years under new laws set to be passed in Queensland. The legislation, likely to pass thanks to a recommendation from the parliamentary group charged with reviewing it, will see the maximum penalty for vandals increased from the current five-year maximum sentence and effectively make the state's punishment the toughest in Australia.

Graffiti vandals could be jailed for up to seven years under proposed new Queensland legislation. The maximum penalty for the same offence in New South Wales is five years, while in Victoria and Western Australia vandalism carries a maximum jail sentence of two years. In South Australia offenders face up to six months' jail-time, while in Tasmania perpetrators may face a fine or a community service order. However, the proposed legislation is not without its critics. Legal Aid Queensland and Protect All Children Today were among the organisations which filed submissions against the changes.

The Youth Advocacy Centre also voiced concern, writing "it is inconceivable that any court would punish anyone by imprisonment for seven years for an offence which does not present any serious risk to life or significant threat to any person. "The offence of "assault occasioning bodily harm" has a maximum penalty of seven years – the same as proposed in this situation. It sends an odd message to the community – that putting (some) paint on a wall is considered as serious as actually inflicting injury on another person."

In response, the department said the legislation delivered on a pre-election commitment to strengthen anti-graffiti laws. "Graffiti crime demonstrates a complete disregard for property by the offender and costs the community significant resources annually for it to be cleaned up," it wrote. "The amendments reinforce that graffiti is an act of vandalism and that such conduct is against the law."

The new Queensland legislation will also remove the distinction between basic graffiti offences and offences that involve obscene or indecent representations. In its final ruling, the Legal Affairs and Community Safety Committee noted courts would still retain the ability to consider cases on individual merit when sentencing offenders. But the committee's ultimate support echoed the words of the Department of Justice and Attorney-General. "The message which is being sent to the community by the amendments in this Bill is that graffiti will not be tolerated and the Committee endorses the amendments," it wrote.

The new legislation will also include:

- ▶ The insertion of a new graffiti forfeiture provision regarding property used to record, store or transmit images of graffiti, applying to prescribed adult graffiti offenders
- ▶ The insertion of a new mandatory community-based order called a Graffiti Removal Order, to apply to any child aged 12 to 16 years convicted of a graffiti offence
- ▶ The insertion of new diversionary mechanisms, which will allow children aged 12 years and over to be made subject to graffiti removal service without court intervention
- ▶ The insertion of a new graffiti forfeiture provision regarding property used to record, store or transmit images of graffiti

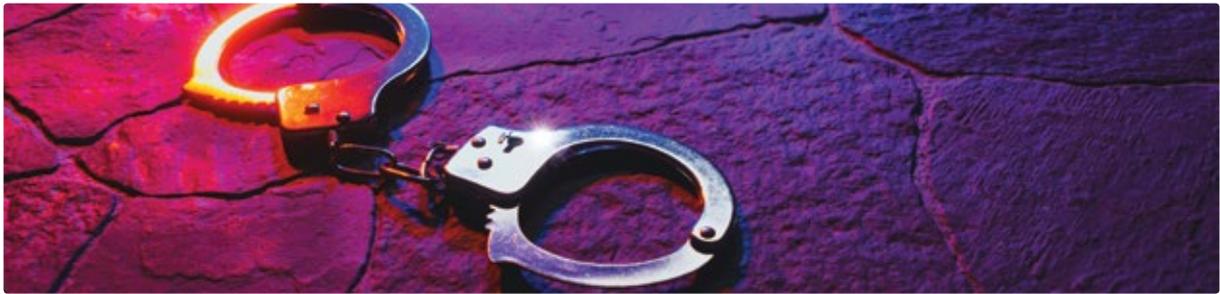
1. State in your own words the issues which each of these sources raise. Outline the facts used by each author that supports his/her point of view about the particular issue. Are the facts relevant and persuasive? Give your reasons. [C] [A]
2. Conduct research and select relevant and up-to-date sources which provide opposing viewpoints in relation to this contemporary legal issue. [S]
3. Examine the opposing viewpoints and consequences which are presented in these sources and in sources which you have selected during your research, referring to evidence which supports these opposing perspectives and outcomes. [A]

PRACTICAL APPLICATION CONTINUED...

4. Based on your weighing up of the competing arguments and substantiating evidence, make a decision as to what is the most persuasive viewpoint in relation to this issue. [A] [E]
5. Present the alternatives available to respond to this issue which, in your opinion, are just and equitable. Provide recommendations for reform which you believe will result in just and equitable outcomes for the community. Set out the facts and principles which support your views. [E] [R]

3.3 KEY PROCESSES IN AUSTRALIA'S CRIMINAL JUSTICE SYSTEM

The focus of the remainder of Unit 1 (BEYOND REASONABLE DOUBT) is on the following key processes or links in Australia's criminal justice system:



- ▶ **Criminal investigation process (Topic 2):** [Students] explore the individual's rights and responsibilities in dealing with the police and others in designated authority.' (p. 17, Syllabus)



- ▶ **Criminal trial process (Topic 3):** 'Students focus on the concept of a fair trial and discuss the extent to which the features of the criminal trial contribute to the achievement of justice.' (p. 18, Syllabus)



- ▶ **Punishment and sentencing (Topic 4):** 'Students evaluate the effectiveness of sentencing from different viewpoints.' (p. 19, Syllabus)

REVIEW

1. Describe (explain the meaning of) each of the following key terms in this chapter using legal terminology: [C]
justice (just outcomes) | equitable outcomes | crime | onus of proof |
standard of proof | adversarial system | inquisitorial system
2. Describe: [C]
 - a. the difference between onus of proof and standard of proof; and
 - b. the difference between adversarial and inquisitorial systems of justice.
3. Explain: [C]
 - a. concepts of just and equitable outcomes as a foundation principle of criminal law in Australia; and
 - b. legal criteria for decisions.
4. Analyse the following criminal legal issues to determine the nature and scope of the issue and then examine different viewpoints: [A]
 - a. Whether or not bullying of school children should be a criminal offence in Queensland.
 - b. The effectiveness and fairness of Queensland's new 'one punch killing' assault laws.
 - c. The effectiveness and fairness of Queensland's wilful damage laws.
5. Link the legal foundations to the criminal justice system as a general overview, including the investigative process (Topic 2), the trial process (Topic 3), and punishment and sentencing (Topic 4). [C]

TOPIC 2: CRIMINAL INVESTIGATION PROCESS

CHAPTER 4: CRIMINAL SITUATIONS: BEHAVIOUR, SOURCES AND ROLES

FOCUS SUBJECT MATTER

4.1. WHAT CONSTITUTES CRIMINAL BEHAVIOUR?

4.2. SOURCES OF CRIMINAL LAW

4.3. DIFFERENT ROLES IN AN ALLEGED CRIMINAL SITUATION

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ the nature and elements of criminal conduct or behaviour;
- ▶ the largely statutory sources of criminal law in Queensland; and
- ▶ how to identify the different roles in an alleged criminal situation.

4.1 WHAT CONSTITUTES CRIMINAL BEHAVIOUR?

Criminal conduct is behaviour that the law deems to be wrongful. Criminal law sets out the rules that are to be applied and lays down procedures and punishments to deal with criminal conduct. In this way, criminal law covers **the acts and omissions that most people in the society consider harmful**. For an act or omission to be criminal, a guilty mind is also required. 'It is an established principle of the common law that a person should not be convicted of a criminal offence unless he or she had a 'guilty mind' which accompanied the wrongful act or omission. A person who has a **guilty mind** is said to be **criminally responsible** for the act or omission. As well as **causing harm to a victim**, a crime is also regarded as **harming the society as a whole**. This is why behaviour that breaks one of these criminal rules is called **an offence** – it offends against all of society. Crimes are regarded as offences against the State.

Many acts are **universally held to be crimes**, such as murder or stealing, whilst **others are specific to certain cultures**. Drinking alcohol is a crime in Islamic countries, but not in Australia. However, the taking of some other drugs, such as heroin or marijuana, is a criminal offence in Australia. Adultery, which is when a married person has a sexual relationship with a person other than his or her spouse, is not a criminal offence in Australia because the conduct is no longer seen as warranting prosecution and punishment by the state. In other parts of the world, adultery remains a criminal offence. It is a serious offence under Islamic law, one for which the death penalty can be imposed. Several countries in Asia continue to have the offence of adultery in their criminal laws. In South Korea, for example, a person convicted of adultery can be sent to jail for up to two years.

By identifying and enforcing core values and beliefs, criminal law helps to define the type of society we have. This is why **changes in values and beliefs** in our society may lead to changes in what conduct is considered criminal. This can be seen in regard to homosexuality, which was once the criminal offence of sodomy. Changing societal attitudes towards what, for centuries, had been regarded as a crime 'against the order of nature' led all states of Australia to repeal sodomy as a criminal offence for consenting adults over the age of eighteen. Another example of changing values leading to change in the criminal law was the recent abolition of the rule that a man could not be convicted of raping his wife. Today, marriage no longer means that a wife has given irrevocable consent to sexual intercourse with her husband. The law clearly responds to current social issues, concerns and attitudes. It has also expanded and developed as technologies and other knowledge have changed society.'



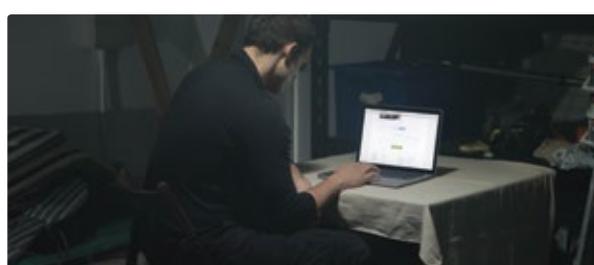
1. ONE PUNCH CAN KILL



2. UNLAWFUL DRINK SPIKING



3. BOMB HOAXES



4. USING THE INTERNET TO PROCURE CHILDREN UNDER THE AGE OF 16 YEARS.



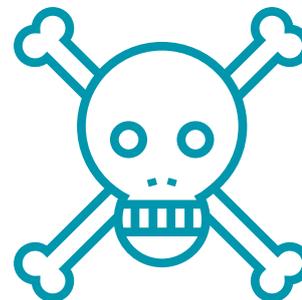
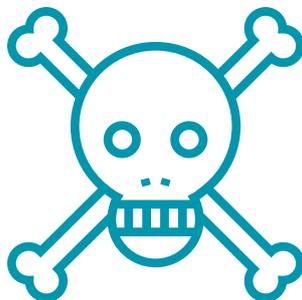
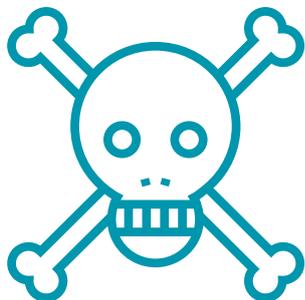
Ch 10.1

4.2 SOURCES OF CRIMINAL LAW

Under the Constitution of Australia, criminal law is the responsibility of the States. For this reason most of our criminal laws are state-made. However, the Commonwealth can enact criminal law for matters that arise under its Constitutional powers. These include crimes relating to importing or exporting drugs and other prohibited items (from its exclusive powers over customs and excise, and also external affairs); offences to aircraft or to property owned by the Commonwealth Government, or involving our communication systems (from s51(v) Constitution).

The criminal law of Australia was derived from the common law of England. Since federation, each state jurisdiction has its own body of criminal law contained in both statutes and common law. In the states of New South Wales, Victoria and South Australia, criminal law, whether common law or statutory, must be interpreted in light of common law principles and doctrines (unless the Parliament has said otherwise). The other states of Australia are often referred to as **code jurisdictions** because each has a criminal code that has completely replaced the common law. Queensland and Western Australia, for example, have had a criminal code for over 100 years. These codes were drafted by Sir Samuel Griffith who became the first Chief Justice of the High Court of Australia and who was one of the drafters of the Australian Constitution.

Some offences which were considered serious when the Criminal Code was enacted almost a century ago have been found to **have little relevance to today's society**. For example, sections that made it an offence to 'bring a seducing message from a pirate' and to 'challenge to fight a duel' were repealed in 2008. Many other outdated provisions have been removed over the years and new ones introduced to bring the criminal law into line with society's current demands.



SOME IMPORTANT CRIMINAL STATUTES

- ▶ *Crime and Misconduct Act 2001*
- ▶ *Penalties and Sentences Act 1992*
- ▶ *Police Powers and Responsibilities Act 2000*
- ▶ *Firearms and Offensive Weapons Act 1979*
- ▶ *Explosives Act 1999*
- ▶ *Prostitution Act 1999*
- ▶ *Drugs Misuse Act 1986*
- ▶ *Domestic and Family Violence Protection Act 2012* (the 1989 Act was repealed by the 2012 Act)
- ▶ *Transport Operations (Road Use Management) (TORUM) Act 1995*
- ▶ *Offenders Probation and Parole Act 1980*
- ▶ *Peace and Good Behaviour Act 1982*

RESEARCH

1. Access three of the Acts listed above (http://www.legislation.qld.gov.au/Acts_SLs/Acts_SL.htm) and set out the main purpose of the Act. Find two provisions which contain a criminal offence. [C]
2. In the last two decades new criminal law offences have been enacted. Find one of these new laws listed below and explain what changes have occurred in society, or what events have taken place, that would have caused the Government to introduce this new criminal law. [C] [A] [E]

Some examples are:

New Offence	Maximum penalty
Assaulting a pregnant woman killing an unborn child	Life
Computer hacking	5 years
Intentional transmission of serious disease	Life
Bomb hoax message	5 years
Performing female genital mutilation	14 years
Making or distributing child exploitation material	10 years
Drink spiking	5 years

3. Look at Part 3B of the *Transport Operations (Road Use Management) Act 1995* (TORUM) and describe what Alcohol Ignition Interlocks are. [C]
4. Why do you think our State Government made laws introducing such devices? [S] [C] [A]

WHAT DO YOU THINK?

For some decades now there have been cases throughout Australia and overseas where sexual assault took place after victims had been sedated by 'Rohypnol', colloquially known as 'Roofies', and also known as the 'date rape' drug. These roofies in pill form have been often dropped into the drink of unsuspecting people. The effect, which kicks in after approximately 20 or 30 minutes, is to make the victim feel extremely intoxicated, with the extra difficulty of being unable to speak or move. Such offences occurred most often at nightclub venues where the drug was typically added to drinks without the victim's knowledge or consent. In 2006 unlawful drink spiking became an offence in Queensland. Section 316A of the Criminal Code (Qld) made it an offence to 'administer, or attempt to administer, a stupefying or overpowering drug or thing into the drink of another person without their consent or knowledge'.

1. Do you think that drink spiking should be a criminal offence regardless of whether the drink was consumed or whether there was a person harmed? [A]
2. Should the offence be limited to just drinks, which the Code in Queensland defines as 'water, beverage or other liquid'? Should food, for example, also be included as it is in Victoria and New South Wales where the spiking offence specifically includes food and drinks? [A]
3. Look at Chapter 27 of the *Criminal Code*. Was it necessary to create a new offence or were there other existing offences that could be used to deal with drink spiking? [A]

Each state has more than a thousand criminal offences. An overview of the main offences, in terms of seriousness and frequency, is in Chapter 6. *The Criminal Code of Queensland (QCC)* will be used with significant points of difference from the common law noted.

4.3 DIFFERENT ROLES IN AN ALLEGED CRIMINAL SITUATION

Read the following scenario in which there is alleged criminal behaviour.

HYPOTHETICAL

On 4 July 2017 the following occurred. Paul Ryan, a young man, left the Prince of Wales Hotel at about 6.00pm. It was not quite dark. He had been drinking but was not intoxicated. He walked towards his car which was parked in a back street, about half a kilometre away. Two men, one aged 20 years, Tony Frederickson, and the other aged 18 years, Michael Moses, saw Ryan leave the hotel and followed him. Believing he was under the influence of liquor, they intended to take his money from him, take his car keys, and then use his motor vehicle. Frederickson pulled a wooden paling off a fence. He intended to frighten Ryan with the paling and to make him give up his money and his keys. As Ryan approached his car, Frederickson struck him in the head from behind with the paling, without warning. Ryan faltered, fell and hit his head on a metal grate adjacent to the footpath. He bled profusely. Despite his being shocked by the violence of Frederickson, Moses reached down and took the wallet and car keys out of Ryan's pocket. Moses opened the car and drove away with Frederickson, leaving Ryan on the ground bleeding. Mr Bill Tomlins lived in a house in front of where Ryan's car was parked. Just before the incident, Mr Tomlins was sitting on his veranda behind blinds which were partially opened. He saw Frederickson

pull the fence paling off his neighbour's house and he saw both Frederickson and Moses following Ryan. Thinking this was suspicious, he pulled out his mobile phone and commenced videoing the men. He saw Frederickson strike Ryan. He saw Moses take money and car keys out of Ryan's pocket. He saw both Moses and Frederickson drive away. He telephoned the police, giving them a brief description of the men and the registration number of the motor vehicle using the video.

Two hours later police saw the car parked at the Commercial Hotel. They had been given details of the attack on Ryan, of the car, and a description of Frederickson and Moses phoned in by Mr Tomlins. When they went inside they saw two men who generally fitted the description of the men who had struck Ryan and taken his car. They arrested the men and took them to the police station. They subsequently charged the men with assault occasioning grievous bodily harm and stealing. Paul Ryan later died and the police amended the first charge for both Frederickson and Moses to murder.

Answer the following questions relating to the above scenario.

1. What happened to Paul Ryan? Would you describe Paul Ryan as the victim? Why? [C]
2. Who are the suspects? [C]
3. Who are the offenders? [C]
4. Who is the witness? [C]
5. Where did the arrest take place? [C]
6. What is the evidence of the offences having occurred, and of the persons who committed the offences? In your answer distinguish between oral evidence and electronic evidence. [C]
7. What are the charges that were made against Frederickson and Moses? [C]
8. The words suspects, the accused and defendants can be applied to both Tony Frederickson and Michael Moses. At what point did Frederickson and Moses become the accused or defendants as opposed to suspects? [C]
9. What role did the police play in this criminal situation? [C]

You will see from the above scenario that the criminal investigation process started with a report made by Mr Tomlins of behaviour of Moses and Frederickson which was obviously criminal. Reports, therefore, from citizens witnessing a crime are very common ways by which criminal investigations start. Another common way in which a criminal investigation starts is by the police seeing an offence occurring or by their witnessing suspicious behaviour. The most common way is however usually reports by victims of offences which have been committed against themselves. All of these ways commence the criminal investigation process.



RESEARCH



Go to the website of Neighbourhood Watch Queensland (<https://www.nhwq.org>) and under the heading of Resources, locate the Suspicious Behaviour Brochure(s). Then complete the following tasks.

1. List five examples of suspicious behaviour. [C]
2. Name ten features of a person important in giving a good description to the police. [C]
3. Name seven details in relation to a motor vehicle which you might observe if it is the subject of suspicious behaviour. [C]
4. Can you think of any other important attributes of a person which could be added to the features of a person in giving a good description to the police as set out in the brochure? [A]
5. Do you agree that community involvement in identifying crime is appropriate? Give your reasons?[E]

REVIEW

1. Describe the following: [C]

A suspect | a victim | an offender | a defendant

2. Why do some criminal law offences remain the same for centuries while others are amended, repealed or introduced? Give three examples to illustrate your explanation. [C]
3. What is meant by criminal conduct? [C]
4. What is meant by drink spiking? [C]

TOPIC 2: CRIMINAL INVESTIGATION PROCESS

CHAPTER 5: THE ROLE POLICE PLAY IN THE CRIMINAL INVESTIGATION PROCESS

FOCUS SUBJECT MATTER

5.1. INTRODUCTION

5.2 THE TYPES OF EVIDENCE THE POLICE MAY COLLECT

5.3 RIGHTS AND RESPONSIBILITIES OF POLICE, SUSPECTS, ACCUSED PERSONS AND VICTIMS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ the role of police in gathering evidence;
- ▶ the main types of evidence collected by police during an investigation;
- ▶ the importance of oral evidence, particularly confessional evidence;
- ▶ the importance of fingerprint evidence;
- ▶ the use of a crime scene by the police to preserve and obtain evidence;
- ▶ the use of DNA evidence to investigate crimes;
- ▶ the police power to search a property;
- ▶ the police power to search persons;
- ▶ the police power to search motor vehicles;
- ▶ the police power to undertake forensic procedures;
- ▶ the police power to take DNA samples;
- ▶ the police power to arrest persons with or without a warrant; and
- ▶ the rights of persons after detention by police.

5.1 INTRODUCTION

The investigation of crimes in our society is conducted by the police. It is the role of the police to search for and gather evidence so that offenders can be brought to justice. To do this the police have been granted powers beyond those of an ordinary citizen. The police need to be able to question people, search people and places, so that they can gather evidence of criminal behaviour. Mostly, citizens cooperate. Even offenders sometimes cooperate with the police.

There are circumstances, however, where people do not cooperate. It is in such circumstances that police need special powers to insist upon searching a person's motor vehicle and premises as well as questioning individuals. It is important for the police to have this lawful authority to conduct their investigation because any evidence relied on in a trial which has not been obtained by police legally may be excluded by the judge. This means such evidence will not be available to determine the innocence or guilt of the accused.

The *Police Powers and Responsibilities Act 2000 (Qld)* (the PPRA) gives special powers to the police. We shall deal more fully with these powers later in this chapter. The role the police play in the criminal investigation process is to gather evidence using their powers. The police then need to determine whether the evidence is sufficient to charge somebody with an offence. Specific offences are dealt with later in this topic. You will see later that each offence is made up of elements. The police collect evidence and they determine whether the evidence is sufficient to charge somebody with an offence. They need to consider that evidence in light of each and every element of the offence. An example of this is as follows.

HYPOTHETICAL

Section 409 Criminal Code – Robbery

(i) Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the things stolen or to prevent or overcome resistance to it being stolen is said to be guilty of robbery.

Look at the following examples and determine whether the police are likely to charge a person with robbery in the following fact situations.

1. Mary was at the house of her friend, Jane. She took Jane's diamond ring and put it in her purse with the intention of getting her brother to sell it for her. [A]
2. Frank's brother, Tony, owned a rifle that Frank wanted desperately to have. He had asked for it many times but Tony would not give it to him. On a Monday when both were not at work, Frank said to Tony that, if he didn't give him the gun, he would bash him in the head with a golf club. Tony did not give him his rifle. Two days later Frank took the rifle and kept it without Tony's knowledge. [A]
3. Richard had broken into a house because he was hungry and wanted to steal some food. While in there, he disturbed the owner of the house, Francis. Richard then told Francis that, unless he gave him the cash which he had in his wallet then he was going to push him over. [A]
4. Bill was at a party with friends of his. One of his friends owned a Rolex watch which his friend had left on the table. After his friend left, only Bill and Mary were sitting at the table. Bill grabbed the Rolex watch and Mary said that he should not take it. Bill told Mary not to say anything or he would twist her arm behind her back. [A]



5.2 THE TYPES OF EVIDENCE THE POLICE MAY COLLECT

The main types of evidence the police may collect at a crime scene or during an investigation process are as follows:

- (A) ORAL EVIDENCE
- (B) FINGERPRINT EVIDENCE
- (C) CRIME SCENE EVIDENCE
- (D) DNA EVIDENCE

(A) ORAL EVIDENCE

The most common form of evidence that police collect is oral evidence. These are statements made by the victims of crimes, or by witnesses to crimes, or even by offenders themselves. The first oral information provided to police of an offence having been committed is usually provided by the victim.

The victim goes to the police and complains about a crime having occurred and, on many occasions, asserts that a certain person committed that crime. When such a complaint is made by a citizen, the police will take a statement. That is, the police will listen to his or her oral evidence, reduce it to writing, and have the witness read it and sign it as being true. Similarly if there are any witnesses to that event apart from the victim, the police will also take the oral testimony of those witnesses. After having collected such evidence, they will then approach the alleged offender (suspect) and ask that person to make a statement about the allegations raised by the victim. At this point the alleged offender considers his legal right to silence, which is as follows:

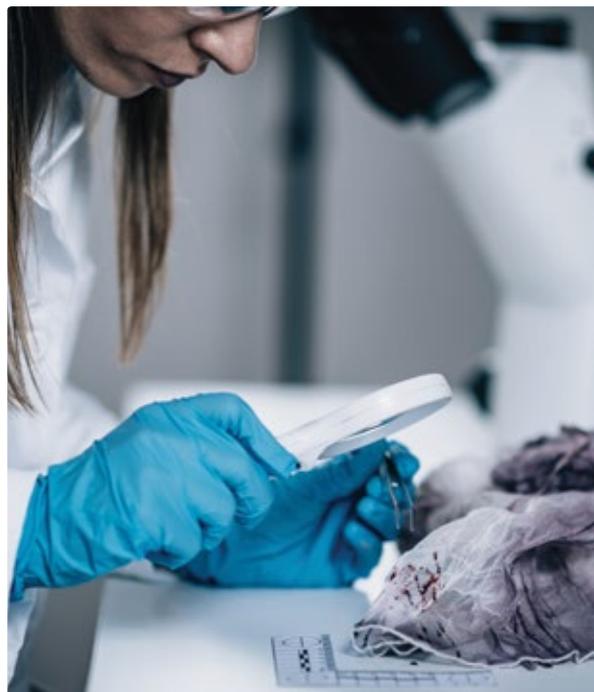
(I) RIGHT TO SILENCE

The alleged offender may or may not make any statement to the police at this point. The alleged offender does not have to answer any questions asked of him by the police. In fact there is an **absolute right to silence** at the police questioning stage of an investigation in all the Australian States. This right to silence is a very old right that existed at common law. **The fact that an alleged offender does not answer questions put to him or her by the police is not allowed to be raised later in a trial.** In other words, **no adverse inference** against the alleged offender can be drawn in a later trial simply because that person refused to engage with the police. In fact, when the police are interviewing a suspect, the police always tell the suspect that he/she is not required to answer questions. Given that these interviews must be audio taped and very often video taped, the police believe it is important to make it absolutely clear that they advise the suspect of the existence of his/her right not to answer questions.

(II) CONFESSIONS

As you can imagine the best type of oral evidence that can be collected by the police is confessions. A confession is when **the offender admits to having committed the offence.**

One form of a confession occurs when the offender admits to having committed the offence directly to the police or to another person.



There are also other circumstances in which evidence of confessions is obtained. The following are examples:

- (a) Undercover police recording confessions of the offender.
- (b) Ordinary citizens, at the request of the police, recording confessions of the offender.
- (c) The police deliberately placing inmates in a prison to befriend an offender and then having the inmate record the confession of the offender.
- (d) Confessional statements made to fellow inmates in a prison advising the police that the offender has made a confessional statement to him or her and the police then arranging for that inmate to have the offender repeat his admission in circumstances where the inmate is recording that conversation.

In relation to confessional statements made directly to the police by the offender, there have been in the past many confessions which have not been admitted into evidence which have arisen as a result of **threats or coercion on the part of the police**. Any confession obtained by these means is clearly **inadmissible**. The practice of **verballing** had also developed in the past which, if discovered, made confessions inadmissible into evidence too. **Verballing is where police officers put damaging remarks, especially confessional statements, into the mouths of suspects during police interrogation**. These practices of verballing and obtaining confessions by threats, intimidation and coercion have subsided greatly since the compulsory requirement of electronic recording of police interviews.

As to the other means of obtaining confessions referred to above, you might regard these as forms of trickery, however, generally speaking, such confessions are admitted into evidence (i.e. are admissible) and considered by the court in determining guilt or innocence.

CASE STUDY

R v O'Neil [1995] QCA 33

Facts: The appellant was convicted of attempted murder and sentenced to twelve years imprisonment. The appellant was a nurse who was found guilty of attempting to murder her husband by injecting him with a potentially lethal dose of insulin whilst he was sleeping. The appellant's husband was an army officer who had returned from service in Somalia. After his return, his marriage with the appellant declined. Evidence was given in the case by Ms Lally, a friend of the appellant nurse, who was also a nurse working with the appellant at a hospital. She was told by the appellant in the course of a conversation that the appellant had tried to kill her husband but had not succeeded. The witness, Ms Lally, responded by suggesting that the applicant was 'kidding', to which the applicant responded, 'I injected him with 300 units of insulin.' The appellant told Lally that, after injecting her husband with insulin, she lay waiting for him to stop breathing, but he didn't do so. He woke up and went into the kitchen and consumed orange juice and biscuits. Lally told the police of this conversation she had with the appellant. Then, at the request of the police, Lally had a further conversation with the appellant which

was tape recorded. Two recordings were made, one by use of a microphone transmitting to a remote tape recorder, and the other by way of a small portable tape recorder carried in Lally's handbag. This recorded confessional statement by the appellant was admitted into evidence and the appellant was convicted at trial. She appealed the decision.

Legal issue: Was the recorded confession unfair and therefore inadmissible?

Decision: The Court of Appeal in Queensland held that the confession was admissible and the finding of guilt was not upset (overturned/dismissed).

Read the following contained in the decision of Pincus J A:

Confessional evidence used to be regarded with considerable suspicion, as being a type of evidence the obtaining of which is particularly prone to abuse. In Queensland, improper pressure or force on the part of the police in obtaining alleged confessions seems, so far as one can tell sitting as an appellate judge, to be

CASE STUDY CONTINUED...



very uncommon, whereas, once, allegations of that sort made by the defence were routine, now they are rare, a reason no doubt being the introduction of the practice of electronically recording confessions. Nevertheless, the courts must in my view be vigilant in guarding the system against oppressive conduct and particularly against the possibility that a suspect may be 'worn down' or subtly intimidated by police questioning.

When considering questions of the present kind, it is important not to overlook that the community relies on the police to solve the problem of identifying offenders; sometimes, even in relation to extremely serious offences, the police are of course quite unable to do this. One of the methods they use in their task is to talk to people who may know something about the matter; some such people may, whether or not they were themselves involved in the offence being investigated, be uninterested in co-operating. Particularly in the case of major offences, one could hardly object to the use of trickery of the kind which occurred here, at least in an attempt to identify the offender, as opposed to the purpose of assembling evidence against him for prosecution purposes. Such trickery may be useful, not only in order that the offender may be brought to justice, but just as importantly to save what might otherwise have been future victims of his criminal conduct; the serial murderer is a prime example.

Yet if, by trickery and deception, discussion arranged by police identifies someone who appears to them to be the offender, it is suggested that quite different rules should apply, designed to discourage the apparent offender from saying anything further.

It is not clear to me what is the policy behind this notion: that once the police have evidence which seems to have some weight that an offence has been committed by a particular person, those methods which were unobjectionable in reaching that stage necessarily become

objectionable in any further questioning. The supposed transition seems particularly odd where evidence of commission of a serious offence has been obtained by a police officer acting as an undercover agent – a method in which trickery and deception are of the essence. If, having obtained such evidence at a chance, unrecorded, conversation, the officer (as was done with Ms Lally here) so arranges matters that an incriminating conversation is then recorded, how are the interests of justice hurt? What was perhaps unreliable evidence, of the undercover officer's recollection becomes reliable, tape-recorded evidence. Similar considerations apply to that notoriously suspect class of evidence, alleged admissions to fellow inmates of a prison. If an inmate claims to have been the recipient of an incriminating confidence in the prison yard, there are obvious risks in proceeding to prosecution of a case based on any significant part on that. The possibility of conviction of an innocent person, on false evidence, is reduced if the police take the sensible course of inviting their informant to attempt to renew the discussion with the supposed offender in circumstances where the conversation can be recorded.

The three principle categories of prosecution evidence are, in general, direct accounts of the commission of the offence, confessional evidence, and evidence of a circumstantial kind – such as the presence of the accused's fingerprints in a place where one would not have expected, were he innocent, to find them. The tendency of malefactors to commit their offences secretly or in a concealed way produces a result that often only the second and third types of evidence are available: i.e. confessional and circumstantial evidence. The laws disinclination to be persuaded by circumstantial evidence is marked by the rule that only if such evidence excludes all reasonable hypotheses consistent with innocence may a conviction be based on it. The result is that the presence or absence of confessional evidence is often critical,

CASE STUDY CONTINUED...

where there is reason to question whether the Crown can satisfactorily prove its case. Recorded confessional evidence is generally a sounder base of conviction than inferences, perhaps of a rather speculative kind, which are likely to be drawn from suspicious circumstances.

Compared with the other varieties of evidence likely to be available in seriously contested cases, recorded confessional evidence appears to be generally of a

high degree of reliability; allegations of such possible malpractices as tampering with a recording or of inducing the confession by unrecorded threats are very unusual. In these circumstances, I would not be prepared to hold, as in a statement by the High Court to that effect, that police conduct of the kind attacked here is unfair. In my opinion what the police did in relation to Ms Lally was fair and proper.

1. Who recorded the conversation of the appellant? [C]
2. How did the police come to know of the appellant's confession? [C]
3. Do you agree with Pincus JA that 'one could hardly object to the use of trickery of the kind' used in this case to identify the offender? Give your reasons. [A] [E]
4. Do you agree with Pincus JA when he says that the possibility of conviction of an innocent person, on false evidence, is reduced if the police take the sensible course of inviting their informant to renew the discussion with the offender and record the conversation? [A] [E]
5. Do you regard it as just and equitable if evidence of recorded conversations, which have been set up by the police and which are unknown to the offender, is accepted into evidence to prove the guilt of the offender? Give your reasons. [A] [E]

One of the most significant criminal cases in recent history in Queensland relates to confessional evidence obtained by recordings made by undercover police

CASE STUDY

R v Cowan; R v Cowan; Ex parte Attorney-General (Qld) [2015] QCA 87 (21 May 2015)

Facts: Daniel Morcombe left his home at Palmwood on the Sunshine Coast to catch a bus to Sunshine Plaza Maroochydore on 7 December 2003. He was killed by Cowan who was charged with the following offences:

1. Murder.
2. Indecent treatment of a child under 16 years of age.
3. Interfering with a corpse.

Cowan was found guilty of those offences. After a trial ending on 13 March 2014, Cowan appealed his conviction to the Queensland Court of Appeal, which delivered its judgement on 21 May 2015.

Cowan had been interviewed by police in relation to these offences in 2003, 2005 and 2006. He denied all

involvement in Daniel's disappearance. He continued those denials in a coronial inquest into Daniel's death in March-April 2011. The police suspected Cowan of being involved in the death of Daniel Morcombe.

Covert police operation

After Cowan left the inquest, the covert police operation commenced. It involved 36 undercover police officers from Queensland, Western Australia and Victoria. On the very plane trip back from giving evidence at the inquest to Western Australia where Cowan was living at the time, an undercover policeman, Joe Emeri, sat next to, met and befriended Cowan. Over the following months Emeri introduced Cowan to a group of men who appeared to be members of a criminal gang. They were, in fact, undercover police. Cowan befriended them and

CASE STUDY CONTINUED...

then committed various 'crimes' as part of that criminal gang. The crimes were not in fact real crimes but Cowan believed that they were, and he was paid for his involvement in them.

These crimes included:

- ▶ collecting money, sometimes from prostitutes;
- ▶ blackmail of a bank manager using photos of the bank manager in the company of a prostitute;
- ▶ a burglary involving \$50,000 worth of cigarettes;
- ▶ purchasing three pistols;
- ▶ buying false passports;
- ▶ collecting a stolen luxury car;
- ▶ collecting and transporting a large sum of money;
- ▶ collecting and transporting "blood diamonds" (diamonds sold to finance war);
- ▶ moving drugs from one location to another for \$8,000; and
- ▶ moving ecstasy pills.

Shortly before his confession, there was under discussion a future job worth over \$1 million, from which Cowan was to earn \$100,000. The impression given by the criminal gang was that they were a very powerful organisation that could fix things all over Australia, including within the Queensland Police Service. In turn they emphasised a need for loyalty and trust by each of the gang members. Everything was being recorded by the 'gang'. During these operations, Cowan became close to Jeff and Paul, two of the gang, who were undercover police officers.

On 29 July 2011 the Queensland Coroner's Court issued a notice recalling Cowan on 26 October 2011 to the inquest. It had not been finalised earlier in the year. One of the gang, pretending to be a corrupt police officer, told Cowan's mate, Paul, in Cowan's presence, of the notice of recall but said that it was something that could be fixed without any real difficulty. What was required of Cowan was to be honest with, and loyal to, the gang.

Cowan then told them of his prior sexual convictions and gave that as the reason why the police were pursuing him in relation to the Daniel Morcombe disappearance. He said, however, he had nothing to do with Daniel's disappearance. He claimed to his associates that his alibi was '100%'. Paul, his mate, told Cowan that his 'prior

convictions' could be fixed. He told Cowan that they didn't care what Cowan had done but that he had to be honest with them. Paul assured Cowan that the 'bosses will make everything cool'. Paul also told Cowan that he was a good mate of his and that he wouldn't tell anybody what Cowan told him.

Jeff, his other close associate in the 'gang', stressed to Cowan the importance of his being honest and that it didn't really matter what Cowan had done in the past. He assured Cowan that whatever he had done could be worked out, and that the gang could 'work some miracles'.

Paul continued to assure Cowan that 'they'll make it go away' and emphasised the importance of being honest. He said that although the boss was a '... mean looking dude and all that, he's actually a real good bloke' and that 'Arnold knows ... everyone'. Paul raised the possibility of sending Cowan away for a while. Cowan agreed, as long as he could contact his parents at least once a month. Paul discussed the big job coming up and Cowan expressed his hope to be part of it still. Paul said that he didn't think the subpoena from the coronial inquest would affect his being involved in the job but it was up to Arnold. Cowan continued to maintain that he had nothing to hide. Paul told him that the boss, Arnold, would want to talk to him.

The next day Arnold called Paul and said he wanted to see Cowan. Paul told Cowan that he should tell the truth to Arnold and that the meeting with Arnold might be about Cowan's problem with the notice recalling him to the coronial inquest going away. Cowan met Arnold alone. In that meeting Arnold emphasised loyalty and respect and honesty and that, if Cowan was to adhere to those principles, then notice to appear at the coronial inquest could be sorted out. Cowan then told him he had two previous convictions for child sex offences in 1987 and 1993. Arnold told him that he had received further information that morning stating that Cowan had murdered Daniel Morcombe. Arnold said that fact didn't bother him. He could sort that out as well and, in particular, find an alibi for Cowan. However Arnold had to work out 'what to do and it was a real dilemma'.

Arnold said he wanted to move forward with a big job but that Cowan was 'too hot'. Cowan then insisted that he had nothing to do with Daniel's disappearance but he explained that he was living in the area when Daniel disappeared and that, because of his previous convictions, the police had hounded him. Arnold said that he had received information that there was also a subpoena coming for Cowan. He said that, even though he understood Cowan was good for the gang, he had to

CASE STUDY CONTINUED...

weigh up the risks involved. Arnold then read to Cowan, from paperwork that he held in his hand, that 'coroner's inquest recommending shortly and Cowan will again ... in the spotlight. If you can't sort this out, I suggest you drop him like a hot potato'. Arnold did not discuss with Cowan the source of that document but again emphasised the need for honesty, trust and respect in the gang.

Confession: Arnold asked Cowan if there was 'any DNA or that kind of s...' in relation to the disappearance of Daniel Morcombe. Cowan said that there was no DNA and that they'd searched his car but found nothing. It was then that Cowan made all the admissions including pulling down Daniel's pants, killing him and disposing of the body and clothes. All this was recorded by way of an audio device. (The transcript of that conversation is available in the report of the case).

The next day Cowan flew to Queensland with the undercover police officers posing as gang members. Over the next few days he directed them to the site of the abandoned house where he had assaulted Daniel Morcombe, then to the sand mining site, pointing out where he left Daniel's body, and then to a small bridge over a creek into which he said he had thrown Daniel's clothes. These admissions constituted Cowan's confession.

Conviction: Two days later Cowan was arrested by other police officers. He was charged and ultimately convicted at the trial. He was given life imprisonment with parole eligibility only after 20 years on the count of murder. He was given 3½ years imprisonment on the second offence and 2 years imprisonment on the third offence.

Appeal: Cowan appealed to the Queensland Court of Appeal, asserting that his confessions and the evidence obtained as a result of his confessions should have been excluded from the trial (i.e. ruled to be inadmissible) under s10 Criminal Law Amendment Act 1894 (Qld).

Section 10

No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown.

**Decision:**

The first point of concern on appeal was whether the confession was made to persons in authority. The Court of Appeal held that they were not. At all times, the police officers were pretending to be part of a criminal gang and Cowan had made his confession to members of a criminal gang (not police), or so he believed. At no time did Cowan believe the undercover police were persons in authority and at no time did the undercover police officers invoke their official powers they had as police officers. It followed, therefore, that the confession was not induced by any promise or threat made by some person in authority but by criminal gang members.

The Court of Appeal then stated that even if the Court was wrong on that first point, the question then arose as to whether Cowan was induced by any threat or promise made by a person in authority to give the confession. The court said that Cowan made his confession because:

- the undercover police officers made it clear that Cowan could only stay in the gang if he told them the truth;
- Cowan would participate in the big job where he would receive his share of approximately \$100,000; and
- whilst he remained a principal suspect in Daniel's disappearance, the gang offered to provide Cowan with a water tight false alibi which would clear him at the inquest. This would only be available to him if he made a full and truthful confession to them.

The court therefore concluded that if there was a threat or promise from a person in authority made to Cowan (which they found there was not), Cowan was not acting upon such threat or promise when he confessed to the undercover police officers. He made his confession for the other reasons set out above. In short there was no threat or promise upon which he acted.

The appeal was dismissed.



CASE STUDY CONTINUED...

1. Who is the victim? [C]
2. Who is the accused? [C]
3. What crimes was the accused charged with? [C]
4. What does the expression 'undercover police officers' mean? [A]
5. What do the words 'find an alibi' mean? How important would that have been for the accused? [A]
6. The confession was captured on an audio device without the knowledge of Cowan. It was admitted into evidence. Do you think that it is fair and proper that a police recording of an accused making a confession be allowed into evidence if that audio recording was made without the knowledge of the accused? Give your reasons. [E]
7. The Court of Appeal concluded that the confession made by the accused was not made to any person in authority. How did the Appeal Court come to that conclusion? Do you think it is a just conclusion? Give your reasons. [A][E]
8. What were the three reasons that the Appeal Court decided the accused made his confession? [C]
9. You will see from this case that the police are allowed to become undercover operatives for the purposes of gaining evidence, and in this case, a confession. Do you think that such covert operations by the police should be allowed? Give your reasons. [E]

You will have seen from the above case that Mr Cowan was unsuccessful in saying that his confession was not voluntary. There are clearly circumstances in which confessions would not be voluntary. As referred to earlier, for example, if police threaten to harm some person who then confesses. It is obvious that in Australia any confession which is made by a person who is subject to threats or violence or other intimidatory acts by police would not be allowed into evidence. In Cowan's case you might think that the police were being deceptive in obtaining his confession. However deception alone by law enforcement officers does not of itself make the evidence inadmissible in court.

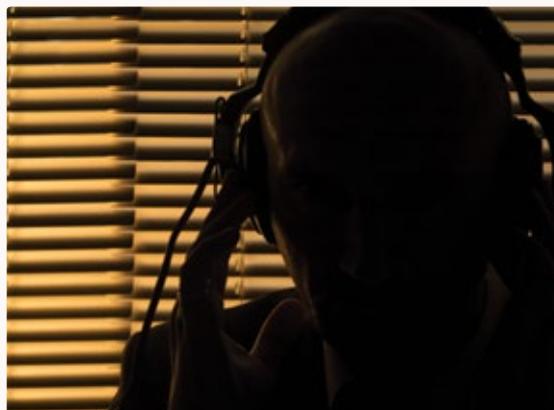
RESEARCH

1. Look at the case *Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v The Queen* [2007] HCA39 (30 August 2007). This is another High Court case similar to Cowan's case. Go to www.austlii.edu.au to access this High Court decision decided in August 2007. Contained within this one decision are four separate cases. In this case there were four appeals being heard by the High Court of Australia at the same time. The court did this because the legal points in the different cases were similar. Each of the appellants was challenging his/her conviction on the grounds that the confessional statements should not have been allowed into evidence. In each of the cases the police used what is now referred to as the **scenario technique**.

- a. Read the facts of:
 - i. Tofilau's case described by Gleeson CJ in paragraphs 70 to 78 of his judgment;
 - ii. Marks' case described by Gleeson CJ in paragraphs 83 to 85 of his judgment;
 - iii. Hill's case described by Gleeson CJ in paragraphs 89 to 94 of his judgment; and
 - iv. Clarke's case described by Gleeson CJ in paragraphs 100 to 106 of his judgment.

RESEARCH CONTINUED...

- b. After reading these facts do you agree with the comment that the statements by each of the appellants were:
- i. not made to a person in authority; and
 - ii. not induced by any threat or promise made to him/her?
2. After having considered the **scenario techniques** used in each of the above cases and in Cowan's case, do you agree that, as a matter of justice and equity, such confessions should be admitted into evidence and used to convict individuals? Give your reasons. [E]

**(B) FINGERPRINT EVIDENCE**

Fingerprint evidence is still regarded as extremely strong evidence. A fingerprint is 'an image or impression of friction ridge detail from the palmar surface of a person's hand'. It includes a digital image of such friction ridge detail. The police collect fingerprint evidence where possible at crime scenes. Crime scenes, as you are no doubt aware from television are regarded as places where nothing should be touched. Fingerprint evidence is so seriously regarded that there is a special provision in the PPRA that allows a police officer to pick up or move a knife or pistol or any object which might contain a fingerprint at a crime scene if there is a possibility that the fingerprint could be damaged or interfered with.



Fingerprints have, for a very long time, played an extremely important role in crime scene investigations. The prints are regarded as a unique means of identifying individuals. No two fingerprints are exactly the same. Also, a person's fingerprints do not change over time. The friction ridges on a person's fingers are formed before a person is born and remain unique throughout the whole of that person's life. They are therefore hugely important tools of evidence. Even when a person's fingerprints are not on any murder weapon but are found, for example, on a glass at the scene of a crime, they can still be used in ensuring convictions if the accused denies, for example, ever being at the crime scene. The first time a fingerprint comparison was used as evidence against a defendant was in Argentina in 1892. The first case in the United States was in 1904. Fingerprint evidence has since been used in millions of cases worldwide. Fingerprints can be left on many types of surfaces: glass, china, polished wood, porcelain, polished metal, patent leather, writing papers and similar types of surfaces.

(C) CRIME SCENE EVIDENCE

Crime scenes are extremely important for the police in gathering evidence. The police are given specific powers under the PPRA to enter a place that a police officer reasonably suspects is a crime scene (s164) and then they have power to establish the crime scene.

In establishing a crime scene, a police officer can stop people entering a building, put barricades or tapes around a particular area or display a written notice stating that the place is a crime scene and that unauthorised entry is prohibited (s165). You can see immediately that such action may interfere with people's property rights. However, the PPRA makes the actions of the police in entering and establishing a crime scene lawful.



After establishing the crime scene, the police must, as soon as is reasonably practicable, apply to a judge or magistrate for a crime scene warrant. If it is intended to do something that might cause structural damage to a building, then the application must be made to a Supreme Court judge (s166). Once a crime scene is established, it is the responsible police officer at the crime scene who must preserve the evidence at the crime scene (s169) and restrict access to the crime scene (s168). The powers of the police at a crime scene allow for any necessary investigation, which clearly entails searches and inspection of anything at the crime scene, to obtain evidence of the commission of an offence or evidence as to who committed the offence.



The police can open anything at the crime scene that is locked. They can use any electricity at the crime scene for their investigation. They can dig up anything at the crime scene. They can remove a wall or ceiling linings or floors of a building. They can dismantle a motor vehicle. They can seize anything that may provide evidence of the commission of an offence (s176).

It is regarded as extremely important to establish crime scenes and then to carefully examine the scene to obtain any physical evidence that might assist in the police investigation. The evidence found at a crime scene is carefully handled and, as you have seen from many television shows, is carefully bagged and then sent off to scientific laboratories for examination. If you are interested in the range of results possible from the scientific examination of the physical evidence at a crime scene, see the US Department of Justice, Federal Bureau of Investigation Laboratory Division, Handbook of Forensic Services – 2014 which is available on the internet.

(D) DNA EVIDENCE

DEOXYRIBONUCLEIC ACID (DNA)

A person's DNA is unique. DNA is important because it can help determine the identity of the victim and it can establish that a suspect was present at the crime scene. It can be present in all kinds of evidence including hair, skin, saliva and blood. In fact any part of the body can provide evidence in which a person's DNA is present. Scientific analysis then can determine whether the DNA in the piece of evidence matches the DNA of a suspect.



Even minute amounts of biological material can link a victim to a crime or can establish the identity of the victim of the crime. In *Cowan's* case (referred to earlier) the human bones found at the Glasshouse Mountains were the remains of the deceased Daniel Morcombe. It was DNA analysis which established that fact.

DNA analysis can also be used to prove that a person did NOT commit a crime and that it was someone else who did. There can be re-examination of evidence collected during old investigations which shows that the DNA profile of a person who was convicted of that crime does not match the DNA profile from biological samples collected at the scene/s of crimes. This has resulted in many pardons being granted. DNA samples can identify weapons used in the commission of crimes where the weapons contain even small amounts of biological material.

The following case study shows the use of DNA profiling in a police investigation. It also illustrates many other ways in which the police conduct a criminal investigation.

CASE STUDY

R v Hannaford [2017] QCA 36 (17 March 2017)

Facts: Mr Hannaford (H) was charged with the murder of Ms Lynch (L). He had been in a relationship with the deceased until about one month before she went missing. No body was ever found. L had broken the relationship off. H did not accept that the relationship had ended. He repeatedly telephoned L. He appeared unannounced at her unit before being told to get out by the deceased. The deceased had told a witness who gave evidence at the trial that H would telephone her, hang up, and park his car around the corner ... then come back and look through the windows. L's daughter-in-law gave evidence that L felt harassed and threatened. Towards the end of June 2012, H approached L's sister at a country music muster and said, "If Gail keeps doing the wrong thing by... a bloke, she's going to get hurt." On a later occasion he told L's sister that he had telephoned L in order to let L know that her "life was a lie".

On 3 July 2012, after speaking to a friend as well as family members, L went missing and was never seen again. L's sister tried to contact her and then took the

police to her unit on 5 July. Using a key provided by the landlord, the police and sister entered. The sister noticed that a number of things were out of place and that a rug from the kitchen floor had been removed. The police suspected foul play. H was spoken to several times by the police. He denied knowing where L was, though he admitted that he knew her. He told the police, in answer to the question as to whether he knew where she was, "No, I don't, her family told me she was on – going on holidays."

On 10 July 2012, H was spoken to again by the police. A written statement was obtained from him in which he denied any knowledge of L's whereabouts. On the following day searches were conducted of H's car and H's residence. His mobile phone and shoes were seized. After his shoes were seized, he was arrested and subjected to a range of forensic procedures. After these procedures he was released and was accommodated for a night in a hotel because his residence was the subject of a crime scene warrant. During a search of the crime scene the next day the police found an axe and recovered the contents of H's rubbish bin.

CASE STUDY CONTINUED...

After the search of his residence was completed on 12 July 2012 the police wished to speak to H again but couldn't locate him. He was found two weeks later in the toilet block at Picnic Point park in Toowoomba. He was injured, dishevelled, and in an unresponsive state. The police then charged him with murder. He was subsequently put on trial. At the trial H elected to give no evidence.

All of the evidence at the trial was circumstantial. The body of L was never found and nobody witnessed H causing the death of L. The evidence included the following:

- ▶ L had not been seen or heard of since 3 July 2012. This was the situation right up until the date of the trial in late 2015.
- ▶ L's bank accounts were untouched from after 3 July 2012.
- ▶ CCTV footage was recovered and showed that a motor vehicle similar in appearance to a motor vehicle driven by H was in the vicinity of L's unit at the relevant time. This vehicle drove along the street where L lived at 7.52pm on 3 July 2012 and was filmed again near the unit at 1.50am the next morning.
- ▶ A flyscreen in L's unit was partially dislodged. Latent impressions were recovered from the windowsill and architrave of that window. These impressions were consistent with the pattern details of a well-known retail brand of rubber gloves. The packaging for the same brand of gloves was located in H's rubbish bin.
- ▶ Bloodstains were found on the floor of L's bedroom, on the mattress overlay on her bed, as well as on a stuffed toy, a wardrobe, a lampshade, a pot plant and the floor of the garage of L's house. Samples were taken of these bloodstains and then subjected to DNA analysis. The DNA profile obtained from each of the samples was found to be an effective match with H's DNA. Expressed as a probability, there was a one in 1,700 million chance that the source of the blood on each of these objects and places was not that of H.
- ▶ The luminol examination of the bathroom, sink and tapware also revealed the presence of bloodstains. The DNA profiles obtained from these stains were an effective match with H's DNA profile (with the same probability as the bloodstains referred to in the paragraph above).
- ▶ There was a missing rug in L's kitchen as identified by L's sister. The missing rug, red in colour, on the floor of L's kitchen was large enough for use in the disposal of a body (the evidence of L's sister was that the rug was approximately three metres in length and width). Fibres left behind in the kitchen were compared to fibres from the boot of H's car and were found to have several features in common.
- ▶ Bloodstains were detected on a number of fabric shopping bags found in the boot of H's car. Those stains were subjected to DNA analysis and a DNA profile was obtained which matched the DNA profile of L. Hairs from L's hairbrush and bristles from her toothbrush were analysed and a DNA profile of L was obtained.
- ▶ L's mobile telephone phone 'communicated' with a cell tower in Rockville at 6.11am on 4 July 2012, suggesting that her telephone had been moved from Warwick to Toowoomba.
- ▶ The axe found at H's address was purchased by him from a hardware store in Toowoomba at 4.54pm on 4 July 2012. The blade was swabbed and later analysed. There was a slow, but positive reaction for the presence of blood. In a similar area on the blade, a DNA profile was obtained which matched the likely DNA profile for L.
- ▶ H was observed by his employer on 5 July 2012 to have injuries to his hands. "A couple of fingers on each hand" were covered with tape. There was also "a scratch or a scrape" on the back of his right hand. H had told his employer that he had been bitten by his own dogs. His employer gave the evidence of H's injuries.
- ▶ Evidence was given that H was observed tending a fire in the backyard of his property on 10 July 2012. Two days later police located a number of partially burnt articles in H's rubbish bin. These included ladies' pyjamas, ladies' underpants, sheets, pillowcases, a stuffed toy and socks. The partially burnt sheets and pillowcases matched similar bed clothes found at L's unit (a burnt fitted sheet appeared to match a top sheet found at L's residence). They also shared a similar laundering history.
- ▶ Masking tape with bloodstains on it was also found in H's rubbish bin. The masking tape was subjected to DNA analysis and a mixed profile was obtained. The major DNA profile in the mix was an effective match with H's DNA. The same probability applied as referred to above with respect to the bloodstains on the floor

CASE STUDY CONTINUED...

and other places in L's residence. The minor profile matched the DNA profile of L.

- ▶ The prosecution relied on the following conduct that they argued revealed the consciousness of guilt:
 - ▶ Flight after his initial arrest and subsequent release on 12 July 2012 until he was located at Picnic Point on 26 July 2012; and
 - ▶ The telling of a lie to a police officer in response to the question as to whether he knew where she was: "No, I don't, her family told me she was on – going on holidays." Evidence was given by the family that that did not occur.
- ▶ The prosecution argued that there was evidence of motive in:
 - ▶ the expressions of anger and hurt by H towards the L which is set out above; and
 - ▶ a reliance on an unsent letter written by H to L which was found at H's residence. The letter read in part, "So whatever happens to you, you deserve it so no other blokes will cop it from you. The world will be better off without you as you are a nasty, cruel, sarcastic person that acts like a 5 year old."

Decision:

- ▶ The jury found H guilty of murder. Mr Hannaford appealed but was unsuccessful.

1. How did this criminal investigation process start? [C]
2. Part of the evidence was that L's bank accounts were untouched after 3 July 2012. How do you think the police got this evidence? [C] [A]
3. What is CCTV footage? While we are not told in the case where the footage came from, suggest one way in which the police may have been able to obtain such footage. [C] [A]
4. What do the words "luminol examination" mean? How is it used by police in obtaining bloodstains? [C] [A]
5. The DNA profile obtained from the blood samples was found to be an effective match with H's DNA. What was the probability once the DNA profile was obtained of the blood not being the blood of H? [C]
6. How did the police obtain the evidence that there was a missing rug in L's kitchen? [C]
7. The police located bloodstains of L on fabric shopping bags. Why was that evidence important? [A]
8. How would the police have been able to obtain the evidence that L's mobile phone had communicated with a cell tower in Rockville? Why was that evidence important? [C] [A]
9. How did the police obtain the evidence of injuries to H's hands which were seen on 5 July 2012? What conclusions could be drawn from the state of H's hands? [C] [A]
10. How do you think the police obtained evidence of H lighting a fire in the backyard of his property on 10 July 2012? How important do you regard that evidence? [C] [A]
11. The masking tape had bloodstains of both H and L on it. If you were on the jury determining whether H was guilty or not, what discussions do you think you would have had as to the importance of this evidence? [A]
12. There was no body ever found. Do you think that there should ever be a conviction of a murder when no body is ever found? [E]
13. Looking at the whole of the evidence, give your opinion as to the strength of the evidence against the accused. [A]
14. Should any of the actions of the police in this investigation have not been allowed, for example, the police searching the suspect's rubbish bin? [A] [E]

5.3 RIGHTS AND RESPONSIBILITIES OF POLICE, SUSPECTS, ACCUSED PERSONS AND VICTIMS

Police need special powers to investigate alleged crimes. They need to be authorised to go beyond what ordinary people in the community are legally able to do. They need to be able to question people. They need to be able to search people and search places in the community which may be connected with an offence. They need to be able to arrest people. As previously set out in this chapter (5.1) special powers have been given to police under the Police Powers and Responsibilities Act 2000 (Qld) (the PPRA). We will consider the following powers and responsibilities of the police:

(A) SEARCHING OF PROPERTY

(B) SEARCHING A PERSON

(C) SEARCHING MOTOR VEHICLES

(D) CARRYING OUT FORENSIC PROCEDURES

(E) TAKING DNA SAMPLES

(F) ARRESTING AND DETAINING PERSONS

(G) RIGHTS AFTER DETENTION

(A) SEARCHING OF PROPERTY

The police must obtain permission from a person in possession of a property to enter and search it. If **permission** is refused they must obtain a search warrant. This is a document which gives powers to police to search places. The police can obtain a **search warrant** which is issued by a Justice of the Peace, a Magistrate or Supreme Court judge, s150 and s151 of the PPRA set out the circumstances in which police can apply for a warrant to enter and search a place (a search warrant). The most common ground for the police to obtain a search warrant is so that they can obtain evidence of the commission of an offence at a particular place. Once a warrant is issued, the police have the power to enter the place stated in the warrant and then to search the place. The search warrant entitles the police to identify and collect any physical and documentary items of evidence which are relevant to their investigation.

The search can involve even a power to dig up the land, to photograph anything, to remove walls or ceiling linings or even panels of a vehicle to search for evidence. However the warrant only allows for structural damage to a building if the warrant was issued by a Supreme Court Judge and authorises the exercise of such a power. It also includes a power to search anyone at the place who the police suspect has been involved in the commission of an offence. The police must give to the occupier a copy of the search warrant, or if there is no person present, leave a copy in a conspicuous place.

The police also have the right to search a person's premises without a search warrant (an emergent search). This power, however, exists only in certain circumstances. It really only relates to where a police officer reasonably suspects that evidence of the commission of an offence will be lost – namely concealed or destroyed – unless the place is immediately entered and searched. This power is set out in s160 of the PPRA. This power also can only be exercised if the offence the police officer suspects has been committed is a 'Part 2 offence' set out in s159 of the PPRA.



CASE STUDY

R v Dang; R v Duong [2015] QSC 377 (25 August 2015)

Facts: Dang was a target of a police investigation and was one of nine people who the police were about to arrest. As part of the police operation which was due to be carried out on 4 September 2013, search warrants were obtained from the Magistrate at Holland Park. The search warrant relating to Dang was for his residential address at Camira which was believed by the police to be where Dang was living. As part of the coordinated operation, there was a briefing at Dutton Park police station at approximately 5.00 pm for all the police officers involved in the closure of the operation. Detective Green had the job of executing the search warrant at Dang's address at Camira. Other police officers were to execute other search warrants on other residences at the same time.

When Detective Green arrived at the Camira address it was in darkness. She decided not to execute the search warrant. She then obtained information that Dang was living at another address at Harvey Place, Calamvale. Detective Green and another police officer then drove to Calamvale to see if they could locate Dang's car at or near that address. Other police officers located Dang's car at Harvey Place and telephoned Detective Green at about 9.05 pm. Detective Green then sighted Dang's car while travelling to Harvey Place. In fact Dang's car pulled in behind Detective Green's police car which was unmarked but which had a red and blue light (not switched on) on the back parcel tray. Detective Green turned off first and Dang's car continued into Harvey Place and stopped outside the residence which was the address the police had for Dang, and where it had been parked previously. The driver of Dang's car was a female and not Dang. The police officers, including Detective Green, discussed what they should do. Detective Green was concerned that the female driver would alert Dang of the police presence and the evidence they expected to find at Dang's residence would be lost. Detective Green was aware of the information the police had received on that very day. Dang had taken possession of a very large quantity of drugs. There was also a concern the other search warrants had been executed and that

Dang may have been telephoned by an associate about the arrests of others. Detective Green then conducted an emergent search (that is, a search without a warrant) of Harvey Place, Calamvale.

Detective Green was successful. She seized evidence of illegal drugs, namely methamphetamine and heroin in the search. Dang was charged along with others. The charges were defended. It was alleged by the defence that any evidence seized from Harvey Place should be excluded as evidence in the trial because the evidence was seized unlawfully.

Legal issue: Was the evidence of drugs seized lawfully by the police and, therefore, could it be allowed to be used (admissible) in the trial of the accused?

Decision: The search, without a warrant, would only be lawful if the terms of s160 of the PPRA were met. Section 160, is headed 'Search to prevent loss of evidence'. This section allows a police officer to enter a place and exercise search warrant powers as if a search warrant was already given, if the police officer 'reasonably suspects' that there is something at a place in the possession of a person which is evidence of the commission of a Part 2 offence (in this case the possession of the drugs suspected held by Dang and Duong were a Part 2 offence) and the evidence may be concealed or destroyed unless the place is immediately entered and searched.

Detective Green had received information that Dang was present at Calamvale as opposed to Camira, and, she and other investigators had identified Dang's car parked at the house at Calamvale. There was also a real risk that the police car had been identified by the female driver of Dang's car who had returned to the residence and that the woman would advise Dang and others in the house of the possible existence of police officers watching the house. As a result Dang might conceal or dispose of the drugs or other evidence. It was held, therefore, that the search without a warrant of the address at Calamvale was justified under s160 of the PPRA and that the application by the defence to exclude evidence was refused.

1. What is an emergent search? [C]
2. What was the evidence seized in the search which the defence was trying to exclude from the trial? [C]
3. What two things must a police officer reasonably suspect before a search without a warrant is justified under s160 of the PPRA? [C]
4. What made the police officer believe there was a risk of the evidence being concealed or destroyed? [C]
5. Do you think that the belief of the police officer referred to in the question above was 'reasonable'? [A]
6. Do you think the police should have such a right to enter a person's house and search it as is provided for in s160? [E]

(B) SEARCHING A PERSON

The police have power to search people without a warrant. This power arises when a police officer reasonably suspects that any of a whole range of circumstances set out in s30 of the PPRA exist. The prescribed circumstances set out in s30 are wide. You will see, for example, that they include a police officer reasonably suspecting that a person has in his/her possession:

- ▶ some form of weapon;
- ▶ unlawful dangerous drug;
- ▶ stolen property;
- ▶ some type of house breaking implement;
- ▶ something which a person intends to use or cause harm to himself or another; or
- ▶ unlawfully obtained property in his or her possession.



There are now provisions in the PPRA about what the police should do in conducting personal searches. These are contained in s624, s629 and s630, which deal generally with:

- ▶ limiting embarrassment to the person being searched;
- ▶ ensuring that the search is conducted by a police officer of the same sex as the person to be searched or by a doctor if the search requires the removal of clothing during the search, telling the person why it is necessary to remove the clothing and giving the person the opportunity to remain at least partly clothed during the search;
- ▶ at all times conducting the search in a way that provides reasonable privacy for the person being searched; and
- ▶ if the police officer seizes clothing during the search (for example, clothing which may be evidence of the commission of an offence), ensuring that the person is left with or given reasonably appropriate clothing to wear.



WHAT DO YOU THINK?



Are the precautions set out in s624, s629 and s630 reasonable having regard to balancing a person's right to privacy against police having sufficient powers to carry out their work? [E]

(C) SEARCHING MOTOR VEHICLES

In a similar way a police officer can search motor vehicles without warrants provided he or she reasonably suspects any of a series of prescribed circumstances set out in s32 of the PPRA exist.



PRACTICAL APPLICATION

31 SEARCHING VEHICLES WITHOUT WARRANT

- (1) A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist may, without warrant, do any of the following—
 - (a) stop a vehicle;
 - (b) detain a vehicle and the occupants of the vehicle;
 - (c) search a vehicle and anything in it for anything relevant to the circumstances for which the vehicle and its occupants are detained.
- (2) Also, a police officer may stop, detain and search a vehicle and anything in it if the police officer reasonably suspects—
 - (a) the vehicle is being used unlawfully; or
 - (b) a person in the vehicle may be arrested without warrant under section 365 or under a warrant under the Corrective Services Act 2006 .
- (3) If the driver or a passenger in the vehicle is arrested for an offence involving something the police officer may search for under this part without a warrant, a police officer may also detain the vehicle and anyone in it and search the vehicle and anything in it.
- (4) If it is impracticable to search for a thing that may be concealed in a vehicle at the place where the vehicle is stopped, the police officer may take the vehicle to a place with appropriate facilities for searching the vehicle and search the vehicle at that place.
- (5) The police officer may seize all or part of a thing—
 - (a) that may provide evidence of the commission of an offence; or
 - (b) that the person intends to use to cause harm to himself, herself or someone else; or
 - (c) if section 32 (1) (b) applies, that is an antique firearm.
- (6) Power under this section to search a vehicle includes power to enter the vehicle, stay in it and re-enter it as often as necessary to remove from it a thing seized under subsection (5) .

32 PRESCRIBED CIRCUMSTANCES FOR SEARCHING VEHICLE WITHOUT WARRANT

- (1) It is a prescribed circumstance for searching a vehicle without a warrant that there is something in the vehicle that—
 - (a) may be a weapon, knife or explosive a person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order or an interstate domestic violence order; or
 - (b) may be an antique firearm that a person possesses and the person is not a fit and proper person to possess the firearm—
 - (i) because of the person's mental and physical fitness; or
 - (ii) because a domestic violence order has been made against the person; or
 - (iii) because the person has been found guilty of an offence involving the use, carriage, discharge or possession of a weapon; or
 - (c) may be an unlawful dangerous drug; or
 - (d) may be stolen property; or
 - (e) may be unlawfully obtained property; or



PRACTICAL APPLICATION CONTINUED...

- (f) may have been used, is being used, is intended to be used, or is primarily designed for use, as an implement of housebreaking, for unlawfully using or stealing a vehicle, or for the administration of a dangerous drug; or
- (g) may be evidence of the commission of an offence against any of the following—
- ▶ the Racing Act 2002
 - ▶ the Racing Integrity Act 2016
 - ▶ the Corrective Services Act 2006 , section 128 , 129 or 132
 - ▶ the Nature Conservation Act 1992 ; or
- (h) may have been used, is being used, or is intended to be used, to commit an offence that may threaten the security or management of a prison or the security of a prisoner; or
- (i) may be tainted property; or
- (j) may be evidence of the commission of a seven year imprisonment offence that may be concealed or destroyed; or
- (k) may be evidence of the commission of an offence against the Criminal Code , section 469 that may be concealed on the person or destroyed if, in the circumstances of the offence, the offence is not a seven year imprisonment offence; or
- (l) may be evidence of the commission of an offence against the Summary Offences Act 2005 , section 17 , 23B or 23C ; or
- (m) may be something the person intends to use to cause harm to himself, herself or someone else; or
- (n) may be evidence of the commission of an offence against the Penalties and Sentences Act 1992 , section 161ZI.
- (2) Also, the following are prescribed circumstances for searching a vehicle without a warrant—
- (a) the driver or a passenger in the vehicle has committed, or is committing, an offence against the Summary Offences Act 2005 , section 10C;
 - (b) the vehicle is being used by, or is in the possession of, a person who has consorted, is consorting, or is likely to consort with 1 or more recognised offenders.



1. How are s31 and s32 of the PPRA connected? [C]
2. What does 'reasonably suspects' in s31 mean? How does it stop police officers stopping cars randomly? [C] [A]
3. Describe the powers of police under s31. Explain why these may be necessary. [C] [A]
4. Do the 'prescribed circumstances' in s32 include speeding or driving under the influence of alcohol? Should they be included? [C] [E]

(D) CARRYING OUT FORENSIC PROCEDURES

The PPRA sets out the circumstances in which the police can carry out forensic procedures and, in particular, have qualified persons such as doctors, nurses and dentists carry out such procedures. They can be carried out with the consent of the person. If the person refuses to give consent, the police can obtain a forensic procedure order from a Magistrate by making an application. A qualified person who conducts an intimate forensic procedure is a doctor, dentist or forensic nurse examiner. A typical forensic procedure would be having a doctor or nurse inspect a person's body for identifying features. The police might wish for a dentist to take a dental impression of a person's mouth or examine a bite mark on a person.

(E) TAKING DNA SAMPLES

These procedures are important because they can help identify victims and explain what happened when a crime was committed. The police may arrange for a doctor or nurse to take a DNA sample for DNA analysis. Police officers themselves may be authorised by the Commissioner of Police to take DNA samples if they have completed a course of training approved by the Commissioner of Police for that purpose and have the necessary experience or expertise to take the sample. The DNA sample can be taken from a person at a police station, a hospital, a prison or detention centre or any other place that the police consider is appropriate in the circumstances. The PPRA sets out in s478 that the person taking the DNA sample can only take it from a person by way of a mouth swab or by the collection of hair (including roots) from the person.



There is a concern in our community that, once a DNA sample has been taken, the results should be destroyed. If the person from whom a sample is taken is innocent, s490 of the PPRA sets out that a DNA sample taken from a suspect must be destroyed. Generally, if the indictable offence is discontinued before a court, or a person is found not guilty of the offence, or if a proceeding for the offence is not started within one year, then the DNA sample should be destroyed immediately. However, if the DNA sample has been given by consent, then unless the person giving the consent limits the purposes of his or her consent to the purpose stated by the police officer when asking for the DNA sample, the results of the DNA analysis of the sample may be included in the Queensland DNA database (QDNA). This can be used by the Commissioner of Police for performing any function of the police service. If a person, however, has been found guilty of an indictable offence or is not proceeded against for an indictable offence because of that person being unfit for trial because of mental illness, the DNA sample will not be destroyed and will form part of the Queensland DNA database.

(F) ARRESTING AND DETAINING PERSONS

If a warrant is issued for the arrest of any person, then it is obviously lawful for a police to act under the warrant and to arrest that person. To arrest a person can include to apprehend, take into custody, detain, and to remove to another place for examination or treatment. The most common form of arrest warrant is issued when a person fails to turn up in court at the prescribed time in breach of his/her bail conditions. Unless there is an explanation made to the court by a defence lawyer who turns up at court and explains to the court the reason why his client is not present, a warrant is usually issued by the court. If there is a failure by a person to turn up on a couple of occasions at the prescribed time in court, then,

despite the best efforts of a defence lawyer, an arrest warrant can still be issued. It is also possible for the police to apply for an arrest warrant before proceedings have been started against the person. The usual grounds for such an arrest warrant are that the police reasonably believe that to simply commence proceedings would not be an effective means to bring the suspect or possible offender to court. The police can also arrest a person without a warrant. Traditionally the police have always been able to arrest a person who a police officer reasonably suspects has committed (or is committing) an indictable offence. In the case of children it needs only to be any offence. In addition, there is set out in s365 of the PPRA a whole range of reasons as to when a police officer may arrest a person without warrant. These include the following:

- ▶ To prevent a continuation of an offence.
- ▶ To prevent the harassment of, or interference with, a person who may be required to give evidence relating to an offence.
- ▶ To prevent the fabrication of evidence.
- ▶ To preserve the safety and welfare of any person because the offence is an offence under the *Domestic and Family Violence Protection Act 2012 (Qld)*.

HYPOTHETICAL

Mary was living in a defacto relationship with Tony. Mary was often the victim of domestic violence of a physical kind. A neighbour, who had heard on many occasions the sounds of violence, saw Tony repeatedly striking Mary through her window into the kitchen window of Mary's and Tony's house. She called the police. When the police arrived, they found that the physical violence was continuing.

1. In what circumstance do the police have the right to arrest Tony without any warrant? [C]
2. Does the fact that Mary refuses to complain to the police despite her severe injuries make any difference to the police power to arrest? [A]

(G) RIGHTS AFTER DETENTION

It follows from what has been said above that the police can detain a person for investigation or questioning, if the police suspect that person of having committed an offence. However, it must be an indictable offence. There are very important safeguards set out in the PPRA. These safeguards include:

- ▶ time limits for the period of questioning (see s403 and s404 PPRA);
- ▶ a person having a right to communicate with a friend, relative or lawyer (s418 PPRA);
- ▶ special provisions when questioning Aboriginal people and Torres Strait Islanders (s420 PPRA);
- ▶ special provisions about the questioning of children (s421 PPRA);
- ▶ special provisions with respect to questioning of persons with impaired capacity;
- ▶ special provisions with respect to questioning of intoxicated persons (s423 PPRA);
- ▶ a requirement to caution persons (s431 PPRA);
- ▶ a right for a person with insufficient knowledge of the English language to an interpreter (s433 PPRA); and
- ▶ the right of a person to be electronically recorded (s435 PPRA).

REVIEW

1. Describe and explain the following concepts and principles: [C] [A]
 - (a) Oral evidence.
 - (b) Confessions.
 - (c) Section 10 of the *Criminal Law Amendment Act 1894* (Qld).
 - (d) The scenario technique used by police.
 - (e) Fingerprint evidence.
 - (f) How police establish a crime scene.
 - (g) DNA and its importance to the criminal investigation process.
 - (h) The power of police to search property.
 - (i) The power of police to search persons.
 - (j) The power of police to search motor vehicles.
 - (k) The power of police in undertaking forensic procedures.
 - (l) The retention of DNA samples in a database.
 - (m) Circumstances when arrests can be conducted without a warrant.
 - (n) The rights of persons after detention by police.

TOPIC 2: CRIMINAL INVESTIGATION PROCESS

CHAPTER 6: THE NATURE AND EXTENT OF CRIMINAL OFFENCES

FOCUS SUBJECT MATTER

- 6.1 INDICTABLE AND NON-INDICTABLE OFFENCES
- 6.2 THE ELEMENTS OF AN OFFENCE
- 6.3 OFFENCES AGAINST THE PERSON
- 6.4 SEXUAL OFFENCES
- 6.5 PROPERTY OFFENCES
- 6.6 MOTOR VEHICLE OFFENCES
- 6.7 OFFENCES RELATING TO PUBLIC ORDER
- 6.8 ATTEMPTS TO COMMIT CRIMES
- 6.9 PARTIES TO OFFENCES
- 6.10 STATISTICS OF CRIME IN AUSTRALIA

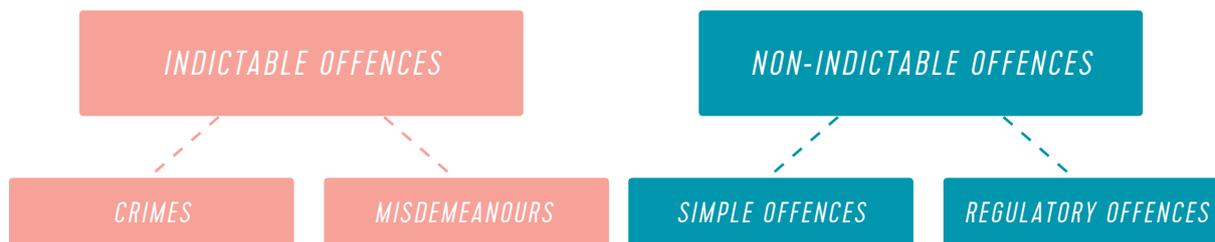
FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ the distinction between indictable and non-indictable offences
- ▶ the elements of offences in Queensland;
- ▶ the main types of offences in Queensland;
- ▶ what is required to prove these offences;
- ▶ what is an attempt offence;
- ▶ the scope and operation of the party provisions in the *Queensland Criminal Code*; and
- ▶ the extent, patterns, relationships, and trends of crime in Australia.

6.1 INDICTABLE AND NON-INDICTABLE OFFENCES

Criminal offences are classified in different ways. One of the ways is to divide them into four categories and this is the scheme used in s3 of the *Criminal Code, 1988 (Qld)*



This classification is important for several reasons. First, it determines in which criminal court the trial will be held and whether there will be a jury. Crimes and misdemeanours are indictable offences and will be tried in the District or Supreme courts before a judge and jury. **Indictable** means these offences must come to trial on indictment, which is a written charge to an accused person to stand trial before these courts with a jury. The more serious offences, such as doing grievous bodily harm and rape, are indictable offences.

IN THE SUPREME COURT OF QUEENSLAND
No. 0001 THE QUEEN
Against
ANDREW ACCUSED
and
CLARE CO-ACCUSED
INDICTMENT
For
Count 1: Attempted Murder
ALTERNATIVELY
Count 2: GBH with intent to do GBH
DIRECTOR OF PUBLIC PROSECUTIONS, BRISBANE

IN THE SUPREME COURT OF QUEENSLAND

Southport Magistrates Court Files Nos PA 001/12 & PA 10/12
SWA DPP FILE NO: S123& 456
THE QUEEN against ANDREW ACCUSED
and
CLARE CO-ACCUSED
The 21st day of November, 2012

Count 1
306(A)
Form 179 (1)

PETER JAMES PROSECUTOR, duly appointed to prosecute for Our Lady the Queen in this behalf, informs the Court
that on the 10th of March, 2012 at the Gold Coast in the State of Queensland, ANDREW ACCUSED and CLARE CO-ACCUSED attempted unlawfully to kill VICTORIA ANN VICTIM
ALTERNATIVELY

That on the tenth day of March, 2012 at the Gold Coast in the State of Queensland ANDREW ACCUSED and CLARE CO-ACCUSED with intent to do some grievous bodily harm to VICTORIA ANN VICTIM unlawfully did grievous bodily harm to the said VICTORIA ANN VICTIM.

Count 2
Section 317
Form 189

Simple and regulatory offences are **non-indictable** and are always heard in a **Magistrates Court** without a jury. This is called a **summary trial** which begins with a formal written charge called a complaint. Witnesses give evidence and are cross-examined in the same way as in a jury trial except that it is the magistrate who has to decide whether the offence has been proved beyond reasonable doubt. If the accused is found to be guilty, he or she is sentenced. If the accused is found to be not guilty, he or she will be discharged.

You will know whether an offence is indictable or not, because each offence section contained in the Code will state whether it is a crime, misdemeanour or simple offence. All regulatory offences are in the *Regulatory Offences Act 1985(Qld)* and are minor offences.

The classification is also relevant for the **time limits for bringing an offence to court**. A complaint of a simple offence must be made within one year. The prosecution of an indictable offence has no time limits. The classification is also relevant for determining whether **legal aid** may be provided.

Certain indictable offences can be also heard summarily when the law allows.

From 2010, there are several new categories of indictable offences in s552BA QCC which are to be dealt with summarily (unless the magistrate is satisfied there are exceptional circumstances). Some examples are offences under *Drugs Misuse Act (Qld)* including possession of unlawful drugs (where there is no commercial purpose) and when the prosecution elects to have it heard summarily. Also included are **all indictable offences with a maximum penalty of three years or less**. Examples are: common assault (s340 QCC) dangerous driving (s328A(1) QCC) assault with intent to steal (s413 QCC) and demanding property with intent to steal (s414 QCC).

Also to be heard in the Magistrates Court are all offences in Part 6 QCC relating to property and contracts, except for those serious offences such as robbery and arson. However, excluded are offences that relate to secret commissions. This is why Queensland's most notorious case of a secret **commission** - the case of *Nuttall* was not heard in the Magistrates Court.



Ch 1.1

PRACTICAL APPLICATION

Find the following offences in the Criminal Code of Queensland (available at <http://www.legislation.qld.gov.au>) and determine:

1. if each is a crime, misdemeanour or simple offence; and [A]
2. if each is an indictable offence or a non-indictable offence. [A]

Section 78	Interfering with political liberty
Section 59	Member of Parliament receiving bribes
Section 207	Disturbing religious worship
Section 507	Fraudulent use of adhesive stamps
Section 323	Wounding and similar acts
Section 321A	Bomb hoaxes



HYPOTHETICAL

After a student received a permanent injury to her eye from being shot with a BB (ball bearing) gun, four friends from her school decide to protest publicly against the availability of ball bearing guns. They marched along the street from their school into the local shopping area. Each carried a ball bearing gun raised in their right hand and they play a recorded tape of loud gun shots. The four are charged with 'Unlawful Procession', an offence in s77 of the *Criminal Code* (Qld). It is a simple offence.

1. In which court would this case be heard? [C]
2. Could the students have a jury trial? [C]
3. Look at s77 of the Code and identify what elements would have to be proven against the students. <http://www.legislation.qld.gov.au> [A]
4. Then write out what the complaint (formal written charge) might state. [A]
5. Should the students be arrested or receive a summons to appear? [A]
6. Would there be any excuses or defences that could be used? (See Ch 10) [A]
7. Be the magistrate and write your decision. [A]
8. Would there be any mitigating factors you would advise the students to use if they were convicted of this offence? [A]
9. What is the other situation in which mitigating factors are relevant? [A]
10. Conduct a mock hearing of the case where the four accused plead not guilty. Follow the procedure set out earlier, but create your own additional facts. This could be role played or written as a script for a play. [A]

PRACTICAL APPLICATION

Visit a Magistrates Court, assuming you are a 'legal affairs' journalist, and write a report for a newspaper on the hearing of a criminal offence. Include in the report the steps that were used in the hearing of the offence and comment on whether or not you believe a fair trial was conducted for the parties involved. [C] [R]

6.2 THE ELEMENTS OF AN OFFENCE

You are about to study the main offences in the *Criminal Code 1899* (Qld) (QCC). It is unlikely that you will have time to study all of them, unless you are particularly interested and go outside the scope of what your teacher expects of you. However, what they all have in common, is that they are made up of what we call **elements**. The elements are all the facts necessary to **prove the offence** beyond reasonable doubt.

If the police, in a **criminal investigation**, are satisfied that all the facts that together make up the elements of an offence have occurred and are provable against a person, they will charge that person with the offence. As you study the main offences that follow, select at least one from each category and complete the activity in the following practical application. Not all offences are included because of the limitations of space.



PRACTICAL APPLICATION

Select an offence from the QCC. In groups of three or four, brainstorm and write a scenario which contains conclusive evidence of each element necessary to prove the offence. Exchange your scenario with another group in the class. Each group then:

1. Decides the offence contained in the scenario before them. [C] [A]
2. Makes a list of the elements which make up the offence. [C] [A]
3. Describes the facts relevant to each element of the offence set out in the scenario. [C] [S] [A]
4. Writes a statement of the particulars of the charge alleged against the accused person. [C] [S] [A] [R]
5. Decides if a jury, properly instructed, could convict the accused, on the basis of the scenario before them. [C] [S] [A] [E]

6.3 OFFENCES AGAINST THE PERSON

The most serious offences against the person are those of homicide, which include murder and manslaughter.

HOMICIDE (S300 QCC)

This is the term given to the unlawful killing of another. The crime will be murder or manslaughter depending on the circumstances of the killing. Homicide requires the Crown to prove the accused:

1. *KILLED*

2. *ANOTHER PERSON*

3. *UNLAWFULLY*



1. KILLED

'Kill' means **causing death directly or indirectly**. The issue of causation is a very important one in homicide, as in many cases of unlawful death there can be more than one event that contributed to the causing of death. This can be seen in the case of *Levy* (set out below). The courts and parliaments have developed principles to assist in determining who is responsible for causing the death when there is more than one causative factor. One frequently used principle requires identifying the act that was the **substantial and operating cause of the death**. This is often referred to as the 'but for' test.

CASE STUDY

Levy v R (1948) 51 WALR 29

Facts: The victim was admitted to hospital suffering from stab wounds intentionally inflicted by Levy. The victim was bleeding profusely and was critically ill. The hospital treated him with sulphur drugs, which was usually the best treatment in these circumstances. However, unknown to the doctors was the fact that the victim had a diseased liver, which broke down because of the drugs given, and resulted in his death.

Legal Issue: Had Levy caused the victim's death?

Decision: The treatment by the doctors was reasonable and proper in the circumstances, and so it was the stabbing by Levy that really caused the victim's death. But for the stab wound, the victim would be alive.

1. What were the possible causes of the victim's death? [C]
2. What was the substantial and operating cause of the death? [A]
3. Do you believe that it was just that Levy be convicted of murder? [E]

The common law and also the codes deem a person has **caused the death of another** person in **certain situations**:

- ▶ **Hastening death** even if a person already has a disorder or disease. Therefore, **euthanasia (mercy-killing)** is homicide (s296 QCC). It is also a well established principle that you cannot consent to your own death (s284 QCC).
- ▶ Where the death has been caused by **threats or intimidation** (s295 QCC) including where a victim is trying to get away from the blows and attacks of another and, in doing so, receives an injury that leads to his or her death. The victim may have taken evasive action such as jumping out of a window or out of a moving car, and if they die as a result, the person who threatened or intimidated them is held to have caused the death.

CASE STUDY

Royall v R (1991) 172 CLR 378

Facts: The body of a young woman, naked and wet, was found in the street below the 6th floor apartment she had shared with Royall. He admitted they had had a violent argument during which he punched her in the face and pulled her hair. There was evidence of greater violence as there was much blood throughout the apartment and gouge marks on the walls. The bathroom door had been forcibly opened. Royall said the victim went to take a shower to calm down, but, as she was an epileptic he was concerned for her so forced open the door. He gave evidence that he saw her voluntarily jump out the window. The Crown argued that Royall either pushed her out the window or that in fear of his continuing violence she either fell whilst trying to get away from his attacks or believed that jumping was her only means of escape.

Legal Issue: Had Royall caused the death?

Decision: The jury found Royall had caused her death. On appeal to the High Court of Australia the conviction was upheld.



- ▶ Where a victim is **seriously injured but the medical or surgical treatment that is given also contributes to the death**. The rule is that, provided the treatment was reasonably proper in the circumstances (that is, not negligent), then the person who caused the initial injury is deemed to have caused the victim's death (s298 QCC). This provision of the Code confirms the decision in *Levy's* case.

CASE STUDY

R v Jordan (1956) 40 Cr App R 152

Facts: Jordan stabbed a colleague in the course of a brawl. The victim was admitted to hospital. He was given a drug – *terramycin* – from which he had a severe allergic reaction. The drug was immediately stopped. Several days later different hospital staff came on duty and they started giving the drug again. They were not aware of the patient's earlier adverse reaction. He died from the *terramycin*.

Legal Issue: What was the cause of death? Was it the stab wound to the stomach or the wrongly given drug?

Decision: The medical treatment here was 'palpably wrong' and outside appropriate hospital care. It was so wrong that it severed the chain of causation. Jordan's act therefore was not the substantial cause of the victim's death.

- ▶ You **take your victim as you find him or her**. It is **immaterial that death from an injury may have been prevented** by taking precautions to prevent the injury, or by having a particular treatment or care (s297 QCC). This means that an injured person does not have a duty to accept a particular medical treatment, such as to undergo surgery or to have a blood transfusion, even if it could save his or her life.

CASE STUDY

R v Blaue [1975] 3 All ER 446

Facts: A victim of a stabbing was a Jehovah's Witness. She refused a blood transfusion, on the ground that it was forbidden in her religion. The transfusion was necessary to prevent the loss of blood that led to her death.

Legal Issue: Who legally caused her death?

Decision: The person who stabbed her and caused the initial injury. The assailant could not claim that the victim's refusal of treatment was unreasonable and was therefore the cause of death. The stab wounds remained the substantial and operating cause.

2. ANOTHER PERSON

Rarely is this a difficult element to prove. The only exceptions are at the time of becoming a person and at the ending of life.

For a homicide offence, it has to be a living person who is killed. Is an unborn baby a living person? In Australia the answer is no. To be a person capable of being killed you must have been born. The Code says this occurs 'when he or she has emerged completely in a living state from the mother.', whether the child is breathing or not or whether the child has an independent circulation or not and whether the navel-string is severed or not (s292 QCC) In all states, killing of an unborn child is a separate offence (s313 QCC). If the death occurs earlier in a pregnancy it may be the offence of abortion (procuring a miscarriage s224-225 QCC). However, if injuries are inflicted on the baby before or during the birth, and these injuries lead to the baby dying after it is born, then the perpetrator of the injuries can be charged under s294 QCC (Deaths by Acts done at child birth).

The issue of the time of death can be complex when an injured victim is on a life support system, artificially being helped to breathe and to circulate blood. The prevailing view in all states is that 'brain stem death', which is irreversible brain function, amounts to the end of life.

3. UNLAWFULLY

A killing will be unlawful if there is no excuse, defence, justification, or authorisation for it. These will be discussed in detail in Chapter 10: 'What are types of defences and excuses?'



Ch 10

MURDER (S305, DEFINED IN S302 QCC)

For a person to be convicted of murder the Crown must prove the three elements of homicide (outlined earlier) plus that it occurred in one of two circumstances. So, for a conviction for murder the following is required:

1. KILLED

2. ANOTHER PERSON

3. UNLAWFULLY

Plus a fourth element which can come in one of two forms:

Either

4A. an intention to kill or do grievous bodily harm;

Or

4B. in the prosecution of an unlawful purpose, the accused did an act which was likely to endanger life, and the victim died as a result of that act.

4A. AN INTENTION TO KILL OR DO GRIEVOUS BODILY HARM

'There are usually two elements to a person committing a crime. There is the *actus reus* (guilty act) and *mens rea* (guilty mind). In other words a person must actually commit the action which is prohibited by law and which is known as the crime and at the same time have the necessary mental element which constitutes the intention to commit the crime. In the offence of murder the *actus reus* is the killing of another person and the *mens rea* is the intention to kill or do grievous bodily harm to that person.'

To establish an intention, you look at what the accused had in his or her mind when he or she did the act that caused death. If the accused meant to seriously harm or kill the victim then the required intention is established. **Intention is a 'meant result'**. One looks at what the accused said and did to determine whether intention was present. If the accused loaded a gun, aimed it at the victim's heart, and said: "You deserve to die", it is likely that the required intention can be proved to the jury. If the gun was fired whilst it was being cleaned it is unlikely that the required intention could be established. The intention to kill need not be directed at a specific person. A gunman who fires at a group of people clearly has an intention to kill, even if he did not know any of the actual victims or aim specifically at one person. **If intention is not established**, the accused can be convicted of **manslaughter**.

HYPOTHETICAL

The accused is a performer who does a 'William Tell' act. One night, he shoots the arrow at an apple on his assistant's head, but misses and the arrow goes into her temporal artery causing her death.

1. On these facts, has the required intention for murder been established? [A]
2. Would the outcome be different if he called out, as he shot the arrow, "This should take the smile off your pretty face!"? [A]
3. What additional facts could be needed in order to establish the intention required for murder? [A]

4B. IN THE PROSECUTION OF AN UNLAWFUL PURPOSE AN ACT LIKELY TO ENDANGER LIFE

The second way to establish murder does not require proof of intention and is commonly referred to as constructive or felony murder. This arises when a person is committing a serious crime and in the process another person is killed. The Code set out three requirements:

- (i) **In the prosecution of** (means the unlawful purpose is underway)
- (ii) **an unlawful purpose** (means an unlawful activity eg. a robbery)
- (iii) **an act likely to endanger life occurs** (means a dangerous act eg. firing a gun)

This means that if you are in the process of committing a serious offence, such as a robbery, and you fire a gun or gag a person so he or she cannot call out or breathe, even if you did not intend for anyone to be hurt or die, it may still be murder.

In the case of *Stuart v R* (1974) ALR 545, Stuart and Finch were accused of setting fire to the 'Whisky A Go Go' nightclub in Brisbane's Fortitude Valley, which killed many young people. They did this as part of an extortion bid, as the nightclub owners were refusing to pay protection money. The fire was to give the 'Whisky a Go Go' and other club owners in the city a warning as to what would happen if they refused to pay protection money. There was no intention to actually kill any of the patrons of the club – just to send a warning to pay up or your club will suffer damage. The court found that the dangerous act was setting alight the petrol container in the nightclub full of people. It was carried out in the unlawful purpose of extortion or arson. Hence, the two accused were convicted of murder.

The penalty for murder is imprisonment for life. In Queensland this cannot be mitigated or varied.



WHAT DO YOU THINK?



In New South Wales and Victoria, recklessness can constitute the *mens rea* for murder. Recklessness requires proof that the accused foresaw death as a probable consequence, even though death was not intended. Recklessness is less than intent but more than negligence. In the Victorian case of *Faure* (1990) 2 VR 537, the Court of Appeal held it was open to a jury to consider whether the accused had been reckless in playing a game of Russian roulette in which he and the victim had agreed to fire two shots each at the other from a six shot revolver. Although there was no intention to kill the victim, the jury had to consider whether there was a substantial and real chance, that when he fired a shot at the victim, he could die, and he went ahead regardless of the foreseeable and probable risk.

Should the law in Queensland be changed to include 'recklessness' as a sufficient state of mind for a murder conviction? [A] [R]

CASE STUDY

R v Cowan; R v Cowan; Ex Parte Attorney-General (QLD) [2015] QCA87 (21 MAY 2015)



Ch 5

Facts: You should refer to the facts of this case in the case study set out in the previous chapter, as well as the following facts:

- (a) Cowan directed the undercover police to the site of the abandoned house where he had assaulted Daniel Morcombe and then to the sand mining site pointing out where he had left Daniel's body and then to a small

bridge over a creek into which he said he had thrown Daniel's clothes. Items of clothing were found in those places belonging to Daniel (identified by his parents in evidence at trial) and seventeen bone fragments confirmed by DNA evidence as being part of Daniel's remains were found at the sand mining site and in the nearby waters of Coochin Creek.

CASE STUDY CONTINUED...

In your view was there sufficient proof to convict Cowan of the murder of Daniel Morcombe having regard to the elements of murder namely:

- (a) Cowan killed another person.
- (b) Cowan killed Daniel Morcombe.
- (c) Cowan intended to kill Daniel Morcombe.

Set out the evidence which supports each of the above elements. [C] [A] [E]

MANSLAUGHTER (S310 QCC)

By contrast, manslaughter is the **unlawful killing of another in circumstances that do not amount to murder**. Usually this is because the prosecution cannot prove an intention to kill or to do grievous bodily harm. A motorist driving a car and speaking on a mobile phone at the same time, who knocks down and kills a pedestrian, will be guilty of manslaughter not murder. There was no intention to hurt anyone, but the motorist's actions did cause the death of another. Nor, in this situation, was there a dangerous act done in the course of another unlawful purpose. As well as being charged with manslaughter, the car driver could be charged with the offence of dangerous driving causing death (s328A QCC).

Manslaughter can arise when there is **criminal negligence**. At common law and also in the codes there are a range of duties that, if breached, will amount to criminal negligence. These are listed in the *Criminal Code* (Qld) at s285 to s290. These duties include:

- ▶ the duty to provide the **necessaries of life** (food, water, shelter, clothing, adequate medical care) to persons under your charge;
- ▶ the duty to have **reasonable skill and use reasonable care** when doing acts which may be dangerous to life or health, particularly medical and surgical treatment, or acts in the course of employment;
- ▶ the duty to take **reasonable care and precautions to avoid danger to the life or health of others when you have a dangerous thing under your control**. Clearly guns, cars, knives and poisons are intrinsically dangerous things but the courts in Queensland have also held that other objects, if used in a reckless and dangerous way, are subject to this duty. For example, the courts have held a piece of iron, a candlestick, and even a pencil can be a dangerous thing, if used in a way that causes serious harm; and
- ▶ the **duty to act** when you have undertaken to do an act, and the **omission to do it**, may be dangerous to human life or health.

CASE STUDY

R v Jackson & Hodgetts [1990] 1 QdR 456

Facts: Two butchers decided to play a prank on a homeless man who visited the rubbish bins at the back of the shopping centre looking for scraps of food. The butchers put a large quantity of meat preservative into a half-full can of Coca-Cola and left it out on a bin. They expected him to drink some, and then spit it out because of the foul taste. They thought that might discourage him from scavenging in their bins. They did not think that

preservatives, which are used routinely in foods, could seriously injure or kill a person. However, the man drank all of the bottle and died hours later.

Legal Issue: Was the meat preservative a dangerous thing that gave rise to a duty of care? If so, had the defendants breached this duty to the standard of criminal negligence?

CASE STUDY CONTINUED...

Decision: Meat preservative is a dangerous thing which gives rise to a duty of care to take proper care and precautions when using it. In the absence of proper care and precautions the duty is breached. The court found there was a *prima facie* (on the face of it) case of manslaughter. However, the standard of criminal negligence requires 'recklessness involving grave moral guilt'. The court decided on these facts, where the accused believed the victim would only swallow a little of the substance, and believed that food preservatives were safe in small quantities, that the criminal standard of negligence had not been reached. The butchers were not guilty of manslaughter.



CASE STUDY

R v Watson; ex parte A-G (Qld) [2009] QCA 279



Facts: In October 2003, 26-year-old Tina, and her new husband, Gabe Watson, both from the American state of Alabama, were on the 12th day of their honeymoon in Australia. Both were diving on the Great Barrier Reef when she died. Gabe Watson was an experienced diver and a certified rescue diver. According to Gabe, his wife, a novice diver, experienced difficulty with her breathing apparatus on the day she died. He testified that his wife got caught in a current and panicked. He said he went to help but she tried to rip his mask off, and that he was unable to bring her to the surface. She sank to the bottom of the ocean. Video footage and photographs taken by other divers on the trip show her holding out her arms for him to help her. Gabe Watson argued that, instead of going to her aid, he thought it better to return to the surface to seek assistance from others. Another diver went to the ocean floor and brought up her body but she could not be resuscitated.

Procedure: After an inquest in 2007, the Queensland Coroner determined there was enough evidence to charge Watson with murder. This was because there were inconsistencies in his story – a total of 16 – and because of eyewitness evidence that he held his wife in a bear hug for a short period before she sank in an uncontrolled manner. Thus it was possible that Gabe Watson cut off Tina's air supply from her oxygen cylinder during that time, bear-hugged her until she suffocated, then turned back on the oxygen before he let go of her. This allowed him to surface whilst she sank to the bottom of ocean. He argued he panicked rather than intentionally killing his new wife. Before the honeymoon, Gabe Watson had asked Tina to increase her life insurance payout to the maximum and name him as the sole beneficiary for her work insurance policy. This was seen as a possible motive for killing his wife, and he did contact the insurance company shortly

CASE STUDY CONTINUED...

after her death to have the insurance money paid to him. He then re-married. The Coroner committed Gabe Watson to stand trial for his wife's murder. Watson was in the United States at the time but voluntarily returned to Australia in 2009 for his murder trial.

Decision: At his trial, Watson surprised many in the courtroom by pleading not guilty to murder but guilty to the manslaughter of his wife. The court accepted his guilty plea on the basis of criminal negligence. Section 290 QCC arose because the respondent, an experienced diver, had undertaken to act as the 'dive buddy' of his wife, who was inexperienced and he had failed to perform his duty towards her, thereby contributing to her death. The judge said:

"The Crown alleges against you that you failed to carry out your duty to her in a number of significant ways. I accept that you failed to do so in the following respects: you failed to ensure that when the deceased had encountered difficulties she had a supply of oxygen available to her, and, in particular you failed to share

your oxygen supply with her; having released the deceased to recover your face mask and oxygen supply, you did not then take hold of her again or stay with her, or follow her as she sank; you did not attempt at any time to inflate her buoyancy control device or remove the weights which divers often carry to assist them to descend. ... you failed to make any reasonable attempt to take the deceased to the surface. I therefore accept that you are guilty of the very serious departure from the standard of care which was incumbent upon you with the result that your conduct is deserving of criminal punishment."

Gabe Watson was initially sentenced to four-and-a-half years' jail in June 2009, to be suspended (allowing his release from prison) after 12 months. Tina's family and many in the community were concerned that Watson would serve only a year in prison. The leniency of the sentence for the unlawful killing of his wife was appealed by the Attorney-General of Queensland and was increased to 18 months.

1. What is the duty of care that Watson breached? [C]
2. How did Watson breach this duty? [A]
3. In your opinion should Watson have had a jury trial for murder as recommended by the Coroner? Take into account legal and social issues in considering this question. [E]

STALKING (S359E, DEFINED 359B QCC)

Stalking is an offence in all Australian jurisdictions. The term 'stalking' originated in the United States after five Californian women were killed. In each case there had been previous and repeated complaints to the police that they were being harassed and followed by a particular individual who eventually did kill them. California became the first jurisdiction to make stalking a criminal offence. The actual elements vary across the Australian states but stalking generally involves **repeated conduct** such as following, watching, sending messages, or visiting the victim at their home or place of work that gives rise to the victim fearing for their personal safety. It extends to repeatedly contacting a person by telephone, e-mail or text messaging. It is a crime punishable by imprisonment which can be increased if violence is used, or threatened, or a weapon is involved.

Additionally, a restraining order may be given by a judge to stop particular conduct. For example the court could restrain the 'stalker' from ever telephoning, visiting, or coming within a specified distance of, the person. This can be issued whether the person is found guilty, or not guilty, of stalking.





YOU BE THE JUDGE



1. Look at the relevant state legislation and summarise the elements that need to be established for the offence of stalking. In Queensland, s 359A of the Code makes it unlawful to stalk another person. [C] [A]
2. Write your judgment for each of the following cases, giving your reasons as to whether you will convict or acquit on the charge of stalking. [A]

Case One: A mother of two children is infatuated with her children's school principal. For six months she sends him love letters. She also phones regularly and makes appointments with the school secretary to meet with him. When they do meet in his office she tells him of her undying love and invites him to visit her at her home. He explains he is happily married and asks that she only contact him if it is a matter regarding her children and their education. The letters and calls continue. The principal becomes concerned when a letter is sent to his home. He fears she must have followed him to know where he lives. The letter is addressed to his wife and says that they have been having an affair and his wife ought to leave him. The mother admits to the letters, calls and visits but says she never would have hurt him or his family.

Case Two: For three weeks a man comes into a city bookstore five times a day and stares at the female shop assistant. After a couple of days she calls store security. Each time the security officer asks the man to leave, which he does without protest. One night he follows the assistant onto her bus home and sits opposite her smiling. She feels concerned and uses her mobile to call the police. He says he is just a good Samaritan and wants to make sure she gets home safely.

Case Three: A man regularly stays at his girlfriend's apartment. She shares the apartment with two other girls. The man sets up a small video camera in the ceiling of their bathroom. Whenever he knows one of them will be in the bathroom having a bath or shower, he activates the camera to film them. The girls are unaware they are being filmed. He later takes out the film and watches it. When the camera is discovered, all three girls are upset and concerned. The police are called and he is charged with stalking.

CASE STUDY

R v Amundsen [2016] QCA 177

Facts: Mr Amundsen was charged with nineteen acts directed at his de facto partner over a period of nine months. These together constituted the charge of stalking. These included:

- a. Loitering near the school where his de facto spouse worked;
- b. Loitering near where his de facto spouse was at a work conference;
- c. Calling his de facto spouse from a public phone box using a false name;
- d. Emailing his de facto spouse using a false name;
- e. Loitering near, watching and approaching a place where his de facto spouse was to visit;
- f. Committing an intimidating and harassing act by prevailing on his mother to contact his de facto spouse by telephone;
- g. Committing an intimidating and harassing act by prevailing on his mother to make telephone calls to family and friends of the de facto spouse using numbers obtained from his de facto spouse's phone records, with the family and friends of the de facto spouse contacting her to tell her of those phone calls;
- h. Committing an intimidating and harassing act by having a private investigator follow his de facto spouse;
- i. Sending his de facto spouse a 118 page letter;
- j. Contacting his de facto spouse by sending two large letters, one to her school, and the other to a friend;
- k. Sending his de facto spouse a message by a computer system called 'Zoosk' (online dating service);
- l. Committing an intimidating and harassing and threatening act by having a doctor contact his de facto spouse;

CASE STUDY CONTINUED...

- m. Sending his de facto spouse a message by msn messenger using a false name; and
- n. His asserting that his de facto spouse had taken over the role of his father (who had died), and the role of his former de facto spouse, as his protector.

He said that he trusted his de facto spouse to continue that role and that he simply wanted to maintain the protection that she gave him. He said that there was never any intention to hurt her and that if he had caused her any fear, then he apologised, but it wasn't intentional.

He thought that if he could go and talk to her face to face she might change her mind. He said further that he believed that his de facto spouse had a moral obligation to be his protector and that once a commitment is made between two people it is a lifetime commitment. He said that that was part of his Christian beliefs and that he shouldn't be blamed for having those beliefs.

Legal issue: Should Amundsen be convicted of stalking?

Decision: Amundsen was convicted of stalking

1. Do you think there was sufficient evidence of stalking having regard to s359B? [C][A]
2. Do you think that he should be excused from stalking because of his particular religious beliefs? [E]

HYPOTHETICAL

Consider the following situations and determine whether one of the offences 'against the person' could be established on the facts. [A]

1. A wife, who has been subjected to violence from her husband, locks him out of their flat and refuses to let him in. He shouts out threats and says he will kill her if she doesn't open the door. Then she hears the sound of the door being kicked down. She jumps out of the window because she is so afraid of what he might do to her. In the fall, she receives a serious facial injury.
2. Mary attacks Jane with a softball bat. Jane suffers a gash on her neck and extensive bruising from a sharp piece of the bat. At the hospital, the doctor treating Jane says: "You are a lucky woman; another inch higher and you would have died." While Jane is in hospital, she finds the hospital food awful, and, in anger, one day throws a plate of food at a nurse.
3. On the way home from school, John becomes angry when he hears that Andrew has taken his place in the school swimming team. He calls out, "I don't think you'll be swimming too well at the next carnival" and starts to throw stones at Andrew. Andrew runs along the footpath and ducks so the stones don't hit him. He loses his footing, trips and falls down an embankment. He severs his spinal cord in the fall and becomes a paraplegic.
4. A boxer bites off another boxer's ear lobe whilst the two are in a clinch in the ring.



6.4 SEXUAL OFFENCES

In recent years, sexual offences have received widespread media coverage. It is impossible to say whether sexual offences are more prevalent than they used to be. The number of sexual offences cannot be accurately measured because many are not reported to the police. All that can be said is that they now receive more explicit media coverage.

RAPE (S349, DEFINED S347, S348 QCC)

Rape is the common law term for **sexual intercourse without consent**. Today in Australia the law has been reformed to include non-consensual sexual penetration in a wider range of situations including digital (finger) rape, penetration by objects, and also anal penetration. Homosexual rape is no longer a separate offence. Rape has its own separate evidentiary rules and procedures which are sometimes referred to as ‘rape shield’ laws. These limit what a defence counsel can ask a rape victim in cross-examination, for example, questions about their past behaviour and need for corroboration (independent supporting evidence). Over the last two decades laws dealing with rape have been reformed and codified in all jurisdictions. Some jurisdictions no longer use the term rape. New South Wales uses the term ‘sexual assault’.

The offence of rape under the *Queensland Criminal Code* requires:

1. *CARNAL KNOWLEDGE OR OTHER ACTS OF PENETRATION*
2. *WITHOUT CONSENT*
3. *UNLAWFULLY*

1. **Carnal knowledge** is the old term for sexual intercourse.

2. **Without consent**

The old common law rule that a wife gave irrevocable consent to intercourse for the duration of the marriage has been revoked. Today a husband can be convicted of the rape of his wife. Also the old presumption that a 14 year old was incapable of rape has been amended.

In most rape trials the key issue is whether the victim consented to intercourse. Consent can be difficult to determine. Case law and also statutes such as the Code require consent to be ‘freely given by a person with cognitive capacity to give consent’. Consent is not freely given if it is obtained by force, threat, intimidation, fear of bodily harm, exercise of authority; false or fraudulent representations about the nature or purpose of the act; or by a mistaken belief induced by the accused that the accused was their sexual partner.

3. **Unlawfully** means that there was **no lawful excuse, defence or justification for the act**. These are looked at in detail later in this section. However, in rape trials, an accused sometimes seeks to rely on the excuse that he, or now she, had an honest and reasonable, but mistaken belief that the victim was consenting to intercourse. The belief must be reasonable, that is, one that another reasonable person could make in those circumstances, as well as honest and mistaken (meaning the accused really believed that consent was given) but mistaken (meaning consent wasn’t really given).

Corroborated testimony, which is independent evidence, that connects the accused with the offence is helpful but is now not required by law. Independent evidence could be a medical examination, torn clothing, or a witness who saw a struggle or heard screams. Rape is a serious offence with the maximum penalty being life imprisonment.

HYPOTHETICAL

Consider the following situations and decide whether rape has been established. [A]

1. An unregistered dentist treats a patient with severe toothache with what the dentist describes as a 'tried and tested' treatment. The treatment involves intercourse with the patient.
2. A teacher finds one of her fifteen-year-old female students in the act of sexual intercourse. The student tells the teacher she agreed to do what the boy asked her to do, but had no idea that the act in question was sexual. She was absent from school on the day when the sex education unit was presented to the class.
3. A boy consents to a homosexual act after the team captain says he will be dropped from the team if he refuses.
4. A woman agrees to have intercourse provided she is sent a dozen red roses the next day. Instead she is sent a cactus.

RESEARCH

Search online to find the following sexual offences on QCC, at www.austlii.edu.au. Follow the prompts to the Queensland Criminal Code 1899, and describe the elements of the following:

- ▶ incest (s222 QCC)
- ▶ carnal knowledge with or of children under 16 years (s215 QCC)
- ▶ unlawful sodomy (s208 QCC)
- ▶ sexual/indecent assault (s352 QCC)
- ▶ indecent treatment of children under 16 (s210 QCC)

6.5 PROPERTY OFFENCES

Property offences are among the most commonly committed offences. 30% of all offences reported to police involve stealing. This section will deal with the most frequently prosecuted offences: stealing (theft), shoplifting, robbery, break and enter, burglary, receiving stolen property, arson, wilful damage to property, fraud, and the new offence of computer hacking. There have been a series of amendments to this area of the law in recent times.

In this technological age with complex commercial and electronic dealings, the property offences, as evolved in the common law of England centuries ago and which were set out at the beginning of the 20th century when the codes were written, have been unable to accommodate the new forms of intangible property. The term 'property' was once simply defined in the Code (s1) as 'everything, animate or inanimate, capable of being the subject of ownership'. Today, that definition has been amended to include a range of other things such as 'money', 'electrical or other energy, gas and water', 'a plant', 'animals', 'things produced by animals' and 'any other property real or personal, legal or equitable, including things in action and other intangible property'. Definitions like this are important because all property offences are dependent on them.

So, an offence such as stealing, known also as theft or larceny in some Australian states, can only arise if 'property' has been taken without consent.

HYPOTHETICAL

Read the following incidents involving Georgia who has broken into Grace's house and determine whether 'property' has been involved. [A]

1. Georgia uses Grace's telephone to call a friend.
2. Georgia opens the lid on Grace's perfume and smells the fragrance.
3. Georgia makes a cup of coffee and heats it in Grace's microwave.
4. Georgia jams a piece of wire in Grace's electricity meter and prevents it from turning and recording electricity used.

STEALING/THEFT (OFFENCE S398, DEFINED S390 AND S391 QCC)

The essential ingredients of the offence of stealing are:

1. TAKING OR CONVERTING

2. PROPERTY OF ANOTHER

3. WITH FRAUDULENT INTENT

1. Taking or converting to your own use involves physical movement of the thing stolen. Converting means dealing with the property in a way that is inconsistent with the rights of the owner. An example of conversion would be if a friend let you borrow a book to help with an assignment, and then, rather than return it, you sold it to another student. In converting it to your own use you have done something quite inconsistent with the right of the book's owner.

CASE STUDY

Wallis v Lane [1964] VR 293

Facts: The accused was an employee working with a delivery truck. He intended to steal certain items from the truck. To do so, he moved the goods from one part of the truck to another part to conceal them, but did not actually remove them from the truck.

Legal Issue: Did this movement satisfy the element of taking?

Decision: The court said this was sufficient actual movement of the goods to constitute this element of the offence of stealing. Only the slightest degree of movement is required.

2. Property of another person can be stolen, provided it is moveable or capable of being made moveable. A person cannot steal his or her own property.

3. A fraudulent intent must accompany the taking or converting. The most common fraudulent intent is to permanently deprive the owner of the thing stolen. Another fraudulent intent is to deal with it in such a manner that it cannot be returned in the same condition in which it was at the time of taking or converting.

CASE STUDY

R v Bailey [1924] QWN 38

Facts: A chauffeur, angry with his employer who had just terminated his services, took his former employer's car for three days and then returned it. He always intended to return it.

1. Do you think the decision was correct? [A]
2. If the chauffeur had returned the car almost empty of petrol, could he have been convicted of stealing the petrol? [A]
3. If the owner's briefcase was on the back seat of the car, could the chauffeur be convicted of stealing the briefcase? [A]

Legal Issue: Was this stealing?

Decision: Because he intended to return the vehicle, there was no fraudulent intention to permanently deprive the owner. Not guilty of the offence of stealing.

Since the time this case was heard, a new offence (s408A – Unlawful use of a motor vehicle) was introduced into the Queensland Code to cover situations of joyriding. This would be the offence with which Bailey would now be charged.

Borrowing an item is not stealing if your intention is to return it in exactly the same condition to the owner. Once you form an intention to not return it or to change it in some way, the item has been converted to your use and the required intention for stealing exists.

HYPOTHETICAL

Read the following facts and decide when the offence of stealing was committed. [A]

A mother is shopping in the toy shop with her little daughter. The daughter sees a doll's pram and starts pushing it around the store. The mother is concentrating on her shopping and doesn't realise until they have walked out of the store, that her daughter has taken the pram with her. The mother says: "We must take this back right away." The daughter says she is tired so the mother decides to take it back after her daughter has had her afternoon nap. The daughter wakes up and tells her mother that she really wants to keep the pram. Mother says: "OK. The store obviously hasn't even missed it. You can keep it."

ARSON (S461 QCC)

1. *WILFULLY*
2. *UNLAWFULLY*
3. *SETS FIRE TO*
4. *THINGS, SUCH AS BUILDINGS*

Arson is the wilful (which means deliberate, intentional or reckless) setting fire to specific things such as houses, buildings, structures, vessels, crops, aircraft and motor vehicles. It must be done unlawfully. This means done without the owner's consent and in a way not authorised, justified or excused by law. The maximum penalty is life imprisonment.



RESEARCH

Search WILFUL DAMAGE TO ANIMALS (s468 QCC) and the *Animal Care and Protection Act 2001* (Qld). Access these online at www.austlii.edu.au. Outline the elements of the offence in s468 QCC, and the duties owed to animals by a person in charge of an animal under the *Animal Care and Protection Act 2001*. Undertake research into the link between animal cruelty and violence against humans. Present your findings to the class, commenting on whether or not the animal penalty laws are satisfactory, too lenient or too harsh. [C] [S] [A] [E] [R]

FRAUD (S408C QCC)

All states have offences to encompass dishonest and fraudulent conduct. In Queensland the older offences of misappropriation of property, false pretences, passing valueless cheques and cheating have been merged into this new offence of fraud. It deals essentially with dishonest or deceptive conduct in regard to property. The current test for dishonesty was formulated by the High Court in *Peters v R* (1998) 192 CLR 493. It was a case involving a solicitor who helped a client to launder money through several false mortgage transactions. He was charged and convicted of conspiracy to defraud. On appeal, Toohey and Gaudron JJ laid down the test for dishonesty as:

Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people.

Fraud remains one of the most prevalent crimes in Australia. It impacts upon individuals as much as it does on businesses.

In 2014-2015 the Australian Bureau of Statistics found (personal fraud, 2014-2015 (CAT NO. 4528.0)) that:

- ▶ In the twelve months prior to being interviewed in 2014-2015 an estimated 1.6 million Australians experienced personal fraud. This represented 8.5% of the population aged 15 and over. It was an increase from the proportion of persons who experienced personal fraud in 2010-2011 of 6.7%.
- ▶ The most common fraud type was card fraud with 1.1 million persons (or 5.9% of the population aged 15 and over) experiencing card fraud. This represented an increase from 2010-2011 when the rate was 3.7%.
- ▶ An estimated 126,300 persons in Australia were victims of identity theft (0.7% of the population aged 15 and over).
- ▶ Just over half of the Australian population aged 15 and over were exposed to at least one scam (56% or 10.4 million persons). This represented an increase from 2010-2011 when the proportion of persons exposed to at least one scam was 36% (6.4 million persons).
- ▶ 4% of persons exposed to a scam responded to at least one scam either by supplying personal information, money or both or by seeking more information in relation to the request. This represented 2.4% of the population aged 15 and over.
- ▶ The total estimated financial loss of persons who experienced personal fraud was \$3 billion.
- ▶ The total estimated financial loss to card fraud in 2014-2015 was \$2.1 billion.'

Whilst theft occurs without a person's consent, the property in a fraud case may be obtained with permission but done so deceptively. Conduct is dishonest if:

- ▶ the standards of ordinary persons in the community would consider the act dishonest; and
- ▶ if the person subjectively knew that what they were doing was dishonest by those standards.

Recent examples of fraud can be found in dishonest application of disaster relief funds. A 26-year-old Queenslanders was convicted of fraudulently applying for, and receiving, \$20,000 in north Queensland flood disaster relief. He had made 33 claims for \$1000 assistance and was successful 20 times. The judge said the accused knew that the authorities wanted to get money to people in need quickly without the thorough checking procedures usually used. In sentencing him to two years and six month imprisonment, Justice Jones said, 'the community won't stand for this behaviour and the courts must enforce that belief'.

'Other examples of fraud can easily be found in advertisements either in the media or on the internet. A recent example of such an advertisement is as follows:

- ▶ Wanted Wagyu cattle
- ▶ Wanted to buy Wagyu cows
- ▶ Grain and Grass Fed Infused
- ▶ And Fullblood Wagyu Cattle
- ▶ Ready for slaughter.



This advertisement elicited responses from owners of cattle properties. They entered into contracts to supply Wagyu and Wagyu cross cattle with the person placing the advertisement in excess of \$1.5 million, which was never paid. The person who received the cattle was charged with fraud.

Another very recent example occurred in Queensland where a woman fraudulently obtained drought relief subsidies by forging invoices and applying for the Drought Relief Assistance Scheme facilitated by the Queensland Department of Agriculture and Fisheries. This was a scheme set up by the Queensland Government to help primary producers in the grazing industry to manage their livestock during drought and help with the restoration of their livestock numbers after the drought.

The extremely common form of fraud is now online scams or fraud. The common types of such scams include unexpected prize scams, unexpected money scams, dating or romance scams, threats and extortion scams and identity theft. Fraudulent scammers are constantly being inventive. In a very recent scam, telephone calls were made to Australians from Cameroon in Central Africa (or some other exotic location). Calls were very short allowing practically no opportunity by the person called, to answer them. Many victims when identifying the missed call, made the decision to phone back. Hugely exorbitant fees for such telephone calls are then paid by the Australian victims when calling the foreign number back. The scammers had established themselves in locations where they could receive the highest possible return for their international premium rate telephone number (the toll number). The scammers had set up a system whereby they shared the received cost of that telephone call between themselves and a foreign telephone company who was in on the scam. The scammers made every effort to ensure that the person who had returned the call stayed on the line as long as possible to achieve their

share of the highest possible cost of the call to the Australian victims.

There is a network which you should contact when you strike any such scam. It is ACORN (Australian Cyber Crime Online Reporting Network).

Queensland has set up a special fraud financial and cyber crime group to investigate and prosecute claims of Centrelink fraud and other roting of funds allocated for victims of the floods and cyclones.

The maximum penalty is five years imprisonment but it increases to twelve years in certain situations, such as when the offender is a company director, when the offender defrauds his employer, or when the value of the property defrauded exceeds \$30,000.

COMPUTER HACKING AND MISUSE (S408D)

It is an offence to use a computer without the consent of the computer's controller. The controller is the person who has a right to control the use of the computer.

The maximum penalty is two years imprisonment. Where the use of a computer causes, or is intended to cause detriment or damage, or to gain a benefit, the penalty is increased to ten years. Damage includes harm to the computer hardware and software, as well as any alteration, addition, removal or loss of information (data, file, document, computer language or coding) on the computer.



WHAT DO YOU THINK?



Are 'white collar' crimes as serious as violent crimes and, should such wrongdoers be punished as severely? [E]

6.6 MOTOR VEHICLE OFFENCES

All states of Australia have similar laws regarding driving offences. Outlined below are ones applicable in Queensland, but each jurisdiction has comparable offences. Some offences are in the Code, but many are found in the *Transport Operations (Road Use Management Act)1995 (Qld)* (TORUM).

DANGEROUS DRIVING (S328A QCC)

'Dangerous' is not defined and the court must look at all the relevant circumstances, including the nature, condition and use of the road and the amount of traffic at the time. Speeding and high blood alcohol concentration or high levels of other prohibited substances in the body are also relevant factors. Imprisonment for three years is the prescribed penalty but this can increase to five years if the person was intoxicated at the time of the offence, or has been previously convicted for this offence.

DANGEROUS DRIVING CAUSING DEATH (S328A (4) QCC)

The maximum penalty is imprisonment for seven years. If the offender was adversely affected by an intoxicating substance (alcohol or drugs) the penalty increases to ten years.

UNLAWFUL USE OF VEHICLES (S408A)

It is an offence to unlawfully use a motor vehicle without the consent of the owner. The maximum penalty in the Code is imprisonment for seven years.

It is an offence to drive a motor vehicle unless the driver is the holder of a current driver's licence. Similarly, it is an offence to drive while disqualified from holding a driver's licence. (s78 TORUM)

CARELESS DRIVING (S83 TORUM)

This offence is commonly brought after motor vehicle accidents. The maximum penalty is six months imprisonment.

USE OF MOBILE PHONES WHILST DRIVING (REG 300 TORUM (ROAD RULES) REGULATIONS)

All states have made it an offence to use hand-held mobile phones whilst driving. Research shows that using a mobile phone while driving increases the risk of crashing by at least four times. The most common types of crashes associated with mobile usage are 'run-off-the-road' and 'rear end' crashes. Using a mobile phone when driving is a physical, visual and mental distraction. It also impairs the driver's cognitive ability which is needed to successfully do two tasks at the one time.



WHAT DO YOU THINK?



1. Why is talking to a passenger in your car different from talking to a person on a mobile phone? [E]
2. What makes text-messaging even more dangerous? [E]
3. Give examples of driving tasks that would be more difficult to do whilst talking on a handheld phone. [E]
4. What options are there if you wish to send or receive a call on your mobile phone while driving? [E]
5. Should it be an offence if you use your mobile phone when sitting at a red traffic light but are not moving? [E]

RACING (S85 TORUM)

Any person who organises, promotes or takes part in any car race, or in any attempt to break or set any speed record, is guilty of an offence with a maximum imprisonment of up to six months.



UNLAWFUL INTERFERENCE WITH VEHICLES (S135 TORUM)

It is an offence to drive a vehicle or to wilfully destroy, damage or otherwise interfere with it, without the consent of the owner. The offence covers 'joy rides'. The prescribed penalty is a fine or imprisonment not exceeding six months or both. The magistrate may also order that compensation be awarded for damage done.

ALTERING OR REMOVING ENGINE NUMBERS (S134 TORUM)

The maximum penalty is six months imprisonment.

DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS

Australia has very strict laws relating to driving under the influence of alcohol or drugs. In Queensland the drink driving offences are contained in the TORUM. Random breath testing allows a driver of a

motor vehicle to be stopped and **asked to supply a breath specimen** (this is often called ‘blowing into the bag’ or a saliva test). The penalties for drink-driving include fines and disqualification of the driver’s licence and, in some cases, imprisonment. There are also stricter measures for drivers who are under 25 years of age and hold a provisional licence, a learner’s permit or no licence at all. These persons can be convicted of a drink-driving offence if there is even the slightest trace of alcohol at all; that is, the legal limit is 0%. Similar provisions apply to the drivers of certain defined vehicles including buses, trucks, tow trucks and taxi cabs.



WHAT DO YOU THINK?



1. Are very strict drink-driving laws and the extensive powers given to the police justified? Why? Why not? [E]
2. Should the police be given specific directions to stop drink-drivers leaving hotels, nightclubs etc? [E]

RESTRICTED LICENCES

Convicted drink-drivers who have no drink-driving offences in the past five years have been able to apply for a restricted licence to allow them to drive at specified times solely for the purposes of their employment. A restricted licence will be granted only if a number of things can be shown, including that refusal of a licence would deprive the applicant of the means to earn a livelihood and thereby would cause extreme hardship to the applicant or the applicant’s family. This licence is not available to anybody who has been convicted of any drink-driving offence in the last five years. The magistrate has the power to double the period of licence disqualification if a restricted licence is granted.

FAILING TO REMAIN AT THE SCENE OF AN ACCIDENT

Any driver involved in a road accident resulting in injury or death or damage to property is required to immediately stop at the scene of the accident and render all reasonable assistance to any injured person. The driver is also required to report the accident to the nearest police station or other police as soon as is reasonably practicable except where there are no injuries or the property damage does not seem to exceed \$1,000. If a driver fails to comply with these requirements, and there is death or injury, the driver is liable to a fine or imprisonment for 12 months or both. If there has been ‘callous disregard’ for the dead or injured person the court is obliged to impose a period of imprisonment as the whole or part of the sentence.

6.7 OFFENCES RELATING TO PUBLIC ORDER

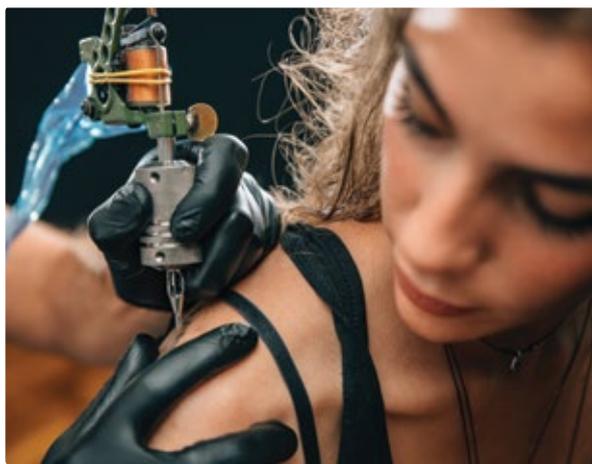
All states have legislation to ensure that the public order is maintained. There are a range of varied offences aimed at stopping behaviour in public places that affects, harms, endangers, embarrasses, offends, disrupts or is likely to annoy other people when they are in a public area.

In Queensland, there are two Acts that go to public order matters.

The *Summary Offences Act 2005* covers:

- ▶ being a public nuisance by behaving in a disorderly or offensive way, or threatening to use violence. An offensive way includes using obscene, indecent or abusive language.
- ▶ wilful exposure of a person’s genitals in a public place.

- ▶ being drunk in a public place.
- ▶ begging in a public place.
- ▶ unlawful riding of a motorbike on public land.
- ▶ possessing items that could be used in the commission of a crime.
- ▶ selling spray paint to minors.
- ▶ sending unlawful SMS messages.
- ▶ selling potentially harmful things if inhaled or ingested and the seller knows or reasonably suspects they will be used for that purpose.
- ▶ piercing certain body parts of minors.
- ▶ tattooing minors.
- ▶ publishing false advertisements on births, deaths, marriages.
- ▶ undertaking unregulated high-risk activities (hang gliding, abseiling).
- ▶ trespass.
- ▶ throwing things at a sporting event, for example soft drink cans or bottles.



The *Peace and Good Behaviour Act 2012* deals with breaches of the peace, and particularly for domestic violence and disputes between neighbours. For example, a father may make a complaint against his daughter's ex-boyfriend who is threatening to send someone to assault her if she doesn't resume their relationship. As threats are included, it is intended that early action may prevent further, more serious violence being carried out.

Under the Act, an action is commenced by the issue of a complaint on oath which is heard by a magistrate. The court may make an order that the defendant 'keep the peace and be of good behaviour' for such period of time and on such conditions as the court thinks fit. If the order of the court is disobeyed, it amounts to an offence under the Act for which penalties are imposed. A breach of a peace and good behaviour order may be enforced by the police. The Act has provisions for mediation of the dispute.

Similarly, the *Domestic and Family Violence Protection Act 2012* can provide protection for a person from his or her spouse who is committing acts of domestic violence.

6.8 ATTEMPTS TO COMMIT CRIMES

In all states it is an offence to attempt to commit any indictable offence.

An indictable offence is one that generally goes to a jury trial:

Most offences in the Code are indictable offences.

Three elements are needed to establish an attempted offence.

1. INTENTION TO COMMIT AN OFFENCE (MENTAL REQUIREMENT)
2. PUT INTO EXECUTION BY MEANS ADAPTED TO ITS FULFILMENT (PHYSICAL REQUIREMENT)
3. THAT INTENTION BE MANIFESTED BY AN OVERT ACT (OBSERVABLE REQUIREMENT)

For example, in the case of **attempted murder**, the accused might decide that he wishes to kill his father to inherit his money. He mentally makes plans. Once this mental element to bring about a particular result is formed, the first element is established.

When he goes out and buys a deadly poison and starts adding it to his father's meals, he is putting that mental intention into effect and using means to bring about that result. This satisfies the physical aspect of actually doing something to bring about the result he wants which satisfies the **second element**.

The fact that adding poison could be observed by another person (whether it is, or not, observed doesn't matter) makes it an 'overt act' and satisfies **element three**.

The offence of attempted murder is made out, provided the acts have gone beyond mere preparation. If the son had bought the poison intending to use it, but had not done so, it would still be preparatory and not an attempted murder. This is because the second and third elements are not satisfied.

The penalty for attempts is generally **half the maximum of the completed offence**. So, attempted wounding is a maximum of three and a half years imprisonment, as the penalty for the completed offence of wounding is seven years. For offences such as rape which have life imprisonment as the maximum for the completed offence, an attempt, unless it is otherwise stated, is for a maximum of seven years.

CASE STUDY

R v Williams [1965] Qd R 86

Facts: A group of teenagers were staying at a Gold Coast hotel. They spent an afternoon around a pool, swimming, talking, and having some drinks. The accused tried to kiss one of the girls and she told him to 'cut it out'. Shortly after that she went back to her room, closed the door, changed out of her bathers and put on a brunch coat. She lay on her bed and went to sleep. She woke up suddenly when she found the accused on her bed, with his hands on her breasts. She struggled and he pulled her off the bed onto the floor. He pulled off her brunch coat and started grabbing the private parts of her body stating that "he would have her". She scratched his face, struggled free and ran out the door, screaming and crying. Medical evidence showed bruising and abrasions to her face and body. The accused was charged with attempted rape

Legal Issue: Was this an attempt, that is, had his acts gone past mere preparation, and had his mental intention been put into effect by overt acts?

Decision: The jury found him guilty and the Court of Appeal agreed with the verdict. Stable J. said: 'In the present case there is no doubt of the appellant's intention. He manifested it by his overt act in stating that he was going to have the young woman whether she liked it or not ... What followed was a brutal sustained battering of a struggling woman clearly directed at overcoming her want of consent.'

1. The appellant had suggested that, because he had not taken off his pants, his acts had not gone beyond preparation. Why would the court have rejected that? [A]
2. If you were on the jury, would you have found him guilty of attempted rape? [A] [E]

6.9 PARTIES TO OFFENCES

It is common for more than one person to be involved in the commission of an offence. All who are alleged to have jointly committed offences or assisted another person commit an offence are called ‘parties’ to the offence. Usually it is easy to work out who the parties are. However, it can be more difficult when, at the time the offence was committed, each person had a different level of involvement – some actually did the act while others merely helped in a major or minor way.

Parties to offences are dealt with in ss7–10 of the Code (QCC).

Under s 7, where more than one person is involved in a criminal offence each of the following people is deemed to have taken part in it and to be guilty of it:

- (a) every person who actually does the act (‘the principal’);
- (b) every person who does an act for the purpose of helping or assisting another person to commit the offence (‘principals in the second degree’);
- (c) every person who aids another person in committing the offence (‘principals in the second degree’); and
- (d) any person who encourages or counsels any other person to commit the offence (‘an accessory before the fact’).

Under the Code all are offenders. An example is where four people decide to break into a house to steal money. One person masterminds the plan. Two jointly open a window and enter the house. The other person waits outside on lookout. All four are guilty of the offence of break and enter.

The person who **actually does the act is known as the principal**. Anyone who assists the principal to commit an offence is called **an accessory**. Both will be parties to the offence committed, and in the eyes of the law, **equally criminally responsible**. However, an accessory will not be criminally responsible for acts beyond what the parties agreed to do originally, unless another act was the probable consequence of what they had agreed to do. An example is where four boys decide to break and enter a house to steal jewellery. Two enter the house and two wait outside on lookout with the get away car. The two who are in the house are then disturbed by the homeowner. They panic and hit the home owner over the head and kill him.

Those waiting outside will be guilty of breaking and entering and attempted stealing. They may not be guilty of the homicide, unless they knew that the two going into the house had a weapon, or were very violent people, or that it was possible that the homeowner could be injured during the break and enter. If a jury finds that injury to the householder was a probable consequence of their plan to break and enter and steal, the two outside may also be found guilty of the homeowner’s death.

There are also **accessories after the fact**. These are people who knowingly assist someone who has committed an offence to escape punishment. They may hide that person, or help them to get away, or make false statements to the police in order to enable the offender to escape punishment.



6.10 STATISTICS OF CRIME IN AUSTRALIA

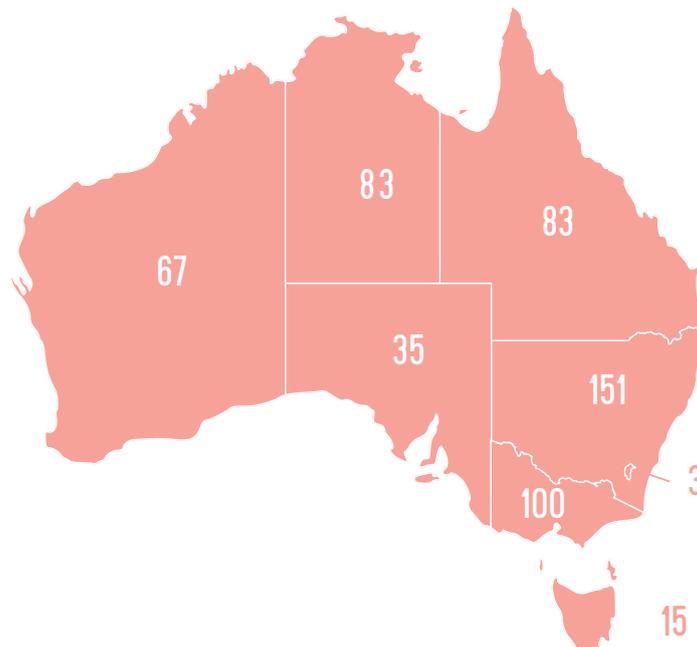
Even though the consequences of breaking criminal laws can be severe, these penalties alone do not deter some people from offending. One way to appreciate the level of crime in our society is by looking at the number of incidents reported to, or detected by, police. Each police service in Australia records this information which is analysed by the Australian Bureau of Statistics (ABS). The ABS regularly releases statistical data on crime and offenders.

The Australian Institute of Criminology (AIC) is Australia's national research and knowledge centre on crime and justice. Using statistics from all sources including the ABS it compiles data which it publishes through its website and which is used in determining policies to be adopted by the government when dealing with crime. Such statistics sometimes produces unexpected results.

PRACTICAL APPLICATION

Homicide incidents in Australia

There were 487 homicide incidents in Australia between 1 July 2012 and 30 June 2014. The homicide incident rate of 1 per 100,000 in 2013-14 is the lowest recorded since 1989-90



Facts:

1. Six in ten homicide victims died from a stab wound or died from being beaten in 2013-14. Only 13% died from a gunshot wound.
2. 64% of homicide victims in 2012-14 were males.
3. The homicide offending rate among males was six times that of females in 2012-14.
4. 79% of intimate partner homicide victims in 2012-14 were female (an intimate partner homicide was one where the victim and offender have a current or former intimate relationship, including same-sex and extramarital relationships).

PRACTICAL APPLICATION CONTINUED...

5. Sunday and Thursday are the most homicidal days of the week, one-third (32%) of homicides occurred on these two days.
6. In 2012-14 victims from 45% of homicides were killed in their own home. 9% were killed in the offender's home and 22% were killed on streets/footpaths.
7. Domestic and acquaintance homicides decreased between 1989-90 and 2013-14 by 13% and 38% respectively. The number of stranger homicides increased by 10%.

Referring to the illustration above, answer the following questions:

- a. Is the homicide rate in Australia going up or down? [C]
- b. Which state of Australia has the most homicides? [C]
- c. What weapon is a homicide victim most likely to die from? [C]
- d. What reasons could you give for the fact that 65% of homicide victims were male? [A] [E]
- e. Do you find it surprising that 79% of intimate partner homicide victims were female? Give your reasons. [A] [E]
- f. Why do you think the number of stranger homicides has increased as compared to domestic and acquaintance homicides [A] [E]

The figures given in relation to homicides above give an indication of the extent of crime in Australia but like criminal statistics they should be adjusted for changes in population size. Crime rate statistics adjust for such changes by taking the number of recorded crimes and dividing these by the number of people in the country or state over the same time period. The rate is then calculated for every 100,000 persons in the population. For example, in the homicide figures provided above adjusted for the changes in the size of the population, it is clear that the most dangerous place in Australia, at least from the point of view of the likelihood of being a homicide victim, is the Northern Territory. The Northern Territory has 6.5 incidents per 100,000 persons. The Australian Capital Territory has the lowest rate of homicide incidents – in 2013-14 it was 0.3 incidents per 100,000 persons.

You will be able to access up to date crime statistics in Australia from the website of the AIC (aic.gov.au). There are constant changes to the data with respect to offences committed by offence category, and to the statistics on the victims of crime and the type of offences that they have been subject to. Set out below are the crimes with the highest volume of recorded victims in 2016 and crimes with the highest volume of recorded offenders in 2015-16.

CRIMES WITH THE HIGHEST VOLUME OF RECORDED OFFENDERS IN 2015-16:

1. Illicit drug offences - 83,160 offenders
2. Acts intended to cause injury - 75,947 offenders
3. Theft - 74,911 offenders
4. Public order offences - 69,042 offenders



CRIMES WITH THE HIGHEST VOLUME OF RECORDED VICTIMS IN 2016:

1. Theft - 537,283 victims
2. Unlawful entry with intent to commit a serious offence - 188,756 victims
3. Motor vehicle theft - 56,086 victims
4. Sexual assault - 23,052 victims

Statistical data on crime is important as it keeps the community informed on an issue that affects everyone. Statistics provide:

- a. information on how big the problem of crime is and who is at risk;
- b. assistance in trying to solve the problem by placing resources where they are most needed;
- c. possible explanations about causes of crime and its prevention by examining the relationship between crime statistics and wider social issues such as unemployment, poverty or domestic violence; and
- d. a way to give correct information to people so that they are better informed about the real risks in the society.

However there are concerns that at times, crime statistics are used by the media in misleading and sensationalist ways. This misuse may cause unnecessary fear and alarm in the community.

PRACTICAL APPLICATION

Over a period of a week collect two newspapers each day or watch two television news programs and monitor the coverage of crime over that period. Answer the following questions:

1. What percentage of space or time was allocated to the reporting of crime? [C]
2. In which part of the newspaper or television report were crime stories more likely to be located? [C]
3. Which type of offences received coverage? [C]
4. Did the offences which received most coverage correspond with the offences that are the most frequently occurring as referred to above? [C]
5. Were there special features about the offences that made them interesting to report? [A]
6. Did the headings accurately reflect the content of the report? [A]

We also should note that the reported crime statistics only cover those offences which become known to police. It is likely that not all crimes are reported. Rates of reporting vary depending on the type of offence, seriousness of incident and victim-offender relationship. It is impossible to tell accurately the amount of unreported crime. There is a general feeling in the community that the number of sexual assault victims is very much understated by victims not reporting such crimes. The number of sexual assault victims recorded by police increased by 8% across Australia from 23,040 victims in 2016 to 24,957 victims in 2017. This was the highest number recorded since the beginning of the time series in 2010 and it is the sixth consecutive year the number of sexual assault victims has increased. When looking also at the population the rate of victimisation has increased from 86 per 100,000 in 2010 to 102 victims of sexual assault per 100,000 persons in 2017. It is generally felt however that there are a large number of sexual assaults which are unreported. This may be the case because of the low level of reporting inside domestic and family relationships, among gay communities and among indigenous communities.

There are no statistics available on the non-reporting of sexual assault offences. Information is sometimes obtained from crime victims surveys conducted in Australia and such surveys indicate that there is a significant level of unreported sexual assaults.

REVIEW

1. What are the two types of indictable offences? Give two examples of indictable offences which can be dealt with summarily. [C]
2. What do murder, manslaughter and homicide have in common? How are they different? [C] [A]
3. List the ways in which a person can be held responsible for the causing death of another. [C]
4. When can a person be found to be criminally negligent? [C]
5. What is needed to prove the crime of rape? How does it differ from sexual assault? [C] [A]
6. Identify five offences that arise from illegal drugs? [C]
7. What is the name of the offence which involves wilfully and unlawfully setting fire to a building? [C]
8. Which two Acts set out the main offences dealing with motor vehicles? [C]
9. What types of offences are found in the Summary Offences Act? [C]
10. What is required to establish an attempt offence? [C]
11. What is meant by the phrase 'parties to an offence'? [C]
12. What makes a person an accessory after the fact? [C]
13. How many homicide incidents occurred in Australia between 1 July 2012 and 30 June 2014? [C]
14. Which State or Territory has the highest homicide rate? [C]

TOPIC 3: CRIMINAL TRIAL PROCESS

CHAPTER 7: PRE-TRIAL PROCESSES

FOCUS SUBJECT MATTER

7.1 INTRODUCTION

7.2 BAIL

7.3 MENTIONS

7.4 CALLOVERS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ the nature and extent of the processes an accused faces in the Magistrates Court before going to trial;
- ▶ that pre-trial processes are designed to ensure an accused is aware of the evidence he or she faces before going to trial and has an opportunity to respond to the prosecution's case;
- ▶ the arguments for and against releasing a person accused of family violence on bail;
- ▶ the purpose of callovers and the nature of matters a magistrate takes into account before moving any matter to the next step in the pre-trial process; and
- ▶ that all parties (victim, prosecution, accused, defence lawyers) to a criminal matter in the pre-trial process are entitled to be heard in an impartial and fair manner.

7.1 INTRODUCTION

The criminal trial process is not the same for every person charged with an offence as it can involve different pathways and events. These depend on matters such as the age of the defendant, the nature of the offence, whether or not the defendant pleads not guilty or guilty to the charge, and the many decisions a defendant must make as he/she moves through the trial process to the actual trial where a decision is made about guilt. The culmination of the trial process is the hearing before a magistrate, judge, or a judge and jury at which witnesses give evidence and either the magistrate, judge, or a judge and jury decide if the offender is guilty or not guilty.

The **trial process begins** when a defendant is **charged**, and ends immediately after a defendant **pleads guilty**, is **found guilty**, or is **acquitted**. The hearing before a magistrate, judge, or a judge and jury, called a trial, is not to be confused with what happens as part of the trial process beforehand. It is also not to be confused with an **appeal** which can be made to a higher court asking for a decision to be set aside (overturned).

For convenience, those trial processes which occur **before and leading up to trial** will be referred to as **pre-trial processes**, in order to distinguish them from the actual trial. We will discuss these in this chapter. They are:

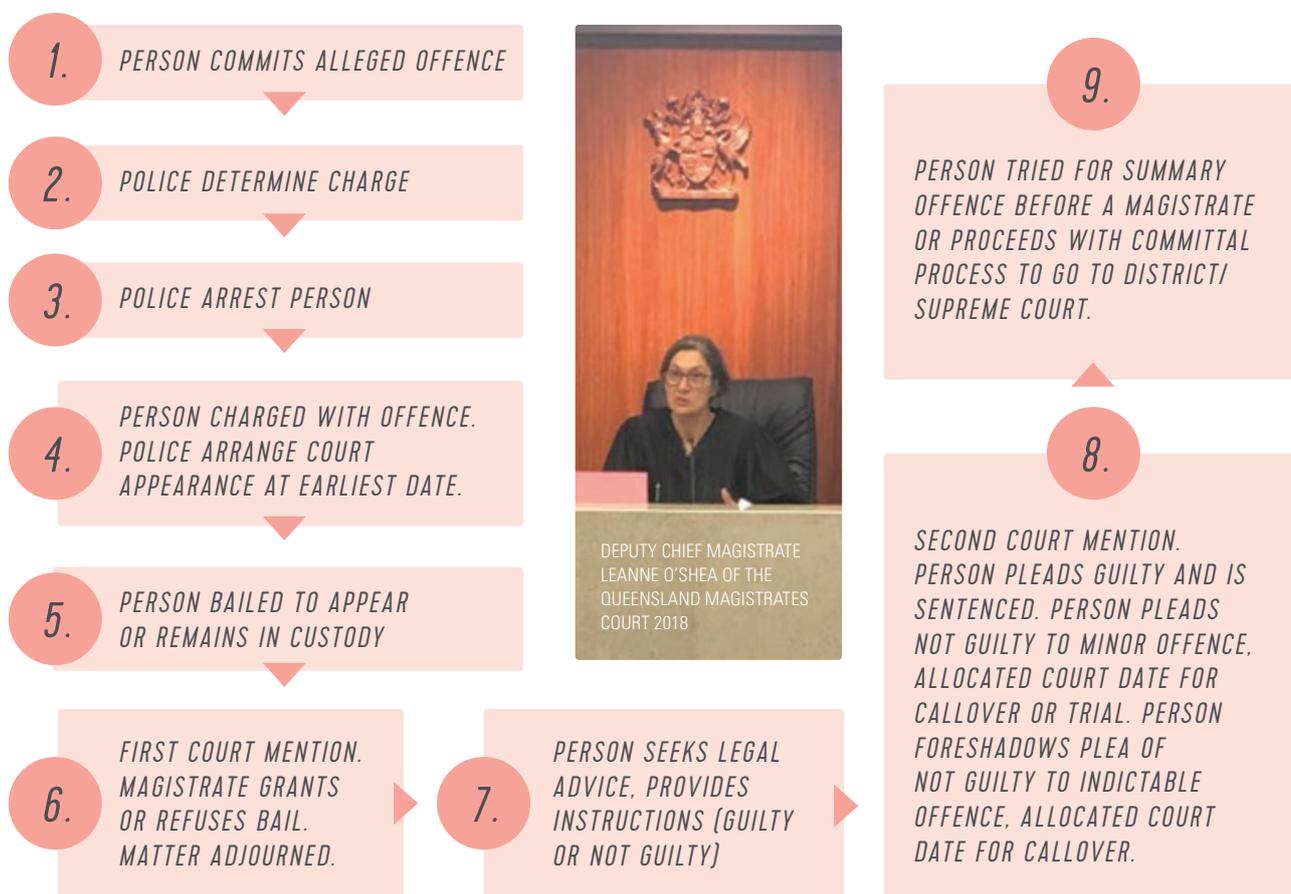
7.2 BAIL

7.3 MENTIONS

7.4 CALLOVERS

PRE-TRIAL PROCESSES FLOW CHART

A TYPICAL SEQUENCE OF EVENTS





Many offences, such as drink-driving, speeding and other traffic offences, are dealt with by defendants acknowledging guilt by simply paying a fine without attending at court or being arrested. These offences are not included in the discussion of the pre-trial process which follows.

The shortest and least complicated trial process is the one where a **defendant pleads guilty to a minor offence in the Magistrates Court**. On such occasions there is no trial, and the sentence (punishment) is pronounced at the same or next mention. A person charged with drunk and disorderly conduct, or stealing a small quantity of groceries, who admits doing these things, will be dealt with in such a manner. The only part of such a hearing which forms part of the trial process is when the defendant enters the plea of guilty itself.

The consequence of such a plea is that **the hearing changes from a trial to a sentencing hearing**, and the defendant may be sentenced immediately unless the court or the defendant seeks to have the sentence heard at a later date. In such a case the matter is adjourned to a later date and the question of **bail** arises.

Less serious offences are heard in the Magistrates Court. When a defendant pleads not guilty to such an offence the matter proceeds directly to a trial in the Magistrates Court.

The pre-trial process which occurs for serious (indictable) offences is quite different. A defendant who pleads not guilty will have a **Committal Hearing** before a magistrate in the Magistrates Court, at which a decision is made to either dismiss the charge because the magistrate determines there is insufficient evidence to convict, or to proceed to a trial in the District Court or Supreme Court before a jury.

Committal hearings are an extremely important part of the pre-trial process for indictable offences. See **Chapter 8: The Committal Process: Pathways to a fair trial**



Ch 8

All of the above pathways lead to a defendant being **acquitted** (found **not guilty**) or being **convicted** (found **guilty** or pleads **guilty**) and appropriately punished (**sentenced**). The question of punishment (sentence) will be considered as a separate topic from the trial process in **Topic 4: Punishment and Sentencing** (Chapters 12, 13).



Ch 12
Ch 13

Once a defendant is arrested and charged with committing a criminal offence, the police must decide if the defendant can be **released on bail**, or **remanded in custody** until the matter is mentioned in the Magistrates Court. Here a decision is made to release the defendant on bail or continue to hold the defendant in custody until trial. The hearing in the Magistrates Court, where such matters are mentioned in the first instance, is required to be at the first available opportunity. In Queensland, this is usually on the day of the offence or the following day unless the court is closed at the weekend.

7.2 BAIL

Bail is freeing or releasing a defendant from custody on the condition that he/she appears in court on a day and at a place required by the police or a court. Each State and Territory in Australia has laws which govern the process of bail. These are broadly similar but there are significant differences. The Queensland legislation is found in the *Bail Act 1980 (Qld)* (the *Bail Act*).

THE DEFENDANT'S RIGHT TO BAIL

Section 9 of the *Bail Act* states that the court shall grant bail to a defendant who is in custody subject to the Act. Generally, the more serious the offence with which a defendant is charged, the more likely a court is to refuse an application for bail. Where a defendant is in the custody of a police officer before appearing in court, the police officer is legally obliged to consider if the defendant should be granted bail. Section 7 of the Act gives a police officer the power to grant bail.

THE ROLE OF THE POLICE IN GRANTING BAIL

After a person is arrested by the police, he/she will be taken to the police station and charged. Cash bail is often granted for minor offences. **Cash bail** is a deposit of a sum of money with no written undertaking. If the person does not appear at court on the specified date, the money is forfeited to the Crown and no further action is taken by the police. In addition, in the case of some minor offences, for example, a person charged with being drunk in a public place or being in possession of a drug, which is only a minor offence under the *Drugs Misuse Act 1986* (Qld), can be released by the police on the payment of a sum of cash and in accordance with the requirements of the *Police Powers and Responsibilities Act 2000* (Qld). This involves releasing the defendant into the care of someone prescribed by the Act and in some cases requiring the defendant to attend a diversion program to assist the defendant to change his/her behaviour (through rehabilitation).

Otherwise, it is generally the case that **persons released on bail** are issued with a notice to attend court on a future date when they are required to appear. The notice will set out the penalty for not appearing in court on that date. The notice contains an undertaking by the person charged to comply with the bail conditions and must be signed by the charged person. One of the main conditions upon which bail is granted is the undertaking (promise) of the defendant to appear (placed in custody) in court on the date set down. If the police do not agree to grant bail, the charged person is locked up until he/she appears in court when he/she can apply for bail.

THE ROLE OF A COURT IN GRANTING BAIL

Section 8 of the *Bail Act* states that a court has power to grant bail subject to the Act. Generally a person charged will appear before a magistrate in the Magistrates Court in the first instance. The defendant is entitled to make an application for bail on this occasion. Where bail is refused by a magistrate, the defendant can bring a further application for bail before a judge of the Supreme Court.

Section 10 states that the Supreme Court has the power to grant, vary, enlarge or revoke bail. Sub-section 10(3) states that this power can only be exercised by the trial judge once the defendant's trial has commenced and proceedings are in the hands of the trial judge.

Section 11 of the Act sets out the matters that a court or police officer must consider when determining the conditions for release of a person on bail.

Section 16 of the Act sets out the matters that a court or police officer must consider when determining whether or not to refuse a defendant bail.

THE CONDITIONS A COURT OR POLICE OFFICER CAN IMPOSE ON A PERSON GRANTED BAIL

Sub-section 11(1) of the Act sets out the order in which a court or police officer should impose the conditions of release, namely:

- ▶ *a person's own undertaking, a deposit of money, a security of stated value; and*
- ▶ *a surety or sureties of stated value.*

For a very minor offence, it is usually enough for a person to give his/her own undertaking to attend

court when required. If the court/police officer considers that the defendant needs to make greater commitment to grant bail, the defendant can be asked to provide a deposit of money as well. If an undertaking and money are not enough and the defendant has property in Queensland, he/she can offer the real property, for example a house or land, as security. If the court requires even more to grant release on bail, the defendant may need to ask a third party to provide surety (ie. that third party offers to pay money or provide security (e.g. real property) for the defendant). This section of the Act also states that a court or police officer

*shall not make conditions for a grant of bail more onerous for the person than ...
is necessary having regard to the nature of the offence, the circumstances of the defendant
and the public interest.*

Sub-sections 11(2), (3) and (4), and the remaining sub-sections of s11, deal with the special conditions a court or a police officer considers necessary to ensure that, at the end of the bail period granted, the defendant appears and surrenders into custody in accordance with the bail conditions;

There is a **wide discretion** given in the Act to courts and police officers when imposing these conditions. They simply must consider that the conditions are ‘**fit for any or all of such purposes**’, including those set out in the *Bail Act*. At the same time, s11(2) is subject to the overriding requirement that is set out above in relation to s11(1).

The case of *Re Tesic [2015] QSC 205* (6 May 2015) illustrates **the range and type of bail conditions that may be imposed** when a defendant is granted bail. This case is available online.

REFUSING BAIL

Section 16 of the *Bail Act* states that the court or police officer shall refuse to grant bail to a defendant, if satisfied that, while released on bail, there is an unacceptable risk that the defendant would fail to appear and surrender into custody, or would commit an offence.

Section 16(2) goes on to set out the requirement that the court or a police officer shall have regard to all matters appearing to be relevant to the decision to refuse bail. It then sets out various matters which should be considered if relevant, including:

S162 (f) *if the defendant is charged with a domestic violence offence or an offence against the Domestic and Family Violence Protection Act 2012, section 177 (2)–the risk of further domestic violence or associated domestic violence, under the Domestic and Family Violence Protection Act 2012, being committed by the defendant.*

Section 16 (3) goes on to list offences which require a court or police officer to refuse bail;

unless the defendant shows cause why the defendant’s detention in custody is not justified and, if bail is granted or the defendant is released under section 11 A, must include in the order a statement of the reasons for granting bail or releasing the defendant.

The effect of s16(3), when read in conjunction with s16(2)(f) is that the recent amendments in 2017 to the *Bail Act* will require a person convicted of a domestic violence offence to prove why his or her detention in custody is not justified. See INQUIRY later in this Chapter 7.2.



Ch 7.2

The following case illustrates what happens when the court is asked to consider a bail application **after the defendant has already unsuccessfully applied for bail.**

CASE STUDY

R v Baden-Clay 14 December 2012 (unreported) - SOURCE: THE COURIER MAIL ONLINE 14 DECEMBER 2012



Facts: Baden-Clay (the defendant) was waiting for a committal hearing to proceed in the Brisbane Magistrates Court. He had already applied for bail unsuccessfully to the Supreme Court on 22 June 2012. On 13 June 2012, Baden-Clay was charged with the murder of his wife Alison and with interfering with her corpse. Alison was reported missing on 20 April 2012, and her body was found at Kholo Creek Bridge, in Brisbane's west, on 29 April 2012.

Mr Peter Davis SC, for Baden-Clay, tendered a number of documents to the judge on behalf of the defendant which had not been available on the date of hearing of the first bail application. He reviewed the evidence, including the further evidence now available, and argued that:

"There is a solid hypothesis in this case consistent with innocence, which is that Mrs Baden-Clay committed suicide."

Mr Davis argued that the autopsy report received on 7 September 2012 (including a toxicology report) clearly raised the issue that Mrs Baden-Clay could have died from ingesting drugs. He argued the Crown (prosecution) would need to exclude suicide as a cause of death.

Mr Davis also relied on further affidavits from the defendant's family offering substantial surety, arguing that the defendant was not a flight risk because he had family, including three children, in Brisbane.

DPP prosecutor, Mr Danny Boyle, said the defendant was still a flight risk because of a possible lengthy prison sentence, despite his family ties to Brisbane. He argued that not every variation of fact would lead to a change of circumstances justifying a reconsideration of the initial bail decision. He said the judge needed to look at the overall effect and decide if it changed the strength of the Crown case. He submitted that the Crown case, while circumstantial, was still strong.

In addition, Mr Boyle relied on the fact that there was new evidence by an expert botanist that leaves and plant material found on the arms, the head, and the body of Mrs Baden-Clay were predominantly found in the garden of the family's home at Brookfield, and not at Kholo Creek.

Legal Issue: When an application for bail by a defendant has been refused by the Supreme Court and a further application is made, the defendant is required to show cause why the judge should reconsider granting bail. In this instance, Judge Applegarth was required to determine whether there had been a material (significant) change of circumstances justifying a reconsideration of the bail application.

Decision: Judge Applegarth refused the application on the grounds that Baden-Clay had not shown cause and was a risk of flight in light of the likely lengthy sentence of imprisonment.

1. Should defendants be allowed to make more than one bail application? Why/why not? [A]
2. Is it fair to require a defendant to show cause why the judge should consider a further bail application? [E]

CHANGING THE CONDITIONS OF AN EXISTING BAIL ORDER

The case of *Clumpoint v Director of Public Prosecutions* [2005] QCA 43 (2 March 2005) illustrates what happens, under s10 of the Bail Act, when the court is asked to vary the conditions attached to an existing grant of bail. You can find the case online at www.austlii.edu.au. There is a case summary in the TSRM which accompanies this book.

THE ROLE OF THE TRIAL JUDGE IN BAIL APPLICATIONS

The administrative requirements of the District and Supreme Courts in Queensland are such that defendants are placed in a list of cases to be managed by a particular trial judge in due course. Once this happens, any application relating to the conduct of the trial, including questions of bail, must be heard before the trial judge. This is what s10(3) means when it says that the powers set out in s10 can only be exercised by the trial judge once the proceedings are in his/her hands.

The case of *Wotton v Director of Public Prosecutions* [2007] QSC 42 (16 March 2007) illustrates what happens **when an application to vary bail is made to a judge other than the trial judge**. This case can be found online at www.austlii.edu.au and a summary in is in the TSRM.



INQUIRY FOCUS



APPLYING BAIL LAWS TO FAMILY (DOMESTIC) VIOLENCE

The character of an inquiry is described and explained in the Preface. You will undertake a number of different tasks in this inquiry which will enable you to complete the learning processes set out in the syllabus.

PRACTICAL APPLICATION

TERESA BRADFORD MURDER SPARKS DOMESTIC VIOLENCE BAIL REVIEW

SOURCE: JORGE BRANCO WWW.BRISBANETIMES.COM.AU (2 FEBRUARY 2017) (EXCERPTS)

The Queensland government will consider forcing anyone accused of serious domestic violence offences to convince a magistrate they are safe to be released, under a review of the state's bail laws.

The lawyer for David Bradford, who murdered his wife Teresa in her Pimpama home, says granting Mr Bradford bail for a previous assault was the 'right thing to do'.

David Bradford, 52, was freed on bail less than three weeks before police believed he murdered his wife, Teresa, at her Pimpama home, before taking his own life. It is believed at least three of her children were home early Tuesday morning and rushed to alert neighbours to the horrible crime.

Before his release on January 12, Mr Bradford had spent 44 days behind bars accused of choking and assaulting his estranged partner on 28 November 2016.

Attorney-General Yvette D'Ath announced on Thursday possible changes to the way bail was granted were under consideration, flagging a particular focus on the newly introduced offence of strangulation.

Police had reportedly called on the specialist domestic violence magistrate to reject Mr Bradford's bail application but were overruled.

The revelations sparked an outcry and calls from DV (domestic violence) support agencies, antiviolence campaigners and more than 30,000 online petitioners to reconsider bail laws for violent offenders, particularly in relation to partner abuse. Several advocates argued choking a partner was a major predictor for future domestic violence and also called for judges and magistrates to be better educated.

1. Where was Mr Bradford before January 12? [C]
2. What was Mr Bradford accused of doing to Mrs Bradford on November 28? [C]

PRACTICAL APPLICATION CONTINUED...

3. What reasons are given in the article as to why Mr Bradford was released on bail? [C]
4. What reasons are given for changing the bail laws in the context of existing family violence? Who are the stakeholders putting forward these arguments? [C]
5. Overall, what position do you think the writer of this article has taken with respect to the adequacy of existing protection for victims of family violence? Do you agree with this position? [A] [E]

In the above practical application, the facts raise the issue whether there should be special rules (laws) which apply to people who behave like Mr Bradford.

In relation to matters of family violence, it may be a preferred position that a person like Mr Bradford should not be released on bail unless he could prove, among other things, that Mrs Bradford would not be in danger from him. This would effectively be a **presumption against the granting of bail for a crime committed in the family violence context**. That is, the magistrate hearing Mr Bradford's application would be obliged to be satisfied by Mr Bradford's evidence (or evidence led by other persons on his behalf) that the presumption against the granting of bail was rebutted (set aside) by the evidence. In Queensland, the law did not require the magistrate at the time of releasing Mr Bradford to be so satisfied.

PRACTICAL APPLICATION

DOMESTIC VIOLENCE DEATHS IN QUEENSLAND ACCOUNT FOR QUARTER OF NATIONAL TOLL

SOURCE: SAM PHILLIPS WWW.COURIERMAIL.COM.AU (2 FEBRUARY 2017) (EXCERPTS)

Queensland accounted for a quarter of the nation's domestic violence deaths in 2016. Mrs Bradford's death is the latest in a list of alleged domestic violence attacks that have shocked Queensland during the past year. DV Connect Chief Executive Di Mangan said 18 Queensland women were killed in 2016, in a national toll of 71.

TOO LITTLE, TOO LATE: THE VICTIMS FAILED BY VICTORIA'S JUSTICE SYSTEM

SOURCE: MARNIE O'NEILL WWW.NEWS.COM.AU (24 JANUARY 2017) (EXCERPTS)

As many as 20 Victorians have been killed by serial offenders who should have been in jail over the past decade. Jimmy Gargasoulas, who allegedly killed five and injured 37 in Friday's Bourke street massacre, was granted bail against the advice of Victoria police five days before the attack.

Mr Andrews (Premier of Victoria) has introduced a system of on-call magistrates who will be available for decisions 24 hours a day as part of an overhaul of Victoria's bail act.

Mr Andrews also promised a shakeup of the system in April last year in response to the 2015 murder of schoolgirl Masa Vukotic by convicted serial rapist Sean Price while free on bail, commissioning Supreme Court judge David Harper to conduct a review. The 2016 Harper Review sought changes to the management of serious sex offenders, who are now supposed to be monitored by a separate "public protection" agency and required to undergo early intervention treatment.

PRACTICAL APPLICATION CONTINUED...

Somewhere in between, a coronial inquest into the death of schoolboy Luke Batty by his homeless father Greg Anderson, who had been bailed to a motel-against police advice-on child pornography charges, found there had been a “system failure” of the bail process.

The strongest proposal comes from the Police Association of Victoria, who want people accused of serious and violent crimes to be automatically refused bail. They include offences such as armed robberies, carjackings, serious assaults and home invasions.

Victoria Police Association boss Ron Iddles told the ABC 7:30 program we should not wait for the tragedies to happen before reviewing the laws.

1. What issues are raised by the article about domestic violence deaths? Set these out in writing in your own words. [A] [E]
2. What issues are raised by the article about victims failed by Victoria’s justice system? Set these out in writing in your own words. [A] [E]
3. Are any of the issues raised by each article the same, similar, or different? Justify your answer. Does your answer suggest anything to you about Australian society generally and about the legal system (laws) in each state of Australia? [A] [E]

A useful background source which examines our bail laws in the context of family violence is the report of the Australian Law Reform Commission ALRC (11 November 2010) entitled *Family Violence - A National Legal Response*. The introduction to Chapter 10 *Bail and Family Violence* of the report states:



10.2 After briefly describing bail and its purposes, including bail in the context of family violence, this chapter considers three important ways in which bail and family violence laws interact. The first concerns the question of whether there should be a presumption for or against the granting of bail for crimes committed in the family violence context. The second concerns bail conditions and whether they can conflict with family violence protection order conditions. Such conflicts and ambiguity may cause confusion and compromise the safety of protected persons. Finally, the chapter considers whether victims of family violence are properly informed about bail decisions and understand what the conditions of bail mean and how they might interact with a protection order.

When describing the nature and purpose of bail in its report on Family Violence - a National Legal Response, the ALRC recognises that bail aims to ensure that the accused ‘**reappears in court either to face charges or be sentenced**’ after being arrested and initially being placed in custody. It goes on to observe that the *International Covenant on Civil and Political Rights 1968* (ICCPR), to which Australia is a signatory, states that:

it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.

It is important to understand the legal concept (idea) which underpins the ICCPR principle stated in support of accused persons. This is the concept that the defendant should be entitled to bail subject to the matters a magistrate or judge must consider when making a decision under the Bail Act to grant bail or not. All defendants are presumed innocent unless convicted. The **presumption of innocence** underlies the general proposition that an application for bail is a **process only** and does not decide guilt or innocence. This is reflected in s11(1) of the **Bail Act**.

RESEARCH

1. Identify and describe briefly events in Australia which involve defendants committing offences while released on bail since 2010. For each of these, state in your own words an issue or issues the factual circumstances surrounding the event raises for the potential reform of the law. [C] [S]
2. Go to <http://alrc.gov.au/publications> and find the ALRC report referred to above on **Bail and Family Violence**. Select a state other than Queensland. Does the law of that state make it easier or more difficult than Queensland for a defendant charged with a Family Violence offence to obtain bail? Do you think Queensland governments should have changed the law relating to bail after the ALRC report? Give your reasons. [C] [A] [E]

WHAT DO YOU THINK?

Consider the following question. Prepare a plan or outline which you think will answer the question adequately. Justify the scope (nature and extent) of your response in a short summary. What other questions can you propose as appropriate inquiries? [C] [S] [A] [E]

Should there be special rules to make it more difficult for serious family violence offenders to obtain bail?

PRACTICAL APPLICATION

DOMESTIC VIOLENCE LAWS: ALLEGED OFFENDERS HAVE TO PROVE WHY THEY SHOULD GET BAIL

SOURCE: GAIL BURKE WW.ABC.NET.AU (23 MARCH 2017) (EXCERPTS)

Anyone charged with a serious domestic violence offence in Queensland will now have to prove why they should be granted bail and allowed back into the community before they face court.

Queensland Parliament passed the Bail (Domestic Violence) and Another Act Amendment Bill 2017 in the early hours of this morning, which reverses the usual legal process where police and the prosecution would have to argue why a person should not be granted bail and kept in custody.

The opposition said the new laws also provided more safeguards for domestic violence victims, including provisions for courts to order alleged offenders to be fitted with GPS tracking devices as a bail condition, and urgent appeal rights for victims.

Opposition leader Tim Nicholls, who introduced the legislation, said the changes provide more security for victims.

The private member's bill came after Teresa Bradford was killed by her estranged husband inside her Gold Coast home in January.

He said it would save lives.

"With over a quarter of the domestic violence deaths in Australia occurring in Queensland last year, we felt it necessary to take action to stop the talk and get going," Mr Nicholls said.

The State government forced a number of amendments to the LNP's bill. Attorney-General Yvette D'Ath said one of the changes would ensure the bail reforms were applied to high-risk offenders, including those charged with strangulation, stalking and even animal cruelty charges.

PRACTICAL APPLICATION CONTINUED...

"These were important offences that were picked up by the private member's bill that we think enhances the reverse onus conditions when it comes to bail," Ms D'Ath said.

The State government and crossbench also rejected the LNP's bid to make it mandatory for victims and their families to be formally notified when perpetrators were granted bail or parole. Ms D'Ath said there were already provisions in place for that to happen.

Anti-domestic violence advocate Sonia Anderson said it should have been made law.

Queensland Women's Legal Service spokesman Angela Lynch said while she congratulated the LNP for taking such quick and decisive action, she was concerned the LNP's bill was too broad. She said there needed to be better use of domestic violence risk assessments that were used in the community already. (Where) "a DV risk assessment determines that a matter is high risk then the court should take it on board," she said.

"We also think that matters involving strangulation-because of overwhelming evidence that that activity is a precursor to murder-and also if a victim is currently in a high risk team ... that evidence should be going before the court about that."

1. Identify and describe each of the changes referred to in the above article made in the *Bail (Domestic Violence) and Another Act Amendment Bill 2017* to the laws which govern applications for bail. [C] [S]
2. Are there any further changes to the law you would make that you have identified during your study of this topic in addition to those which are set out in the above article? [A] [E]
3. Should all of the changes set out in this article and/or identified by you be made Australia-wide? [E]
4. Imagine you are working in the office where legislation is drafted for the Queensland Parliament. You have been asked by the relevant Minister to draft a list of the objectives of legislative changes in this area. As this is a draft, the Minister has asked you to include your own ideas for consideration by him to assist in the final draft to be taken to Cabinet. Prepare your draft. [C] [A] [E] [R]

7.3 MENTIONS

A **mention** is a court hearing of a procedural nature which a defendant must attend. As the name suggests, a mention is an occasion when the case comes before the court but is not finally decided. There are as many mentions as are required by the defendant, the prosecution, and the magistrate, in order to ensure a fair and timely progression of a defendant's matter through the judicial system. The magistrate determines when and where a defendant's matter is set down for mention.

On the first hearing date (mention), the defendant must go to court. This date is shown on the:

- ▶ *Notice to appear; or*
- ▶ *Complaint and summons; or*
- ▶ *Bail undertaking (if granted bail by a police officer after arrest).*



There are practical things which a defendant should know about going to court, such as the location of the court, how to behave when before the court, and getting legal advice before going, or from the duty lawyer at the court beforehand (a free service generally provided by Legal Aid Queensland). Find this information at <http://www.legalaid.qld.gov.au>.

In the courtroom, the magistrate will read out the charges, and ask the defendant to respond. If the defendant has not received legal advice, or would like more time to obtain legal advice, he/she should ask for an **adjournment** (where you are given a new court date to come back and face the charges in court). If an adjournment is granted, the defendant will need to ask the magistrate to **enlarge his/her bail**. This means to grant the defendant further bail until the new court date.

HYPOTHETICAL

Facts: Jake Simon and his mates are at Schoolies week on the Gold Coast. After drinking in their hotel room until 11pm they decide to go to a nightclub. The nightclub refuses them entry on the grounds that they are all drunk. They argue with the doorman and stay outside the nightclub on the footpath yelling and swearing at the doorman and other patrons who are allowed to enter. A police officer on patrol orders them to move on. They do so temporarily but then return a few minutes later to continue their behaviour. Several police officers, including the first one to request them to move on, arrive, arrest them, and take them to the watchhouse. They are refused bail, and after spending the night in the watchhouse, are taken to the Southport Magistrates Court the following morning to face the magistrate. Jake is worried. He has heard a conviction might affect his future employment in his chosen profession as a lawyer. He obtains permission to telephone his mother who says she will be at the court the next day, 12 November.

The court appearance

Jake is sitting in the back of the court waiting his turn with his friends. None of them have had the opportunity to obtain legal advice because the duty lawyer is very busy. The magistrate is going through a list which the police prosecutor has provided to her. She calls his name. Jake walks to the bar table, stands to the left of the prosecutor, and bows to the magistrate.

Magistrate: You may sit down Mr Simon. Thank you Mr Prosecutor.

Prosecutor: Your Honour, the defendant is charged with two offences, one count of being drunk in a public place under s10 of the *Summary Offences Act 2005* (Qld), and one count of Public Nuisance under s6 of the same Act. Does Your Honour require the particulars of the charges to be read out to the court? I understand from the defendant that he has not had the opportunity to receive legal advice.

Magistrate: No thank you, Mr Prosecutor. Mr Simon, I will hear from you now.

Jake Simon: Your Honour, I would like to get legal advice before deciding what to do. I apply for bail. My mother is outside waiting for me and has said she will assist with any of the court requirements. She has arranged an appointment for me with the family's lawyers early next week.

Magistrate: Very well, Mr Simon. Bail is granted on your own undertaking and your matter is remanded for a period of one month to the 13 December. On that day you will need to advise the court as to what you intend to do: either enter a plea of guilty or say you are going to defend the charges. Do you understand?

Jake Simon: Yes, Your Honour, I do.

Magistrate: You may go.

1. Describe the roles played by Jake Simon, the police, the magistrate and the Prosecutor. [C] [A]
2. Conduct a short role play of the courtroom scene. Set up your classroom like a court room. [C]



Ch 11

ENTERING A PLEA

Once the defendant has received legal advice, he/she should be in a position to respond to a request by the magistrate to plead to the charges. There are only two pleas possible: guilty or not guilty.

Upon a plea of guilty, the magistrate will want to sentence the defendant (determine the appropriate punishment) straight away, or at some suitable future date. The magistrate will want to hear submissions from the defendant/defendant's lawyer and from the prosecution (the police prosecutor in the Magistrates Court) before passing sentence. There are a large number of matters which a court must consider before passing sentence and therefore great care needs to be taken to make sure the magistrate is provided with every piece of information that is relevant to deciding the sentence. Except in the simplest of cases, a lawyer's skill is usually of great assistance to a defendant when being sentenced. The process of sentencing a defendant and the hearing at which this happens, is the subject of a separate topic later in this book (see Topic 4: Punishment and Sentencing).

A not guilty plea will mean that the court will require the matter to go to trial. Where the charge is one which can be heard in the Magistrates Court, it will be adjourned to a Summary Callover, at which it will be set down for trial.

If the defendant pleads not guilty to a more serious charge which must be heard in either the District or the Supreme Court, the matter will be adjourned for mention to a Committal Callover, at which arrangements for a Committal Hearing will be made.

To enable matters which come before the court to proceed in an orderly and fair manner they must first all go to a Callover, before being set down for trial. What happens at Callovers is considered in more detail later in this chapter.

It is necessary for a defendant's grant of bail to be further enlarged each time he/she attends court.

RESEARCH

Magistrates Court visit

Students should go to the closest Magistrates Court when the court opens to hear matters that have been listed for the first time. These **mentions** are the best way to learn about court procedures, the different roles of the parties, the nature of a bail hearing, and the different options available to defendants, depending upon the nature of the offence with which they are charged.

If going by yourself, telephone the court first to find out when and where to go, and be sure to have done your reading about the criminal trial process.

1. Enter the court a few minutes before it starts. Tell the police prosecutor why you are in court (to find out how the court works for your legal studies) and sit quietly at the back of the court.
2. In the courtroom, identify the magistrate, the police prosecutor, the defendant (accused), and any lawyer representing the defendant. Draw a diagram showing where each of these persons is positioned. Describe how each of them behaves and what they say. Write a short description setting out the role of each of these characters in the courtroom scenario.
3. Number each matter which comes before the court numerically. Use this numbering system to record why each defendant is before the court and what the police prosecutor says he/she has done.
4. Record what is said by each participant in the form of a role-play for at least three matters. Hopefully, you will be able to record what happens if a defendant is sentenced immediately, with or without legal representation, and what happens in a disputed bail hearing (when the police prosecutor opposes bail). If you are with other students, agree to share your notes with one or two other students so that you do not miss anything that is said. When you get back to school, join with other students and re-enact a role-play that illustrates what happened.

HYPOTHETICALS

Answer the following questions with respect to each of the hypotheticals.

1. What charge/charges does the defendant in each case face? [C]
2. What should each defendant say to the magistrate directly or through his lawyer in response to each of the charges? [C] [A]
3. What should each defendant say to the magistrate directly or through his lawyer about the future management of his matter? [C] [A]

1. Blair is charged with being in possession of a dangerous drug under s9 of the *Drugs Misuse Act 1986* (Qld). A neighbour reports him to the police who then attend at his home and find two cannabis plants in pots. The cannabis plants weigh 400g. Blair takes the summons to attend court to his solicitor and gives a statement. The solicitor advises him to plead guilty and indicates she is available on the hearing date set out on the summons. Blair engages her to represent him at this hearing.
2. Cruze Briar is charged with drunk and disorderly conduct, resisting arrest, and assault. He refuses to cooperate after being spoken to by a policeman on duty in Fortitude Valley, refuses to move on, and is arrested. In the course of being arrested he resists being physically restrained and placed in a police vehicle. Cruze is accused of spitting on one of the police arresting him. Cruze is brought before the Magistrates Court the morning after he is charged before he has the opportunity to take legal advice.

Case Study (*Unreported*)

3. Ken is fired from his job at Engineering Works Ltd (EWL). He has an angry argument with Ross, the manager, who fires him, whom Ken thinks does not like him. He goes home, gets his father's rifle (.22 calibre) and goes back to the EWL factory. The factory floor is open plan and the six employees who work on the floor can generally see the office window (from waist to ceiling) at one end. Ross sits in the office facing the factory floor. Ken goes to the office window, hits it with the rifle barrel, and yells at Ross. Ross yells back. Ken fires the rifle at the window then runs away. The bullet shatters the glass and lodges in the ceiling of the office. Ken is arrested at home, taken to the police station, and charged with attempted murder and causing damage to property.

7.4 CALLOVERS

PRE-TRIAL PROCESSES FOR SIMPLE OFFENCES (SUMMARY MATTERS)

1. MENTION (FIRST HEARING)

the accused pleads not guilty, and applies for bail. Date allocated for summary callover, brief of evidence must be delivered to the defence within five weeks of the summary callover date.



2. MENTION (CALLOVERS)

the accused attends summary callover/Case conference and/or directions for future conduct of matter/trial date may be allocated.



3. SUMMARY TRIAL

evidence is presented by prosecution and defence. Relevant facts must be proved beyond reasonable doubt. Magistrate decides guilt or innocence and gives reasons for judgement.

The above flowchart sets out the usual pathway followed by a criminal matter in which the defendant pleads not guilty and where the trial can be heard before a magistrate in the Magistrates Court.

When a defendant pleads not guilty in the first instance, the magistrate will set a date for him/her to appear at a mention called a **Summary Callover**. The purpose of the Summary Callover is for the defendant to:

- ▶ inform the magistrate if he is going ahead with the trial;
- ▶ give the magistrate a preliminary outline of witnesses likely to be called on his behalf, if any;
- ▶ advise the magistrate of any proposed legal representation;
- ▶ attend case conferencing with legal representation;
- ▶ request the prosecution to provide statements of witnesses, documents, and exhibits needed to facilitate any case conference; and
- ▶ indicate if any special requests will be made to assist in presenting this case (for example, by video evidence); and

for the prosecution to:

- ▶ attend case conferencing with the defendant's lawyer;
- ▶ advise the witnesses for the prosecution and indicate their availability;
- ▶ indicate if there are any special requests to be made for the conduct of the trial; and
- ▶ indicate when the Crown (prosecution) expects to be ready to proceed.

By this process, the court ensures **procedural fairness**, and the defendant is given a proper opportunity to put his case so that he is treated fairly.

PRACTICE DIRECTIONS

The court often makes what it calls Practice Directions in which it sets out what it expects the prosecution and the defendant to do in order to move the matter forward through the court system efficiently and impartially.

An extract from a Practice Direction is set out below. It should help you understand the purpose of the practice directions made from time to time by the court.

CHILDREN'S COURT (MAGISTRATES COURT)

Practice Direction No.2 of 2017

Judge Orazio Rinaudo, Chief Magistrate, 17 March 2017.

This Practice Direction is intended to assist with case management of Criminal Matters in the Magistrate Children's Court ("the Court") by encouraging the Prosecution and Defence to enter into a case conference in each case and sets out procedures to be adopted at the Summary and Committal Callovers.

CASE CONFERENCES

A case conference can occur at any time a legal representative for the defendant speaks to or negotiates with the relevant Police Prosecutor on the phone or in person. The Case Conference is always ‘without prejudice’. This means anything said is not able to be used in evidence at the trial (if any) unless otherwise agreed. The case conference usually includes charge negotiations. Is there enough evidence to justify them? How should the matter proceed if there is agreement about the charges?

HYPOTHETICAL - CONTINUED FROM PAGE 156

Cruze Briar is granted bail. It is a condition of his bail that he must return to the Magistrates Court in two weeks. During this time he is given legal advice. His lawyer prepares a statement which he signs.

Cruze's statement.

1. I was drinking last Saturday night with three friends at a bar in Fortitude Valley. It was about 10 pm and very busy. Part of the bar opens to the footpath, but a sign states that all drinkers should remain inside. Because it was busy we were close to the footpath and on occasion one or two of us stood outside the bar area on the adjacent footpath.
2. We had been drinking for at least an hour and a half when the incident occurred. I was facing away from the footpath when one of my friends started yelling to attract the attention of someone inside the bar. There was a very noisy exchange and two people from inside the bar joined a group which was pushed out onto the footpath, and blocked some pedestrians from walking past. At the same time three policeman on patrol were walking past and one of them told us to behave ourselves and move inside or leave. There was some stupid behaviour. Laughing and swearing. One of the group said loudly “We’ll leave when we finish our drinks! ”
3. Two of the group were immediately arrested. I had just taken a mouthful of beer and was standing next to these two, who struggled, and I was jostled, gagged on the beer and accidentally sprayed some of the mouthful on the policeman nearest to me. I was immediately grabbed and arrested, then roughly pulled towards a police wagon that had just pulled up on the street, then loaded into it with my two friends.
4. It is a location where I believe CCTV cameras would have recorded the incident.

Signed: *Cruze Briar.*

Cruze’s lawyer contacts the Police Prosecutor responsible for the matter and obtains the QP9 (Charge Sheet) which sets out the charges being brought against Cruze as well as the particulars of each charge. **Particulars are the facts relevant to each charge relied on by the prosecution to prove the charge.**

Charge 1: One count of drunk and disorderly conduct under s9 of the Summary Offences Act 2005 (Qld). The accused with a number of other offenders was blocking a public footpath and using loud and offensive language. The accused did not move from the footpath when ordered to do so.

Charge 2: One count of resisting arrest under s790 of the Police Powers and Responsibilities Act 2000 (Qld). The accused physically resisted by pulling away from an officer when he was being arrested.

Charge 3: One count of assault under s335 defined in s245 Criminal Code 1899 (Qld). The accused spat on Constable Free while he was being arrested.

Cruze’s lawyer requests the police prosecutor to obtain the CCTV record of the incident before the second hearing (mention). Cruze’s lawyer indicates to the police prosecutor, that once he is given the opportunity to view this recording, he will be in a position to advise Cruze. He will then take instructions about the charges. He also requests disclosure of any sworn statement of evidence by any witnesses, including the police, and to be given access to peruse the notebooks of the police giving evidence at the trial.

The CCTV record of the incident does not become available before the next hearing date (second mention) of the matter. There are also no sworn statements from police witnesses although it is indicated by the police prosecutor that she will not oppose making these available once Cruze pleads not guilty and she receives a brief of them from the police. Until the sworn statements are finalised, she is not prepared to request the police to provide their notebooks.

HYPOTHETICAL CONTINUED...

The Hearing (Second Mention)

1. Cruze instructs his lawyer to plead not guilty and to make submissions at the hearing seeking a further mention of the matter once the CCTV record of the incident and the sworn statements of any witnesses are made available. You work for Cruise's lawyer and are asked to prepare draft submissions for him to seek the outcome that your client has requested. Prepare this draft in your own words outlining the issues that require the matter to be set down for a further mention before any Summary Callover. [C] [A] [R]
2. The magistrate does not agree to set the matter down for further mention. She sets it down for Summary Callover on a future date which allows the prosecution enough time to finalise signed witness statements, provide the CCTV record of the incident, and for case conferencing to take place. You are the magistrates clerk, and she asks you to prepare reasons in draft supporting her decision. Prepare the draft for her consideration. She stands the matter down after hearing submissions from Cruze's lawyer to give you time (about half an hour) to prepare the draft. [C][A][R]
3. What orders/directions does the magistrate need to make in order to progress the matter so that it can be set down for trial at the Summary Callover? [C] [A] [R]

Case Conferencing

The police prosecutor makes the CCTV record of the incident available for viewing. Cruze and his lawyer attend the police station at Fortitude Valley to watch it. They observe the following:

1. All of the members of the group behave in a drunk and disorderly fashion before the police approach them.
2. When the police arrest two of the group Cruze is accidentally bumped just after he takes a mouthful of his beer. The policeman close to him is looking the other way and does not see that this makes him gag involuntarily and spit some beer onto his shoulder and cheek from his left hand side.
3. The policeman turns and puts his hand on Cruze's arm and says he is under arrest for spitting on him. Cruze tries to pull his arm away several times while trying to explain it was accidental.

Cruze's lawyer and the police prosecutor meet by themselves in conference to discuss the charges. Cruze's lawyer submits to the police prosecutor that the evidence on the CCTV record does not support the charge of assault because it was an accident and therefore unintentional. Also, although technically Cruze resists arrest by pulling away his arm when he was detained during arrest, the circumstances do not justify proceeding with the charge. The police prosecutor agrees to withdraw the assault charge, but not the charge of resisting arrest, although he does say that he accepts the particulars of the charge could be amended to make it clear that in the circumstances it is not a serious example of resisting arrest. He will support submissions by Cruze's lawyer for a small fine if Cruze pleads guilty.

Summary Callover

Cruze and his lawyer attend court at the mention of Cruze's matter where it is set down for Summary Callover. Given the outcome of the case conference, the matter is finalised on that day.

1. Prepare a statement by the magistrate which finalizes the matter, in which Cruze is discharged without conviction and fined \$350. [R]



WHAT DO YOU THINK?



Suppose the CCTV record of the incident is not available because there was a fault in the camera at the time. Suppose also that Cruze's partner Sophie arrives at the bar fifteen minutes before the incident and is standing a couple of metres away in the bar area talking to a friend when the incident takes place. She sees everything and corroborates Cruze's evidence. She is prepared to provide a sworn statement and give evidence at a summary trial. Cruze decides to plead not guilty to the charges of assault and resisting arrest.

You are Cruze's lawyer. What directions/orders will you seek from the magistrate when you appear at the Summary Callover? [C] [A] [R]

PRE-TRIAL PROCESSES FOR INDICTABLE OFFENCES



COMMITTAL CALLOVER

All matters which are unable to be heard summarily in the Magistrates Court, and where the defendant has not pleaded guilty, proceed to a Committal Callover for mention. At the callover:

1. First, consideration is given to whether or not any requested specified statements and/or copies of exhibits to be prepared, copied and delivered have been made available to the defendant/defendant's lawyer.
2. Second, the court must be advised of the result of any case conference (changes of charges, changes to any election from indictable to summary). This step may require a second appearance (mention) when matters set out in 1 above are not satisfied at the first appearance (mention).
3. Third, the defendant must advise the court as to which way the matter is to proceed under the *Justices Act 1886 (Qld)*.

Where a matter must be heard in a higher court (District Court/Supreme Court) there are three options as to how it proceeds to the relevant higher court. These are considered in detail in Chapter 8 which follows.

4. Fourth, the defendant may plead guilty and choose to be committed for sentence to a higher court.

Pathway to the higher court to be taken by the defendant must be chosen and communicated to the court at the Committal Callover, we will consider this process as part of the next chapter, namely the **Committal Process**.

REVIEW

1. Describe the following: [C]

bail | cash bail | remanded in custody | accused (defendant) | prosecutor
 magistrate | pre-trial processes | mention | plea | callover
 practice directions | case conferencing

2. Describe and explain the following: [C]

2.1 The role of the police in granting bail.

2.2 The role of the court in granting bail.

2.3 The conditions a court or police officer can impose on a person who is granted bail.

2.4 What happens in court on the first hearing date.

2.5 The role played by the lawyer for the accused during the pre-trial process.

2.6 The purpose of the practice directions when a matter is mentioned.

2.7 The matters an accused person or his lawyer must provide to the magistrate in a summary callover.

3. Explain:

3.1 Why Judge Applegarth decided to refuse bail in *R v Baden-Clay*. [C] [A]

3.2 The role that callovers play in the pre-trial process of a summary matter. [C] [A]

4. 'It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial'.

SOURCE: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1968

Explain the above proposition by reference to the *Bail Act* (Qld). Do you agree with the latest amendments to the *Bail Act*? Give your reasons. [C] [A] [E] [R]

TOPIC 3: CRIMINAL TRIAL PROCESS

CHAPTER 8: THE COMMITTAL PROCESS: PATHWAYS TO A FAIR TRIAL

FOCUS SUBJECT MATTER

8.1 THE PURPOSE OF THE COMMITTAL PROCESS

8.2 THE COMMITTAL PATHWAYS

8.3 REGISTRY COMMITTALS

8.4 COMMITTALS BY MAGISTRATES

8.5 THE ROLE OF THE CROWN LAW OFFICE
(OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS)

8.6 EX-OFFICIO INDICTMENTS

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ committal proceedings ensure an accused does not face trial on a serious criminal matter without sufficient evidence;
- ▶ the committal process ensures the accused is fully informed about the nature and detail of the case against him or her (disclosure);
- ▶ full disclosure means that the accused is given a fair opportunity to meet the case against him or her; and
- ▶ the nature and role of committal proceedings have been subject to review in Queensland from time to time.

8.1 THE PURPOSE OF THE COMMITTAL PROCESS

Traditionally the committal hearing is a process designed to test whether the evidence against the accused is strong enough to put him/her on trial before a judge and jury in the District or Supreme Court. The decision to be made to commit a person to trial is not whether the accused is innocent or guilty, but **whether the police evidence is sufficient for a jury in a higher court to convict the accused**. The test is **not** whether a jury **would** convict the accused but whether, on the evidence presented, if believed and unexplained, a jury **could** convict the accused.

In the Australian legal system it is important that a person charged with an offence is aware of the evidence against him or her. Consequently, the process at a committal where all the evidence available to prove guilt is presented, enables a defendant to understand the case of the prosecution and to prepare for trial. The **right to a fair trial** is an essential element of **natural justice**, and is enshrined in Article 10 of the *Universal Declaration of Human Rights 1948*.

The committal process also adds to the efficiency of the justice system. Weak cases will be identified and possibly eliminated. Strong cases may help the defendant who receives legal advice to plead guilty.

In the Australian criminal legal system, defendants are innocent until proven guilty. You will read later in chapter 9, that the case for the prosecution is presented first in a trial, and then the defence presents its case. Obviously, if the defence is surprised by part of the prosecution's case, and needs extra time to prepare, it will ask for an adjournment, which delays the trial and is inefficient. For example, it may need to find a witness to contradict some evidence brought by the prosecution. This would take time and interrupts the trial. The committal process is efficient because it presents the evidence against the defendant in advance, which allows the defendant to prepare his or her response.



Ch 7

As has been identified at the end of Chapter 7 there are a number of committal pathways which were legislated in amendments to the *Justices Act 1886 (Qld)* in 2010.

8.2 THE COMMITTAL PATHWAYS

At the Committal Callover the defendant must inform the court which pathway he/she will take to progress to a higher court. The choices for a defendant are set out in the *Justices Act 1886 (Qld)*. These are:



Each defendant has different reasons for his or her choice of the form of committal. In anything but the most straightforward and uncomplicated of cases, lawyers will tell you that they like to see all of the evidence which is to be faced before giving the defendant advice about which pathway to choose. Once the brief of evidence (the statements of witnesses, the statements of police, any expert witnesses, documents, and physical evidence) is available to the defendant it is possible to decide which parts of the evidence need to be tested or further explored in cross-examination. Generally, the more complicated the factual circumstances surrounding the alleged offence, the more likely it will be that the matter proceeds by way of a committal hearing.



In committals before magistrates, the prosecution is required to call its witnesses to give oral evidence in the court and to be cross-examined by defence counsel on their oral testimony as well as on any written statements. There may be arguments as to whether cross-examination of some witnesses will be allowed. If the prosecution consents to such cross-examination then that is the end of the matter. If the prosecution does not consent to the cross-examination of certain witnesses then the Magistrate will hear arguments and will decide if cross-examination is allowed.

Regrettably, for defendants facing these choices, an important consideration is always the cost of legal representation.

8.3 REGISTRY COMMITTALS

Section 114 of the *Justices Act 1886* (Qld) sets out the requirements which apply if a defendant decides to proceed with the registry committal performed by the clerk of the magistrates court. This choice of committal is usually adopted by the defendant who has decided there is little or nothing to gain from requiring a magistrate to rule that there is a case to answer.

Section 114 requires that **the defendant must be legally represented**. The defendant's lawyer must communicate in writing to the clerk of the court that

- ▶ the defendant does not intend to give evidence or call any witness in relation to the defendant's committal on the indictable offence; and
- ▶ the clerk of the court is not required to make a decision as to whether there is sufficient evidence to commit the defendant for trial or not; and
- ▶ the defendant must indicate if the matter should go to a higher court for trial or for sentence.

There are other requirements set out in s114. The defendant's lawyer must acknowledge on behalf the defendant that all of the evidence that the prosecution must present at the committal has been made available. If the defendant intends to plead guilty and notifies the court of this fact, he or she must provide the clerk of the court with a signed written statement to this effect. It must contain words to the effect that:

the defendant acknowledges that the defendant is not required to enter any plea, and has nothing to hope from any promise, and nothing to fear from any threat, that may have been held out to induce the defendant to make any admission or confession of guilt.

8.4 COMMITTALS BY MAGISTRATES

FULL HAND UP COMMITTAL WITHOUT CROSS-EXAMINATION

When a defendant does not require any prosecution witness for cross-examination, one option is to simply inform the magistrate that he or she chooses to be committed to the higher court for trial or sentence. It is not necessary at this stage to plead, but obviously the magistrate will not commit the defendant to a higher court for sentence unless a plea of guilty is entered.

For this type of committal to occur:

- ▶ no witnesses give evidence or are cross-examined;
- ▶ the prosecutor hands up all the evidence to the magistrate; and
- ▶ the magistrate commits the defendant's matter to the higher court for trial or sentence, depending on whether the defendant pleads guilty or not guilty.

PRACTICAL APPLICATION

Facts: Primrose needs a special dress for her daughter's wedding. She goes to an expensive boutique in the city. She finds a dress she loves. It is expensive, over \$2000. This is not a problem for Primrose as she and her husband Orlando are well off. Primrose has been suffering from short-term memory loss for nearly a year, has been referred to a specialist, but is not on any medication. While in the boutique, wearing the new dress in the changeroom, her daughter telephones about the coming wedding. Primrose becomes distracted and leaves the boutique taking all her belongings except the dress she had worn to the shop. Primrose walks out of the boutique wearing the new dress without paying. She is seen by a member of staff who telephones the police. Primrose is leaving the car park when she is stopped, arrested, and charged with stealing. While there, the police arrange for her own dress to be returned to her from the boutique, and retain the alleged stolen dress as well. Primrose is upset and embarrassed and telephones Orlando who arranges for the family lawyer to meet her at the police station. Despite explanations on her behalf by her lawyer, the police prosecute the charge of stealing. It becomes apparent that the owners of the boutique could not simply accept the explanation that Primrose had a temporary loss of memory. Because of the value of the dress, the charge of stealing against Primrose must be heard in the District Court.

The family's lawyer advises Primrose to plead not guilty. The matter proceeds through several mentions while Primrose obtains medical evidence from a psychiatrist which would prove that at the time she took the dress belonging to the boutique, that she had short-term

memory loss, and did not know what she was doing. The medical evidence is not ready at the Committal Callover. The family's lawyer advises that the simplest process is for Primrose to plead not guilty and simply accept that the matter be sent to the District Court for trial. He advises that it is possible, once the report is available, to provide it to the Crown Law Office with a written submission seeking the charge of stealing be withdrawn.

It is not uncommon for an accused to challenge the prosecution's case by making submissions to the Crown Law Office in the period between committal and trial while Crown Law prepares the indictment and reviews the transcripts of the committal proceedings.

1. The offence of stealing is set out in s398 and defined in ss390 and 391 of the *Criminal Code 1899* (Qld). The essential elements of the offence of **stealing** are **taking or converting the property of another with fraudulent intent**. Describe the evidence which the police investigating the charge against Primrose need to present in order to prove the offence of stealing. Set out the possible witnesses with a brief summary of the evidence (including documents) which each witness would provide. [C] [A]
2. Assume that the evidence provided by the prosecution to Primrose's lawyer accurately describes the events which occurred. What advice do you think Primrose's lawyer should give her about the form of committal which would be appropriate? Give reasons. [C] [A] [E]

A COMMITTAL HEARING (CROSS- EXAMINATION ALLOWED)

Section 110A of the *Justices Act 1886* (Qld) applies when a defendant's lawyer wants to cross-examine all or some of the witnesses called by the prosecution. All of the evidence must be presented by the prosecution at the committal hearing and the defendant is entitled to request the prosecution to make the witnesses available to give oral evidence under cross-examination. The prosecution and the defence can agree on the witnesses to be cross-examined. The magistrate, where the prosecution does not consent to a witness being cross-examined, must decide if cross-examination should be allowed. Cross-examination is generally allowed if a sensible reason is given, unless the witness is in a special category (a child, a protected witness). Most defendants want to cross-examine any witness if their evidence is contestable.

At the end of the committal hearing the magistrate must decide if there is sufficient evidence to put the defendant on trial. If there is not, the magistrate rules that there is no case to answer, and the charge against the defendant is **dismissed**.

CASE STUDY

Case study (unreported): from page 157 *R v Ken*

Facts: This case study continues from Chapter 7 on page 157. Before the committal callover Ken gives a statement to his lawyer which is put in writing and signed. It says that he did not intend to harm the manager but simply to frighten him because of what he had done. Ken's lawyer requests the prosecution to call the manager of EWL, the forensic expert, and the four factory workers so that they can be cross-examined on the statements they provide to the police. The prosecutor agrees to make all witnesses available for cross-examination.

At the committal callover the prosecutor and Ken's lawyer inform the magistrate of the agreement to make all witnesses available for cross-examination. The magistrate queries the arrangement and asks for reasons. Ken's lawyer submits that when the evidence is tested it may not support the charge of attempted murder although clearly there is evidence that may support other charges. He informs the magistrate that Ken is not giving evidence or presenting evidence from other witnesses. Ken's lawyer and the prosecutor estimate that the hearing may take up to 1½ days so the matter is listed for two days. The magistrate directs the prosecutor to make arrangements for all witnesses to be present for cross-examination.

At the committal hearing each witness responds to cross-examination as follows:

The manager: When asked about the circumstances in which he dismissed Ken, he admits that he acted outside the EWL protocol, and immediately, without giving any reasons, summarily dismissed Ken when he came to work the morning of the incident. Ken asked why he was being dismissed and the manager stated he had told Ken

to leave or he would call the police. He admits Ken left without threatening him. The manager stated that when Ken returned and stood outside the glass window to the office, he was frightened, and could not recall if Ken had pointed the rifle at him or not before firing it. He admitted he was at least two metres from the window and had crouched down behind his desk almost exactly at the moment he heard the rifle discharge.

The forensic expert: When asked about the fact that the bullet fired by Ken through the window was lodged in the ceiling of the office, the forensic expert admits that the rifle must have been pointing in that direction when fired. He is asked about the effect of the glass window and gives evidence that the glass window pane is not shatterproof and is too thin to have any effect on the bullet trajectory. He admits that the rifle could not have been pointing at the manager at the time it was discharged.

The other witnesses: The four other witnesses were in different parts of the factory floor. The closest witness to the office window was at least 12 metres away and was wearing goggles and working with dangerous equipment. The other three were further away and occupied with separate jobs. None of them was able to distinguish clearly what was said but all heard a loud commotion and the sound of steel striking glass, followed by the explosion of a shot and glass shattering. They all saw Ken throw down his rifle and run away after the shot. Under cross-examination it is clear none of the witnesses heard clear words from Ken threatening the manager or saw him point the rifle directly at the office window.

CASE STUDY CONTINUED...

At the conclusion of the prosecution's case, Ken's lawyer informs the magistrate that Ken is not entering a plea at this stage. He then sums up the evidence, and makes the submission to the magistrate, that on the evidence before the court, a jury, properly instructed, could not convict Ken of the offence of attempted murder.

Legal issue: Should the magistrate decide that a properly instructed jury could convict Ken of the offence of attempted murder?

Decision: The magistrate commits Ken for trial to the Supreme Court.



WHAT DO YOU THINK?



1. Section 4 of the *Queensland Criminal Code* states as follows:

Attempts to commit offences. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence.

In your own words, set out the arguments for and against the magistrate's decision. Do you agree with his decision? Refer to the evidence given to prove your point of view. Remember, Ken did not give evidence. [C] [A]

2. Without Ken's evidence, what direct evidence supports an allegation that he intended to kill the manager? What direct evidence refutes the allegation? Is Ken's evidence needed in order to know his state of mind at the time of pulling the rifle trigger to discharge it? [A]

The evidence presented to a Magistrates Court at a committal proceeding is recorded, certified by the magistrate and becomes what is known as the **depositions** of the hearing. These depositions, or the documents from a Registry committal are forwarded to the Crown Law officers who examine them and decide whether to present an indictment against the accused. If they decide not to proceed, they present a **No True Bill**, which discharges the accused. Police officers draft complaints for Magistrates Court hearings and Crown Law officers draft indictments for the District and Supreme Court hearings.

8.5 THE ROLE OF THE CROWN LAW OFFICE (OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS)

The role of the Crown Law Office, as already indicated, is to prepare indictments (statements of the charges) to be read to a defendant at the beginning of the trial in the District or Supreme Court. This is not an automatic process, and sometimes the Crown Law officer responsible, on reviewing the depositions, does not agree with the magistrate that the charges against the defendant should proceed and decides that they should be withdrawn. This can include dropping one charge and replacing it with another. When this happens the indictment issued against the defendant is called an **ex officio indictment**. In such a case the actual charge has not been the subject of committal proceedings.

There is always an opportunity for the legal representative of a defendant to make representations directly to the Crown Law Office that the charge should be withdrawn altogether, or replaced with a lesser charge where the facts contained in the depositions support such a representation.

CASE STUDY (UNREPORTED) - R V KEN CONTINUED

Take on the role of Ken's lawyer. You have been instructed to make submissions to the Crown Law Office that the charge of attempted murder should be withdrawn and that Ken is prepared to plead guilty to the lesser charge of common assault under s335 of the *Criminal Code 1899*.

1. Read the case study earlier in this chapter carefully. [C]
2. Google AustLII (<https://www.austlii.au>), follow the prompts to find the *Criminal Code 1899* (Qld), go to the definition of **assault** in s245 of the Code and s335 which creates the offence of **common assault**. Apply these sections of the Code to Ken's case and decide if he should plead guilty to the lesser charge. Give your reasons. [C] [A] [E]
3. Ken has provided a signed statement to you, which admits everything that happened, but states that by the time he had driven back to the factory to confront the manager, he realised that he only wanted to make him frightened because of how he had behaved towards him earlier that day. Complete a legal letter to the Crown Law office on behalf of Ken, on a 'without prejudice' basis, setting out the arguments in support of the withdrawal of the charge of attempted murder and its replacement by the lesser charge of common assault. [C] [A] [E]

8.6 EX-OFFICIO INDICTMENTS

The issue by the Crown Law office of such indictments has already been referred to in this chapter. There are further circumstances when the Crown Law office may issue such an indictment against an accused person. These include:

- ▶ when a magistrate does not commit an accused for trial but the Crown Law Office considers there is sufficient evidence for a jury to convict; and
- ▶ when the Attorney-General requests the Crown Law Office to issue an ex-officio indictment against an accused without any committal proceeding taking place.

Section 561 of the *Criminal Code 1899* (Qld) says that a Crown Law officer may present an indictment in any court of criminal jurisdiction against any person for any indictable offence whether the accused person has been committed for trial or not.

There are historical reasons for the current position in Queensland law whereby the Attorney-General (Crown Law Office) can issue indictments on an ex-officio basis, even where an accused is not committed to trial after a committal proceeding. A research assignment follows which gives references for any student interested in conducting an inquiry into committal proceedings and their role in the criminal justice system. It is worth stating here what Justice Philp stated in *R v Webb* (1960) QdR 443 at 446:

Of course normally in Queensland as in England today the procedure followed towards the indictment of an accused person is by committal proceedings before a magistrate as provided by the Justices Acts. From the depositions of the witnesses taken before the magistrate the accused knows what case he has to meet and the magistrate if he be not satisfied that a prima-facie case of guilt in law and in fact has been made may refuse to commit. The magistrate thus fulfils in part the function of a grand jury ...

This normal procedure thus provides safeguards against the conviction of innocent person ...

The fact that an Attorney-General may not agree with the decision of a magistrate and reinstate charges against an accused person, or create new charges by issuing an ex-officio indictment through the Crown Law office means that the court must hear such proceedings. However once the indictment has been presented and proceedings commenced the courts will control its proceedings so as to ensure that the accused receives a fair trial.

As stated by Justices Gibbs and Mason in a joint judgement in *Barton, Gruzman & ors v the Queen, Attorney-General for NSW, Walker and ors* (1980) 147 CLR 75

... the courts have a general power to prevent unfairness to the accused, even to the extent of preventing an abuse of process resulting from the prosecution of proceedings brought without reasonable grounds...

... every court has undoubtedly the right, in its discretion, to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.

CASE STUDY

R v Rollinson [2011] QDC 64

Facts: There is a brawl on a football field in December 2004 between two teams. The melee is described as being “like a swarm of bees”. One player receives facial injuries which require surgical intervention. The police are called. One player is charged in December 2005 with **grievous bodily harm**. In mid- 2008, there is a four-day committal hearing in the Magistrates Court with full evidence for the most part and extensive cross-examination of all witnesses. The witnesses include the referee, the police who attend the incident, and most members of the victim’s team. An experienced magistrate presides at a committal hearing and dismisses the charge. He makes it clear that the evidence does not satisfy the standard for a committal.

In May 2008 the Director of Public Prosecutions (DPP) presents an ex- officio indictment in the District Court charging the defendant with causing grievous bodily harm to the complainant in 2004.

In May 2009 Judge Dearden refuses the defendant’s application to permanently stay those proceedings as an abuse of process, concluding that, despite the delay by the prosecution and the difficulties of the prosecution case arising from failures to investigate the process properly, this is not a matter in which it is appropriate to grant a permanent stay.

The trial is listed in May 2011 to be heard before Judge Koppenol, some two years after Judge Dearden’s ruling. The prosecutor, Mr Kinsella, informs Judge Koppenol that six further witnesses may be called and asks for a short adjournment so that those people can be interviewed and witness statements obtained. However, as the defendant’s lawyer submitted, apart from the possible additional

witnesses, the Crown case was exactly the same as it was when the magistrate found that there was insufficient evidence to commit the defendant on that charge.

Legal issues:

1. Could Judge Koppenol reopen Judge Dearden’s ruling to refuse an application to permanently stay the proceedings for abuse of process? [C] [A]
2. Should the ex- officio indictment be permanently stayed? [C] [A]

Decision:

1. Judge Koppenol states that, although it is not possible to speculate about what the additional possible six witnesses may say and whether, therefore, any of them will be called as witnesses, the fact is the prosecution case against the defendant is currently still precisely the same one that the magistrate held, after a full hearing five years ago, to be insufficient to place the defendant on trial. He exercises his discretion to grant leave to reopen Judge Dearden’s ruling because of this.

2. Judge Koppenol further states:

In the present case the earlier prosecution was disposed of on its merits at the committal. To then further prosecute that same case by way of an ex-officio indictment five years later is unfair to the defendant. In my view it constitutes an abuse of process. The ex- officio indictment will be permanently stayed.



WHAT DO YOU THINK?



1. Did the legal process in *R v Rollinson* achieved a fair balance between the rights of the victim (complainant) and the rights of the accused (defendant)? [A] [E]



RESEARCH



Consider the following proposition:

'Committal proceedings ensure that an accused person is treated fairly in our criminal justice system'.

Do you agree or disagree? Prepare a short report based on your research of relevant sources to present to your class setting out the reasons for your point of view. [C] [A] [E]

Some useful sources are:

Mossop, Traceyann. 'Ex Officio Indictments & Committals', HEARSAY, The Journal of the Bar Association of Queensland, Issue 50: July 2011.

Moynihan, Hon Martin AO QC. 'Review of the civil and criminal justice system in Queensland' 2008 Chapter 9: Reform of the Committal Proceedings Process

REVIEW

1. Describe each of the following: [C]

an indictment | Registry committals | full hand up committal without cross-examination
a committal hearing (cross-examination allowed) | ex-officio indictments

2. Describe and explain: [C] [A]

(a) the purpose of a committal hearing;

(b) the role of the magistrate in a committal hearing;

(c) the assistance a lawyer can provide to an accused during the committal process;

(d) the role of the Crown law office between committal and trial; and

(e) the decision of Mr Justice Koppenol in the case of *R v Rollinson*.

3. Compare and contrast the different committal pathways available to an accused person in the committal process. Indicate in your answer those matters which are important to enable an accused person to choose an appropriate pathway. Do these pathways ensure procedural fairness? [C] [A] [E]

TOPIC 3: CRIMINAL TRIAL PROCESS

CHAPTER 9: THE ATTRIBUTES OF A FAIR TRIAL

FOCUS SUBJECT MATTER

- 9.1 A COMMON LAW RIGHT
- 9.2 THE AUSTRALIAN CONSTITUTION
- 9.3 TRIAL BY JUDGE AND JURY
- 9.4 TRIAL PROCEDURES FOR INDICTABLE OFFENCES
- 9.5 COURT RULES OF EVIDENCE
- 9.6 THE RIGHT TO SILENCE
- 9.7 THE RIGHT TO LEGAL REPRESENTATION
- 9.8 CRIMINAL APPEALS AND DOUBLE JEOPARDY

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ in Australia, the attributes of a fair trial originated in the common law, and have been improved by parliamentary reform;
- ▶ the role of the courts is to ensure that the right to a fair trial is not eroded by statute;
- ▶ the elements of a fair trial are related to the essential characteristics of a court, which include the reality and appearance of independence and impartiality, the application of procedural fairness, operating as an open court, and giving reasons for decisions; and
- ▶ there have been attempts to reform the jury system in recent years, but it remains the cornerstone of our justice system.

9.1 A COMMON LAW RIGHT

A fair trial is designed to prevent innocent people being convicted of crimes. By helping to prevent the punishment of the innocent, fair trials justify and promote the prosecution and punishment of the guilty. In *Jago v the District Court of New South Wales* (1989) 168 CLR 23, Mr Justice Mason said at page 29 that a right to a fair trial is:

commonly manifested in rules of law and practice designed to regulate the course of the trial.

The attributes of a fair trial, as we know them today, have their basis in English legal history, which is a study in itself. These attributes, which are looked at in more detail from Chapter 9.3 onwards are now from time to time challenged by statute. Whenever, for example, the **onus of proof is reversed**, so that the defendant must prove his or her innocence rather than be presumed innocent until proved guilty, this common law right is eroded. There may be good reasons for this, for example the recent changes to the *Bail Act* in Queensland (see Chapter 7).

People often say ‘that is not fair!’. Or they might say ‘that is not natural justice’. It could be about violence during an AFL game when the perpetrator was reported but allowed to stay on the field and keep playing, or about a decision of the video referee during an NRL game which was obviously wrong and affected the result, or it could be about Serena Williams clashing with the umpire in the recent women’s US open final, in which Serena complained that men tennis players were treated differently. She may have had a point. Since the **Magna Carta** was promulgated, English criminal law has based the fairness of its criminal justice system on the notion of a jury trial, where decisions of fact are made by the peers of the accused.



In a closely contested jury trial, someone will be disappointed. It will either be the **victim**, or the **accused**. The outcome (the result) is likely to be seen by one of the parties as ‘not natural justice’, even though in the criminal trial process the rules of law and practice which regulate the course of the trial had been followed rigourously. In these chapters on this topic, **Criminal Trial Process**, natural justice has been served, if there is **procedural fairness**. This is the real issue for the criminal justice system, and you will have the opportunity to decide how well the system works.

If natural justice means **procedural fairness**, then the common law appears to have developed to a point where it may be accepted that there is a common law duty to act fairly. In this sense, the idea of giving procedural fairness to members of the community is more often applied to the idea of making administrative decisions which affect the rights, interests and legitimate expectations of individual citizens. You will find as you progress through this topic, that it is the rules of practice and procedure which are correctly applied in the criminal justice system which are intended to protect those basic principles, (**the presumption of innocence, the jury trial, the court rules of evidence, the burden of proof and the standard of proof**) that will determine a fair trial. As Gleeson CJ explained in *Ex Parte Lam* (2003) 214 CLR 1

Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

9.2 THE AUSTRALIAN CONSTITUTION

Section 80 of the Australian Constitution states:

the trial on indictment of any offence against any law of the Commonwealth shall be by jury.

The words ‘trial on indictment’ have been interpreted by the High Court to mean that Parliament may determine whether a trial is to be on indictment, and thus, whether the requirement for a trial by jury applies. Further, because of this, commentators have said that s80 does not restrict Commonwealth power to enact legislation where citizens can be tried for an offence in the absence of a jury. This of course does happen in the state Magistrates Courts exercising Commonwealth jurisdiction for minor offences and in the Federal Circuit Court where legislation does not require a jury trial.

There is also the question of the power given by the *Australian Constitution* requiring the courts to exercise the judicial power of the Commonwealth. Australian courts, both commonwealth and state, unless otherwise required by statute, apply common law principles of fairness and equality. The courts are, by and large, entitled to **manage their own processes** and this has led the High Court in *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brendan, Deane and Dawson JJ) to say that the Constitution implies that the Parliament cannot pass a law which:

requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.

9.3 TRIAL BY JUDGE AND JURY

It is important to know where a trial fits into the criminal justice system. A **trial** is a formal examination of evidence by a judge, before a jury in most serious cases, in order to decide guilt or innocence in a criminal case. It is at the heart of the system. It decides guilt or innocence. It does not happen until what we have referred to as the pre-trial processes in chapters 7 and 8 have been completed. At this point, an accused person knows if he or she is going to a summary trial in the Magistrates Court, or to a trial before a judge and jury in the District or Supreme Court. The court in which an accused is tried generally depends on the nature of the offence with which he or she is charged (see chapter 6). **Simple offences** are generally heard in a summary trial which is before a single magistrate (no jury) who acts as both judge and jury. The magistrate makes all decisions of fact and law in the trial. Because trials before a judge and jury are essentially the same process as summary trials, we do not go through the steps that occur in the Magistrates Court. However, their importance should not be underestimated, because there are many more trials in the Magistrates Courts than in the District and Supreme Courts.

So far as the criminal trial process is concerned, there is a **hierarchy of courts** at both state and federal levels which is illustrated in the diagram in Chapter 2.

THE STATE’S ROLE IN THE CRIMINAL JUSTICE PROCESS

As criminal offences are regarded as offences **against all of society**, it is the State itself that brings the **charge**, gathers the **evidence** and conducts the **trial** against a person accused of an offence. We have seen that in the **pre-trial phase** of the criminal trial process it is the **police who** gather evidence and provide it to a **prosecutor** who appears in the Magistrates Court on behalf of the Crown (the State). Generally when the trial of a charge against an accused is heard in the Magistrates Court, a **police prosecutor** will be instructed by the police to appear on behalf of the Crown (the State). When a trial against an accused is heard in the District court or Supreme Court a **barrister** (sometimes referred to as **counsel**) is



Ch 7



Ch 2

instructed by the Director of Public Prosecutions (Crown Law Office) to act on behalf of the State (the Crown).

This is why it is easy to recognise most criminal cases as they are brought in the name of the Crown (the State): either Regina (the Queen) or Rex (the King) against the accused person (e.g. *R v May*). Similarly, in the United States, which is a republic, criminal cases are brought by The People against the accused person. If the person is found guilty, then the consequences, whether they be jail, a fine or community service, are imposed by the State. The courts, as the institutions for hearing of criminal cases are provided by the State.

WHY ARE JURIES IMPORTANT?

A report of the Queensland Law Reform Commission quotes Chief Justice M Gleeson, describing the role of juries in the following terms:

All institutions of government exist to serve the community, and the judicial branch of government, which has no independent force to back up its authority, depends on public acceptance of its role. That acceptance requires a certain level of faith. What is it that sustains, or threatens, such faith?

Public participation in the administration of justice is part of our legal tradition ... Through the jury system, members of the public become part of the court itself. This ought to enhance the acceptability of decisions, and contribute to a culture in which the administration of justice is not left to professional cadre but is understood as a shared community responsibility.

SOURCE: A Review of Jury Selection, Queensland Law Reform Commission Report 69 (2011)

An important principle of criminal justice in Queensland, and indeed, in Australia, is that defendants accused of serious offences are judged fairly and impartially by a jury of their fellow citizens. The jury delivers its verdict based on the law and the evidence led at trial.

It is only indictable offences that can have juries deciding this question. In simple offences, the magistrate decides both fact and law. Therefore, the **overall percentage of criminal cases heard by a jury is actually quite small**. The number has been decreasing as statutory amendments have increased the range of offences for which an accused can elect to be tried summarily by a magistrate. It is estimated that less than 5% of criminal cases go to a jury trial; the remainder are heard in the Magistrates Court. The bonus of a summary hearing is that there is a lower penalty given if the accused is found guilty, and the procedure is simpler.



Juries are regarded as **impartial fact finders** because they are randomly selected and represent the cross section of the community. It is hoped that any bias or prejudice will be cancelled out by having twelve persons rather than one person making the decision.

“... the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters.”

Doney v R (1990) 65 ALJR 45, 47.

HISTORICAL BACKGROUND OF THE JURY

Juries have been used in many legal systems, including ancient Rome and Babylon. In English law, juries were used in criminal trials in the reign of King Henry II (1154-89). In 1215 the Magna Carta enshrined the jury system into the common law.

No free man shall be seized, or imprisoned, or dispossessed or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, except by the legal judgment of his peers, or by the law of the land.

Section 80 Constitution of Australia confirms this principle.

The trial on indictment of any offence against any law of the Commonwealth shall be by jury.

The jury is regarded as the cornerstone of our criminal justice system. As you know, juries decide whether the accused is guilty or not guilty on the admissible evidence presented in the trial.

Juries were established in Queensland in the *Jury Acts* of 1867, 1884, 1923, and 1929. You will find a discussion of this legislation in the Queensland Law Reform Commission Report, *A Review of Jury Selection*, at pages 22 and 23. They were replaced by the current law in the *Jury Act 1995* (Qld). It is this act to which we turn to see whether or not the law succeeds in making juries representative of the community.



WHAT DO YOU THINK?



1. Does the jury system help the public feel involved and to accept the decisions made by the courts in criminal trials? Does it make the public think the system is fair? [A] [E]
2. Why might the experiences of ordinary people, rather than trained judges, be more impartial in deciding issues of fact? [R]
3. British researchers have reported that data obtained in an experiment shows that jurors were more likely to convict suspects deemed ugly than those seen as attractive. This indicates that jurors may be swayed by irrelevant considerations such as physical appearance. Do you think this could happen? Do you think it would apply equally to judges? [R]

HOW REPRESENTATIVE ARE OUR JURIES?

The relevant law is found in the Jury Act 1995 (Qld).



In order to have a cross-section of people, **service on a jury is compulsory** for all people qualified to serve, unless they have been excused by a judge or sheriff (court officer who supervises the jury) from jury service. Failure to respond to a jury notice can amount to contempt of court and fines of \$40-\$2000 can be ordered.

The following people are currently qualified to serve on a jury.

QUALIFICATION TO SERVE AS JUROR

4 (1) *A person is qualified to serve as a juror at a trial within a jury district if—*

- (a) *the person is enrolled as an elector; and*
- (b) *the person's address as shown on the electoral roll is within the jury district; and*
- (c) *the person is eligible for jury service.*

(2) *A person who is enrolled as an elector is eligible for jury service unless the person is mentioned in subsection (3).*

4 (3) *The following persons are not eligible for jury service —*

- (a) *the Governor;*
- (b) *a member of Parliament;*
- (c) *a local government mayor or other councillor;*
- (d) *a person who is or has been a judge or magistrate (in the State or elsewhere);*
- (e) *a lawyer engaged in legal work;*
- (f) *a person who is or has been a police officer (in the State or elsewhere);*
- (g) *a person who is or has been a correctional officer;*
- (h) *a person who is 70 years or more, if the person has not elected to be eligible for jury service under subsection (4);*
- (i) *a person who is not able to read or write the English language;*

- (j) a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror;
- (k) a person who has been convicted of an indictable offence, whether on indictment or in a summary proceeding;
- (l) a person who has been sentenced (in the State or elsewhere) to imprisonment.

People who are qualified to be jurors, can be **excused from jury service**, if they can establish any of the following:

21(1) In deciding whether to excuse a person from jury service, the sheriff or judge must have regard to the following –

- (a) whether jury service would result in substantial hardship to the person because of the person's employment or personal circumstances;
- (b) whether jury service would result in substantial financial hardship to the person;
- (c) whether the jury service would result in substantial inconvenience to the public or a section of the public;
- (d) whether others are dependent on the person to provide care in circumstances where suitable alternative care is not readily available;
- (e) the person's state of health.

The Sheriff's office in Queensland reported that one in five Queenslanders called up for jury service avoids it by offering an excuse. Some excuses given to not serve on a jury were:



PRACTICAL APPLICATION

1. Look at the list of persons ineligible for jury service in s4(3) of the *Jury Act* and give reasons why each of these people should not serve on a jury. [A]
2. What features do the excuses in s21 have in common? [C]
3. Given those who can be disqualified and excused, how representative are our juries of the general public? [A] [E]
4. Is it fair to say that it is the lower socio-economic groups who are bearing the brunt of jury duty? [A]
5. Which of the above excuses are reasonable and which should not be allowed? [A] [E]

SELECTION OF JURORS

Once a group of jurors is selected by a sheriff (by selecting names at **random** from the electoral roll), a panel of 36 jurors is chosen at random for each case. The panel stands at the rear of the court. Their names are put into a barrel which is spun and, as each juror's name is called out, that juror steps forward to be sworn in by taking the oath on the Bible or making a solemn affirmation.

A potential juror can be rejected before taking the oath by either the barrister for the Crown (who says 'stand-by') or by the barrister for the defence (who says '**challenge**'). No reason has to be given for 'challenging' or 'standing-by' a juror – the decision is made by the respective barristers looking at the jury list which contains the name, address and occupation of each potential juror. The process just described continues until 12 jurors are chosen. Reserve jurors can also be sworn in, if the trial will be a lengthy one. If a juror is discharged for some reason, such as illness, the jury can continue hearing evidence as long as the numbers do not go below 10.



WHAT DO YOU THINK?



1. Why is there a right to challenge jurors? [C] [A]
2. Should both the Crown and the accused have the right to reject jurors or should this just be a right of the accused? [A] [E]
3. Should both have to accept the random selection of the first twelve names drawn out of the barrel? [E]
4. Is there enough information available on which to make decisions of jury selection? [C] [A]
5. Should the Crown and the accused be given the added right to ask questions of the jurors, as occurs in American states? [A] [E]
6. Assess the validity of the following criticism of the right to challenge.

"The object of the process of jury selection should be to pick twelve people who can be fair. It should not be a tactical manoeuvre by which each side tries to secure the twelve most sympathetic jurors from their point of view." [A] [E]

WHAT RECENT CHANGES HAVE BEEN MADE TO THE JURY SYSTEM?

DO WE KNOW ENOUGH ABOUT THE WAY JURIES MAKE THEIR DECISIONS?

Although we have had juries for centuries, very little is known about the way jurors come to their decisions and the factors that influence their decision-making. This is because what happens in the jury room is kept **confidential**. Judges have to give reasons that are published as to why they came to a particular decision. Jury deliberations remain secret. The community has to trust that the twelve jurors will come to their decision fairly and based solely on the evidence.

The rationale for the non-disclosure of jury deliberations is that jurors must feel completely free to discuss the credibility, motives, and behaviour of the accused and the witnesses in the trial. They may be too cautious and concerned if their reasons for their findings of guilt or innocence were to be published. It would be too great a burden on them.

RECENT REFORMS TO OUR JURY SYSTEM

The jury is a longstanding and important feature of our criminal justice system.

Making changes to the way juries operate has been met with mixed responses.

Lord Devlin, a renowned English judge, cautioned against reforms to the jury:

'Since no one really knows how the jury works or, indeed, can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming.'

HON SIR PATRICK DEVLIN, TRIAL BY JURY, STEPHENS & FUNDS, LONDON, 1966, 57.

On the other hand, a Queensland Law Reform Commission argued reform was needed:

'...it is time for uncritical veneration of the jury to end. Juries and other tribunals, including magistrates, ought to be opened up to more rigorous scrutiny. The interests of justice demand that the mystery that surrounds such institutions be finally swept away.'

MAJORITY VERDICTS

The requirement for a unanimous verdict was once an important feature of the common law jury system. Following the trend in Britain and other Australian states, in 2008 Queensland amended the *Jury Act 1995* (Qld) to allow for majority verdicts in this State. **Unanimous verdicts are now only required for murder** and criminal offences under s54(1)A QCC which carry mandatory life sentences and for offences against a law of the Commonwealth. Majority verdicts are allowed for all other indictable offences. A majority verdict can be accepted by the court as long as no more than **one juror is in dissent** (s59A QCC). The judge will only accept a majority verdict after a deliberation of more than eight hours (breaks excluded) or for a period of time that the judge thinks is reasonable given the trial's complexity.



WHAT DO YOU THINK?



What do you think are the benefits and the disadvantages of allowing majority verdicts? [A]



RESEARCH



1. Look at the Code and find which offences are covered under s54(1)A. [C]
2. Why are offences against the Commonwealth excluded? [C]

JUDGE-ONLY TRIALS

In late 2008, amendments to the *Criminal Code* made it possible for a judge to sit without a jury and to make any findings and give any verdict that a jury could have made. The judge's verdict has the same legal effect as a verdict of a jury.

Either the prosecutor or the accused can apply to the court for an order, called a **no jury order**, to allow this. Where the prosecutor makes the application, the accused must also consent. The court will have an overriding discretion to make the order and will do so if it considers it is in the interests of justice. Guidance is given in s 615(4)QCC as to factors the court may consider when deciding whether to grant a no jury order:

- (a) The trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury.
- (b) There is a real possibility that acts that may constitute an offence under s119B QCC (offences involving intimidation of a judicial officer, juror, or witness) would be committed in relation to a member of a jury.
- (c) There has been significant pre-trial publicity that may affect jury deliberations.

The court may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of **objective community standards** including, for example, an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

One difference from a jury trial is that the judge must also include in his or her judgment the principles of law that have been applied and the findings of fact on which he or she has relied on in coming to the verdict.



WHAT DO YOU THINK?



1. What are the benefits to an accused to have a judge-only trial? [A] [E]
2. What are the disadvantages to an accused of a judge-only trial? [A] [E]
3. If you were charged with a serious criminal offence, would you prefer to have a jury or a judge only trial? Why? What factors influence your decision? Would your answer differ if you alone knew you were innocent or guilty of the offence charged? [A] [E]



INQUIRY



IS IT TIME FOR JURIES TO BE ABOLISHED?

Most countries in the world do not have the jury system. An important question therefore, is whether our jury system offers greater protection to the rights of an accused person, than do the alternatives.

Some alternatives are:

- ▶ judge-only trials;
- ▶ trials by a panel of judges;
- ▶ trial by judge and lay assessors (people from the community who served as assessors for a set period);
- ▶ trial by judge with a panel of experts in the field relevant to the trial; and
- ▶ trial by judge with professional jurors—persons trained, paid and permanently appointed to sit on trials.

Article 10 of the Universal Declaration of Human Rights 1948 states that

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The legal concept of a fair trial is enshrined in our criminal justice system and has been since the Magna Carta in 1215. Traditionally, the jury system is the cornerstone of this system. Can it be made more flexible, or should it go?

The character of an inquiry is described in the preface. You will do a number of different activities in this inquiry. They will enable you to complete the **learning processes** required by the syllabus in an inquiry activity.

What follows should be read in the context of all of this chapter up to this point.

PRACTICAL APPLICATION

LEGAL FRATERNITY DEBATES THE RELEVANCE OF JURIES IN LIGHT OF THE SOCIAL MEDIA AGE

SOURCE: EMILY MOULTON WWW.NEWS.COM.AU 25/10/2017 (EXCERPTS ONLY)

When Kasim Davey posted on Facebook that he wanted to “f... up a paedophile” he thought his actions were innocent enough.

Davey, a Genyer from North London, had just been selected for jury duty in a trial against an alleged paedophile and wanted to express his “spontaneous surprise” despite being warned by the judge not to discuss or use social media in relation to the matter.

“Wooooow I wasn’t expecting to be in a jury deciding a paedophile’s fate, I’ve always wanted to f... up a paedophile and now I am within the law!”, Davey wrote.

After the judge was alerted to the post, the trial against Adam Kephalas was aborted (he was later retried and convicted of sexual activity with a child) and Davey was charged with contempt of court. He was sentenced to two months jail in July 2013.

1. What does the post which Davey put on Facebook say about his state of mind before hearing the evidence to be given in the trial? [C]
2. Why would the member of the jury ignore the judge’s warning not to discuss or use social media in relation to a trial? [A]
3. Do you think the penalty received by Davey was harsh in the age of smartphones and social media? [E]
4. How else do you think Davey and any other member of the jury could be discouraged from posting such a message on Facebook? [A]

PRACTICAL APPLICATION CONTINUED...

IS “TRIAL BY JURY” AS EFFECTIVE IN UK?

SOURCE: STUDENT AUTHOR (NAME WITHHELD) LAW TEACHER
WWW.LAWTEACHER.NET/FREE-LAW-ESSAYS 25/10/2017 (EXCERPTS ONLY)

The *R v Ford 1989 89 Cr App* [UK] case concerned (the issue of) a multiracial jury. Ford, as the defendant, confronted an all-white jury. Ford's request for a multiracial jury had been denied by the trial judge. The defendant was convicted and appealed, submitting that the trial judge had been wrong to refuse his request. The Court of Appeal upheld the principle of random selection as the most suitable way to ensure fairness and therefore confirmed that the trial judge had no power to empanel a multiracial jury and no power to discharge a competent juror so as to obtain a multiracial jury. The purpose of this ruling is to support the idea that justice is delivered through the concept of random selection, which is the whole essence of the jury system...

According to the *Criminal Justice Act 2003* (UK), a development to limit jury trials has been established. By this law, trials can be conducted without a jury when there is a real and present danger of jury tampering or where jury tampering has taken place. As a result of this new regulation, the first serious offence to be tried without a jury in England for more than 350 years took place in 2009. The case concerned the four men accused of an armed robbery at Heathrow Airport, London, in 2004. After three juries had been discharged due to jury tampering, the fourth trial took place before a single judge. All four defendants were convicted.

(Note, the above extracts have been amended for coherence, without changing the substance of them.)

1. Is it possible for a First Nation person to face an all-white jury in Townsville or Brisbane? Should the law be changed to ensure such defendants face multiracial juries? [C] [A] [E]
2. How did Ford's case mean that he was not judged by his 'peers'? [C]
3. What is jury tampering? How often do you think this happens? Search 'jury tampering' online. [C][S]

TRIAL BY JURY: IS IT OUTDATED FOR CRIMINAL CASES?

SOURCE: GREG BARNES WWW.CRIKEY.COM.AU/2009/05/06 25/10/2017 (EXCERPTS ONLY)

Why, in the 21st century, do we cling to the quaint but totally unfounded notion that trial by jury is the fairest means of ensuring that criminal justice is not only done, but seen to be done?

The outcome of the Dennis Ferguson case in Queensland in March this year provides an opportunity to reflect on some of these issues.

Ferguson, who had previously been jailed for kidnapping and sexual assault of three children in 1987 was charged with one count of indecent assault on a five-year-old girl, but last year, Queensland District Court Judge Hugh Botting ruled in a pre-trial hearing, that because of the extraordinary level of prejudicial publicity Ferguson could not get a fair trial. Botting permanently stayed the proceedings, a decision which Queensland Attorney General Kerry Shine had overturned on appeal. In the meantime Ferguson was subjected to rampant vigilantism and media harassment.

Given all this, Ferguson's lawyers applied for a rare judge-only trial and he was acquitted of the charge of sexual assault by Judge Patsy Wolfe on March 6 2017.

PRACTICAL APPLICATION CONTINUED...

1. What did Judge Hugh Botting decide to do about the Ferguson trial? Normally, in a jury trial, evidence is not allowed to be presented to the jury about the criminal history of the defendant. If the defendant is convicted, the judge can then be informed by the prosecution of the criminal history of the defendant in order to decide an appropriate sentence. What was the nature of the prejudicial publicity Ferguson experienced? Do you agree with the decision of Judge Hugh Botting? [C] [A] [E]
2. Do you think the rise of social media reduces or increases the likelihood that a defendant with a significant criminal history will get a fair trial? Give reasons. [A] [E]

OSCAR PISTORIUS

The Oscar Pistorius trial in South Africa did not have a jury. The jury first appeared in South African law as a result of the British intervention in South Africa. Prior to that there were no juries in South Africa because South African law was predominantly Roman / Dutch law. Juries were formally abolished in South Africa by an Act of Parliament in 1969. The reasons why the jury system was abolished in South Africa are set out in the South African Law Commission Issue Paper 6 - page 17. There was a fear of racial prejudice existing among jury members, given South Africa's long standing history of difficult race relations. Members of the public were extremely reluctant to serve on a jury and various excuses were used for not serving on a jury. The number of persons who were excused from jury service was so great that few competent persons remained. Furthermore the Minister of Justice had over a period of time acquired such wide powers to determine that certain trials be conducted without a jury, that the use of trials by jury had declined in practice. Oscar Pistorius' fate was decided by the trial judge (Judge Thokozile Masipa) and two assessors who were appointed by the judge. It is the decision of the judge in the trial to decide who the assessors are to be, but they are normally people skilled in the law such as advocates, retired magistrates, lawyers or legal academics. The decision as to guilt or innocence is one made by the assessors and by the judge. The decision can either be unanimous or by majority. The question of sentence is one decided by the judge only.



RESEARCH

There are other countries, in addition to South Africa, in which the criminal justice system does not involve jury trials (for example, Japan, Indonesia, and the Philippines). Investigate at least one example of such a country. Do you think that the Australian community would accept the system of justice which is used in such a country? Give your reasons. [C] [A] [E]

PRACTICAL APPLICATION

LEGAL FRATERNITY DEBATES THE RELEVANCE OF JURIES IN LIGHT OF THE SOCIAL MEDIA AGE (EXCERPTS ONLY)

SOURCE: EMILY MOULTON WWW.NEWS.COM.AU DOWNLOADED 25/10/2017

... some of our most prominent legal minds think it's time to abolish the practice and make way for judge-alone trials.

They argue that diverse media coverage and human nature make it virtually impossible to guarantee a non-influenced jury.

"I would be very surprised if there were not many people on juries now, who, quite innocently, just as second nature go to all these various sources on social media, to see what they can find out," former WA Governor and respected barrister Malcolm McCusker QC told news.com.au.

"It's very dangerous. Even though judges, as a matter of course, regularly informed jurors of the danger of looking outside the evidence and direct them not to go to social media... I think quite frankly it's a losing cause."

Despite the risk of jurors going rogue, Pauline Wright from the NSW Law Society says being judged by a group of your peers is still an essential part of our democracy and a good indicator of a fair justice system.

Ms Wright says she thinks those selected for jury duty take their role seriously and are a good representation of a person's peers ... "I think jurors in general do a good job. It's only the odd person who does the wrong thing." She does concede that there is sometimes a need for judge-alone trials because of intense media coverage but says it should be the exception, not the rule.

1. What does Malcolm McCusker suggest should replace juries? [C] [A]
2. From your reading and research, select the evidence which supports Malcolm McCusker's opinion. Organise the evidence into categories and prioritise it, from the most significant/important evidence to the least significant/important evidence. Give your reasons. [C] [A] [R]
3. From your reading and research, select the evidence which supports Pauline Wright's opinion that being judged by a jury of your peers is a good indicator of a fair justice system. Summarise the evidence, setting out what you consider to be the most significant/important evidence. [A] [R]



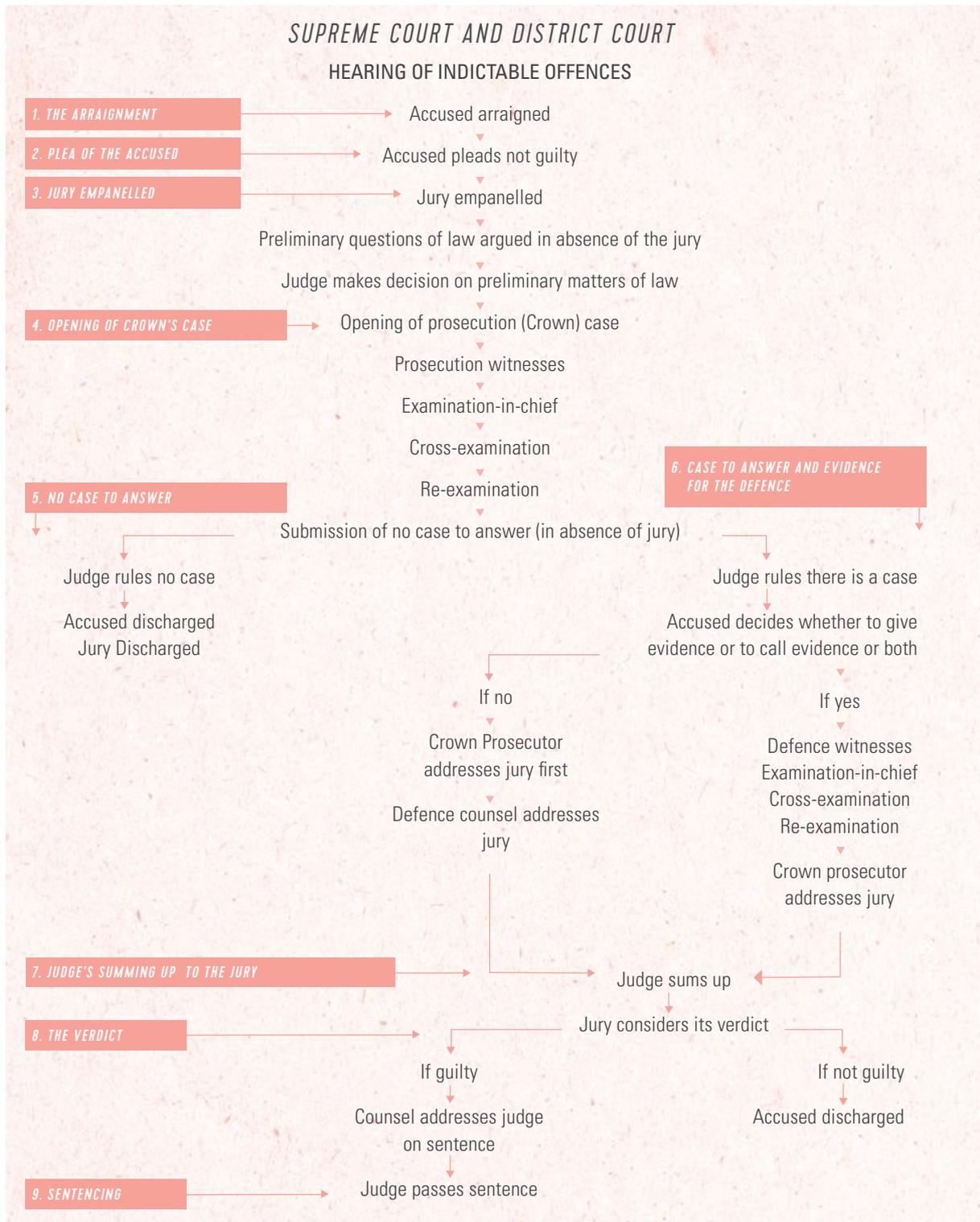
WHAT DO YOU THINK?



1. You have been asked to prepare a policy paper for the consideration of the Queensland Attorney-General setting out possible reforms to the jury system. In your paper list the various issues and criticisms of the jury system that have arisen both in Queensland, in other Australian states, and in the United Kingdom and the USA. Outline the reforms which have been made to the system in the last decade, and indicate, where possible, if these reforms have been successful or have failed. Include, as a possible reform, the complete or partial abolition of the jury system. Make a list of recommendations for change to be considered. [A] [E] [R]
2. Conduct a class debate on the following topic:

'the right to trial by jury, like the right to vote, is seen as an inseparable part of our democratic system. Do you think the jury provides a safeguard against oppressive rule?' [E] [R]

9.4 TRIAL PROCEDURES FOR INDICTABLE OFFENCES



The case for the Crown is presented by a government prosecutor. The government prosecutor is a barrister employed by the Crown in the office of the Director of Public Prosecutions. He or she will be assisted by an employed lawyer working for that office. The accused is usually represented by both a barrister and a solicitor.

1. THE ARRAIGNMENT

The Crown prosecutor reads out the indictment, following which the judge's associate formally reads out the charges to the accused. The accused is required to plead guilty or not guilty.

2. PLEA OF THE ACCUSED

The accused (or lawyer) enters the plea of guilty or not guilty.

3. JURY EMPANELLED

If it is a not guilty plea, the jury is then empanelled.

4. OPENING OF CROWN'S CASE

The Crown prosecutor opens the case for the Crown. In the opening address to the jury the prosecutor outlines what evidence is to be given by the witnesses for the Crown. At the end of the opening address for the Crown, examination-in-chief of each Crown witness by the Crown prosecutor occurs. **Examination-in-chief** refers to the process by which the prosecutor calls each of the witnesses for the prosecution to the stand, and each of them gives his or her evidence after being sworn in. In some courts, this evidence can be by sworn written statement, but in Queensland the evidence of witnesses is usually given orally from memory, with the assistance of questions asked of them by the prosecutor, unless the trial judge's permission for evidence to be given by sworn written statement or by electronic means. By way of contrast, evidence in the Federal Court and Family Court of Australia is usually by sworn written statement called an affidavit. Each witness is then subjected to cross-examination by defence counsel. The Crown prosecutor may re-examine on any points arising from the cross examination.

There are often issues which arise in the course of the hearing about the evidence. Commonly, this is because the defence barrister objects to evidence given in the prosecution's case. The test which is applied to the evidence is whether or not it is admissible. The judge determines the admissibility of evidence. The court rules of evidence are discussed in the next part of this chapter. This will include a discussion about the nature of evidence and how it is decided what evidence is admissible in the criminal trial. There is a case study included in this general discussion which will make this issue clear. You will identify the admissible evidence from the facts of *Murdoch v R* [2007] NTCAA.

5. NO CASE TO ANSWER

At the end of the Crown case, defence counsel may make a submission of no case to answer against the accused. If such an application is made the jury leaves whilst the argument proceeds and the trial judge must give a ruling. If there is no case to answer the accused is discharged.

This is the identical submission that can be made at the end of the prosecution's case in a Committal Proceeding in the Magistrates Court. You will recall that the submission is that the evidence led by the prosecution is such that **a jury, properly instructed, could not convict**. This is a matter of law and not a question for the jury to decide.

6. CASE TO ANSWER AND EVIDENCE FOR THE DEFENCE

If the judge is satisfied that there is a case to answer, the accused is asked whether evidence will be presented in defence. If the accused does decide to call evidence, defence counsel delivers the opening address and defence witnesses are called to give examination-in-chief, are cross-examined and re-examined. Counsel then deliver the closing address for the Crown and the defence.

If the accused elects not to call evidence in his or her defence, the Crown prosecutor delivers the opening address first and the defence counsel has the advantage of addressing the jury last.

7. JUDGE'S SUMMING UP TO THE JURY

Following the presentation of the case by each party to the case, the judge sums up the case to the jury, directing it as to the points of law involved and summarising the evidence presented at the trial. The jury then retires to consider its verdict.



Ch 8

As discussed earlier at 25.2 juries are a vital part of our system. It is important to understand that the jury is the sole judge of facts in a criminal trial. The judge decides matters of law and his decisions on those matters are binding on the jury but it is the jury who gives the verdict.

8. THE VERDICT

Once the jury returns, the foreperson is asked if the jury has reached its verdict and is invited to announce the verdict. The jury must be satisfied beyond reasonable doubt that its decision is the correct one.

If the verdict is not guilty, the accused is discharged. If the verdict is guilty, the judge's associate then turns to the accused and says: "[Name] you have been convicted of [charge]: have you anything to say why judgment should not be pronounced upon you according to law?"

9. SENTENCING

The prosecutor then reads out the accused's antecedents. The antecedents are the personal details of the accused that may be relevant in sentencing. Examples are age; previous criminal convictions; whether the accused is a drug addict or known associate of criminals; whether the accused has a job and family and so on. The accused's barrister then has the opportunity to present factors in mitigation. These are the matters that the accused wants raised as being relevant to reducing the sentence the judge will impose. Examples are: any explanation for committing the offence; whether the accused played a major or minor role in the offence; any remorse shown for committing the offence; and the effect a jail sentence will have on the accused's family or employment.

The accused may be remanded for sentence on another day to enable the judge to consider an appropriate penalty and/or to enable the prosecution or defence to prepare submissions. The jury does not have any say in the sentence imposed.

VOIR DIRE

Since the trial judge decides all questions of law, **the jury will be asked to leave the courtroom if legal matters need to be argued.** This commonly happens in criminal trials and can occur a number of times during the course of a trial. An example is the question of admissibility of certain evidence such as confessions made by the accused. The jury is excluded because it is possible that, if it hears this evidence, it may affect its decision and this would be wrong if the judge rules that the evidence is not admissible. In the absence of the jury, the Crown prosecutor and defence counsel make submissions to the judge on whether the evidence should be admissible.

The judge then makes a ruling. This trial within a trial is called a *voir dire*.





WHAT DO YOU THINK?



1. Should the antecedents of an accused be read earlier in a trial before the jury gives a verdict? [A] [E]
2. If the antecedents of Robert Long (who, in 2002, was convicted by a jury of murder and arson in the Childers Hostel fire case) had been read out in court, the jury would have known of his previous history of lighting fires. Would that have been prejudicial or useful information that a jury should have? [E]

9.5 COURT RULES OF EVIDENCE

We have seen in **Topic 1: Legal foundations**, that the criminal justice system is based on some important principles which have stood the test of time, and continue to be applied today in our courts. These are:

- ▶ **the presumption of innocence** - an accused person is presumed to be innocent until proven guilty
- ▶ **the onus (burden) of proof** (the responsibility carried by a party to a court hearing to convince the judge or jury that what is being said is true)
- ▶ **the standard of proof** (the degree to which a party must convince or satisfy the judge or jury that an alleged fact, or series of facts, necessary to prove a claim did actually occur). In criminal cases **the prosecution must prove allegations of fact beyond reasonable doubt**
- ▶ **the right to silence** ((the right of a suspect not to answer questions asked before trial or give evidence at trial).

You have also studied in **Topic 2: Criminal investigation process**, the types of evidence which are presented to the court, in order to prove that a criminal offence actually occurred, namely **oral, documentary, and real evidence** (Chapter 5.2).

Evidence is all information that is relevant to establishing the facts in issue that are necessary to prove guilt. The **rules of evidence** exist to protect the accused (defendant), prevent the jury from being sidetracked, and to save time in court cases. The fact that the rules of evidence mean defendants are treated fairly, reassures victims and their families that everything possible is done to make sure that the system is able to find the correct perpetrator and punish that person.

DIRECT EVIDENCE

The best type of evidence is **direct evidence**, which is the making of a statement, whether orally or in writing, that a particular fact is true because the maker of the statement saw, felt, or heard it. Lawyers for both parties seek to present the best evidence available for the guidance of the court. In a criminal trial, such as an assault case, direct evidence would be the testimony of a witness who actually saw the accused punch and kick another person.

INDIRECT EVIDENCE

Indirect evidence, also called circumstantial evidence, is evidence of facts which make it probable that other material (important) facts are true. The evidence is indirect in the sense that the judge or jury must make an inference that another fact is true. In a criminal trial, an example of circumstantial evidence that may lead to the conviction of a person for assaulting another is the accused expressing a desire to 'sort out' the victim an hour before the incident. Further circumstantial evidence may be given by someone who saw the accused person leave a hotel at the same time as the victim, only minutes before the incident took place.



Ch 3.1



Ch 5.2

ADMISSIBLE EVIDENCE

Evidence is **admissible** when a judge or magistrate decides that it **complies with the rules of evidence** that apply to the court in which the matter is being heard. Where counsel (the legal representative in court) for one party objects to the evidence presented by the other party, it is part of the judge's role to rule on the matter.

The main types of evidence that are **inadmissible** in a court hearing are as follows.

1. IRRELEVANT EVIDENCE

2. HEARSAY EVIDENCE

3. OPINION EVIDENCE

4. PRIVILEGED COMMUNICATIONS

5. CHARACTER EVIDENCE

6. EVIDENCE THAT IS ILLEGALLY OR UNFAIRLY OBTAINED

1. IRRELEVANT EVIDENCE

If the evidence **does not relate to the questions of fact in dispute**, then it will not be allowed to be given to the court. This rule is intended to avoid evidence being given that is likely to sidetrack the court or unfairly prejudice one or more of the parties. For example, if a witness testifies that the accused had been drinking excessive amounts of alcohol five days prior to the car accident that he or she was alleged to have caused, this would be ruled to be irrelevant. If, however, the evidence is that the accused had been drinking to excess within an hour of the accident occurring, this would be relevant. Another example is the past convictions or the character (for example, evidence that the accused has been dishonest or violent on previous occasions) of the accused, which are usually disallowed as irrelevant to the question of whether or not the accused has committed the crime in the current trial.

It should be noted that, even if the court decides that evidence is relevant, it will still be ruled to be inadmissible unless the probative value of the evidence (its importance to proving or disproving a key legal element) outweighs its prejudicial effect (the extent to which the evidence causes the magistrate or jury to become unfairly biased against a party). In *Murdoch v R* [2007] NTCAA 1 (an appeal to the Northern Territory Court of Criminal Appeal against the conviction of Bradley Murdoch by a jury for the murder of British backpacker, Peter Falconio), Mr Murdoch's legal representatives argued that evidence given by six witnesses about having seen Mr Murdoch with a gun, three of whom specifically recalled that it was a silver revolver, was unfairly prejudicial against their client because nobody had actually seen him shoot the victim. The Court of Appeal, however, ruled that the evidence was relevant and that it '... possessed probative value as to the capacity of the accused in July 2001 to carry out killing by shooting'.



2. HEARSAY EVIDENCE

Hearsay evidence is generally ruled inadmissible when a witness asserts as a fact something the witness **did not actually see, hear, feel or smell, but instead is relying upon someone else's statement about it**. For example, a customer who was on the other side of a supermarket when an elderly lady fell heavily as a result of slipping on a discarded lottery ticket on the floor will not be permitted to give evidence in a negligence court case against the supermarket owner that, several minutes after the accident, a shop

assistant commented that he had noticed the lottery ticket lying on the floor over an hour before the accident. Instead, the plaintiff will be required to call the shop assistant to directly give the evidence to the court as the direct source of the evidence. This direct evidence can be tested by way of cross-examination.

3. OPINION EVIDENCE

Witnesses can give evidence of facts which they know from their experiences to be true. They cannot give their opinion of what was probably true. Opinion evidence is **an inference made by a witness from circumstances which normally can be made only by an expert or by the fact-finding body (either the judge or the jury)**. It is therefore inadmissible unless the witness is an expert and the subject matter of the testimony of the witness is within the scope of the witness's expertise.

Experts include psychiatrists, social workers, orthopaedic surgeons, engineers, handwriting experts, forensic scientists, pathologists and many other people with highly specialised knowledge, skills and experience. As stated earlier in relation to oral evidence, DNA tests must be explained and interpreted by scientists who specialise in the field of this new form of identification technology because generally they fall outside the experience and knowledge of the magistrate or jury.

However, the court is not bound to accept an expert witness's opinion if both parties to a court hearing call upon expert witnesses who arrive at different conclusions. In any event, it is ultimately the role of the judge or jury to come to its own conclusions on the material (important) facts.

4. PRIVILEGED COMMUNICATIONS

Statements made in the confidentiality of a doctor-patient or lawyer-client relationship are presumed to be privileged ('safe') from disclosure (being forced to say what was said) in a court hearing. This rule of evidence also applies to 'without prejudice' communications, which are communications made between the solicitors for the opposing parties to a court hearing when the aim of the communications is to achieve a settlement of the dispute before a court decision is made. An accused person in a criminal trial also has a privilege against self-incrimination, which means that, in general, the accused cannot be forced to give evidence that would expose him or her to the risk of a criminal charge. Exceptions to the idea that a person cannot be forced to give evidence which incriminates himself or herself are few but are set out in various statutes and relate to matters such as bankruptcy, taxation avoidance and motor vehicle accidents.

5. CHARACTER EVIDENCE

The past criminal record or character of the accused in a criminal trial, apart from generally being considered **irrelevant** to whether the accused is guilty of the current crime, is also disallowed on the basis of it being **unnecessarily and unfairly prejudicial** to the jury's general opinion of the accused. This rule of evidence is designed to ensure a fair hearing for the dependant.

6. ILLEGALLY OR UNFAIRLY OBTAINED EVIDENCE

Evidence may also be inadmissible on the ground that it has been illegally or unfairly obtained. An example is where the accused confesses to a crime only after violence has been threatened. Another example is where documents are stolen to prove the case of one of the parties.



CASE STUDY

***Murdoch v R* [2007] NTCAA 1**

This is the 2007 decision of the Northern Territory Court of Criminal Appeal that heard an appeal made on behalf of Bradley John Murdoch against his conviction and sentences for the murder of British backpacker, Peter Falconio and the assault and deprivation of liberty of his girlfriend and fellow backpacker, Joanna Lees.

Facts: Summarised below are the main facts of the murder of Peter Falconio that were given to the court in the testimony of Joanna Lees in the Northern Territory Supreme Court trial of Mr Murdoch in 2005.

At about 8pm on Thursday 14 July 2001, Joanna and Peter were travelling in an orange Kombi van along a dark, isolated stretch of the Stuart Highway north of Alice Springs in the Northern Territory. Mr Falconio was driving. A vehicle, with its internal light switched on, came alongside them as they were travelling and the driver, who was a stranger, gestured to Mr Falconio to pull over. The Crown case was that the driver of the other vehicle was the accused, Bradley John Murdoch, who had been identified by Ms Lees.

Stopping on the side of the highway, Mr Falconio walked to the rear of the Kombi van where he met the driver of the other vehicle. Ms Lees heard him speak to the stranger about sparks coming from the exhaust of their van. Mr Falconio then returned to the driver's side door, collected his cigarettes and asked her to rev the engine. That was the last time Ms Lees or anyone else saw Peter Falconio alive.

In her evidence given to the court, Ms Lees said that, as she was revving the engine, she heard a loud bang, '... like the backfiring of an engine or a gunshot'. It was the Crown case that the driver of the other vehicle shot Mr Falconio. Ms Lees stopped revving the engine and turned to look out the window. The stranger reappeared at her driver's side window with a silver revolver pointed at her. He ordered her to switch off the engine but she could not because her hands were shaking so much.

The stranger moved inside the van, pushing Ms Lees to the passenger seat. She screamed and struggled with him until he placed the gun at her temple, which subdued her, and then tied up Ms Lees' hands behind her back with hand-made handcuffs created out of cable ties and electrical tape. He then forced Ms Lees out of the van and she fell on the gravel injuring her knees. Mr Murdoch straddled Ms Lees on the ground and tried to tie up her legs but was unsuccessful as Ms Lees struggled. He punched her on the right temple, partly stunning her. Ms Lees called out to Mr Falconio for help but there was no response.

Mr Murdoch lifted her up and forced her over to his utility where he unsuccessfully tried to put tape across her mouth. He lifted up the corner of the canvas canopy behind the passenger's door and pulled out a sack, which he put over her head for a short time. Ms Lees was pushed backwards into the passenger seat area of the utility and saw a dog sitting on the driver's seat. At that point, the bag had been removed from her head, the interior light was on in the vehicle and she saw the man's face from a distance of only about 18 inches.

Eventually, Ms Lees found herself in the rear of the utility. She called to her captor, 'What do you want, is it money, do you want the van, just take it ... are you going to rape me?' He told her to shut up or he would shoot her. The man went away for a short time and Ms Lees heard a noise like gravel scraping, as if something was being moved. She managed to sit up with her hands still tied behind her back and slide out of the back of the vehicle's tray. She ran 50 or 60 metres into the bush along the side of the highway, 'buried' herself in a bush and shielded her eyes 'a bit like a rabbit' covering its eyes in the hope that nobody would see her.

It was pitch black. She could hear the man somewhere behind her and saw some torchlight at one stage. She then heard vehicle doors opening and closing, more dragging of something, and the sound of two cars being driven off in a southerly direction. Ms Lees testified that she unsuccessfully tried to loosen her hand cuffs by rubbing some lip balm on them that had been in a pocket of her board shorts. The lip balm tube fell to the ground in the darkness and she did not pick it up. After hiding in the bush for what she thought was some hours after the second car had driven off, Ms Lees moved back to the road, flagged down a passing road train and was rescued by the driver and his companion. The driver testified at the trial that Ms Lees jumped out from the left side of the road in front of his prime mover, just before 1am on July 15, 2001.

The body of Peter Falconio was not found and nobody actually saw Mr Murdoch shoot him or dispose of his body. No gun or other weapon was found. In fact, on the first day of the trial, 14 August 2005, the prosecutor had told the jury that, even though there was no direct evidence that Murdoch murdered Mr Falconio as Ms Lees would testify that she never saw her boyfriend killed, the circumstantial evidence in the case would lead the jury '... to the inescapable conclusion ...' that Mr Murdoch murdered him. Eighty five witnesses were called to give evidence during the trial that ran for almost nine weeks.

CASE STUDY CONTINUED...

Examples of evidence presented by the prosecution, which were ruled admissible by the trial judge and the three appeal court judges, are set out below:

- ▶ After the police had arrived at Barrow Creek after 4am, Joanna Lees identified a standard white Toyota Land Cruiser utility with a green canvas cover as being somewhat similar to the vehicle driven by her assailant. She described her assailant to the police as a tall man '45+' years of age with a long and ovalish face, deep set eyes, sunken cheeks and scraggly hair coming out from under a black baseball cap.
- ▶ Ms Lees later testified that, not long after being advised by the police on the telephone that they had a suspect, she had accessed the Internet on 10 or 11 October 2002, not expecting to see a photograph of the suspect: 'I saw an article and a square picture of a male I recognised immediately as the same male who'd attacked me. The male was completely clean shaven in the picture and he had very short hair. I could tell that it was the same male even though he'd completely changed his appearance. I didn't know there was going to be a picture there to look at.'
- ▶ Exhibits presented to the court included the hand-made handcuffs, as well as a lip balm container and two pieces of black tape that were found under the bush where Ms Lees had hidden.
- ▶ A Dr Wright, who had conducted a medical examination the next day, gave evidence that Ms Lees had multiple abrasions on both elbows and her knees, as well as other abrasions to her ankle and lower back, many of which were dirty and required cleaning.
- ▶ A 'facial mapping' expert, Dr Sutisno, identified Mr Murdoch as the man featured on security camera (CCTV) footage taken at a truck stop which corroborated the evidence of three other witnesses who testified that Mr Murdoch was at the truck stop despite his claim (which was not accepted by the jury or the appeal court judges) that he had been at a Red Rooster store instead.
- ▶ A British DNA expert, Dr Whitaker, using a new matching technique, had established, in the words of the prosecution, a 'very, very high probability' that a small smudge on the back of Ms Lees' T-shirt that she was wearing at the time of the alleged crimes matched Murdoch's DNA profile.
- ▶ Dr Whitaker also stated in his report and in his testimony in the trial that DNA on the gearknob of the couple's kombi van and on the homemade handcuffs

that had been used to restrain Ms Lees 'safely matched' Mr Murdoch's DNA.

- ▶ The court was told by a New Zealand man, James Hepi, that he and Mr Murdoch were involved in the business of transporting cannabis from South Australia to Broome in Western Australia and that they both regularly travelled along the highway where the incident took place. Another witness who travelled with Mr Murdoch over a 24 hour period across the Nullabor testified that Mr Murdoch gave him cannabis and amphetamines during their journey.
- ▶ Six witnesses gave evidence that they had seen Mr Murdoch with a gun before the alleged murder, with three of the six specifically testifying that the revolver or pistol was silver, while another two of the six said it could have been grey.

An example of inadmissible evidence in the trial was that the jury was warned by the judge not to take any notice of any previous charges for which Murdoch had been acquitted, including the alleged abduction and rape of a woman and her teenage daughter in South Australia in August 2002.

Verdict (given by the jury in the original trial):

On 13 December 2005, after deliberating for eight hours, the jury found Murdoch guilty of the murder of Peter Falconio. The judge (no less than the Chief Justice of the Northern Territory) thanked the jury for doing its job extremely well and said he agreed with the jury's verdict. Murdoch was also found guilty of the assault and deprivation of liberty of Joanna Lees.

Legal issue (appeal):

An appeal against the murder conviction was made on behalf of Mr Murdoch to the Northern Territory Criminal Court of Criminal Appeal, with one of the main arguments being that there had been a miscarriage of justice in the original trial due to:

- ▶ significant evidence being accepted by the jury that should have been ruled inadmissible by the trial judge; and
- ▶ there being insufficient evidence available for the jury to have concluded beyond reasonable doubt that it was Mr Murdoch (identity was the crucial question of fact in this trial) who committed the murder.

Decision (appeal):

The three Supreme Court Justices in the Court of Appeal,

CASE STUDY CONTINUED...

however, dismissed the appeal and concluded that no substantial miscarriage of justice had occurred in the original trial. The conclusion of their joint judgment was as follows:

The core issue in this case was the identity of the assailant. In our opinion the presence of the blood of the appellant upon the T-shirt of Ms Lees establishes beyond reasonable doubt the presence of the appellant

[Mr Murdoch] at the time Ms Lees was attacked just north of Barrow Creek. When this evidence is considered along with the other evidence properly admitted at trial of events occurring at that location, the guilt of the appellant of the murder of Peter Falconio is established beyond reasonable doubt. The case against the appellant becomes overwhelming when the evidence of the identification of the appellant as the assailant by

Ms Lees is taken into account.

1. Why was the accused, Mr Murdoch, mentioned first in the title of this court case? [C]
2. Who had the onus of proof in the original trial? [C]
3. What was the standard of proof required to prove the murder of Peter Falconio? [C]
4. What were examples of oral evidence (testimony) given in the trial? [C]
5. What documentary evidence would have been presented to the trial? [C]
6. What would have been examples of real evidence? [C]
7. What key evidence (material facts) would the jury have accepted as true to conclude that Mr Murdoch was guilty of the murder? [C] [A]
8. What would have made it difficult for the standard of proof to be met to the satisfaction of the jury in this case? [C] [A]
9. On what legal basis would the original trial judge have ruled the evidence of unproven charges of abduction and rape to be inadmissible to the jury's deliberations? [C] [A]
10. Imagine you were the barrister representing Mr Murdoch in the appeal. Are there any arguments that you could have made to convince the three judges that certain types of evidence allowed in the trial should have been ruled inadmissible and that the jury, therefore, caused a miscarriage of justice by finding your client guilty of murder? [A] [E]
11. With such intense media coverage prior to, and during, the trial, would it have been possible for Mr Murdoch to receive a fair hearing? [A] [E]
12. Should guilty verdicts be allowed in totally circumstantial cases? [A] [E]

9.6 THE RIGHT TO SILENCE

The right to silence has two aspects:

- ▶ the right of a suspect not to answer questions asked before trial (**pre-trial silence**); and
- ▶ the right of an accused person not to give evidence in his or her defence at trial (**at trial silence**).

The responsibility of the State to ask questions is matched by the right of a suspect, or an accused, not to answer them. The first aspect (**pre-trial silence**) has already been discussed in Chapter 4 of **Topic 2: Criminal Investigation Process**.

In *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws* (Interim Report 127) the Australian Law Reform Commission (ALRC) discusses in **Chapter 12: Privilege against Self-Incrimination, the right to silence**. It says:



Ch 4

The right to silence protects the right not to be made to testify against oneself (whether or not the testimony is incriminating) the privilege against self-incrimination is narrower in that it protects the right not to be made to incriminate oneself. Statute might require a person to answer questions, thus breaching the right to silence, but allow the person to refuse to give incriminating answers, thus preserving the privilege against self-incrimination.

Further:

the privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'. It reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.

The right to silence, particularly in its aspect of privilege against self-incrimination, has been suggested to have originated in the 12th and 13th centuries, and in its present form developed as part of the rise of the adversarial criminal justice system later in the 19th century. The right evolved in the common law partially as a consequence of the presumption of innocence, and also because of distrust at how police obtained information from suspects.

AT-TRIAL SILENCE

It is argued that the right to silence would be weakened if juries could infer guilt or other negative consequences from an accused person not taking the stand and answering questions. Hence, the exercise of this right means that a judge, prosecutor or co-accused **cannot make any adverse (negative or harmful) comments about the fact that the accused remained silent** during the trial. A judge should also warn the jury not to do so.

'An incident of that right to silence is that no adverse inference can be drawn against an accused by reason of his or her failure to answer such questions to provide such information. To draw such inference would be to erode the right to silence or to render it valueless.'

Petty and Maiden (1991) 55 A Crim R 322.



WHAT DO YOU THINK?



Would it be unfair to an accused person if the judge, in his or her summing up to the jury, said any of the following? [E] [R]

- "You will have noticed that the defendant failed to give evidence. She must have had no possible explanation for her conduct on the night in question."
- "You will have noticed that the defendant failed to give evidence. Although the law says she doesn't have to do so, it certainly must make you wonder."
- "There can only be one reason why the accused did not give evidence – she is guilty."
- "I remind you that the accused does not have to give evidence. This is her right. It is the Crown who has the onus of proof."
- "There can be many reasons why an accused person chooses to remain silent. You must not treat this as an admission of guilt."

The reasons for the right to silence include:

- ▶ It protects the innocent defendant from convicting himself by a bad performance on the witness stand.
- ▶ It spurs the prosecutor to carry out a complete and competent independent investigation.

- ▶ It contributes towards a fair state/individual balance by requiring the government to leave the individual alone and requiring the government in its contest with the individual to shoulder the entire load.

See: Davies JA, 'The prohibition against adverse inferences from silence: a rule without reason?' (2000) 74 *ALJ* 105

At-trial silence differs from pre-trial silence in the following ways:

- ▶ Questioning at trial takes place in a public courtroom and under the control of a judge. There is no possibility of threats or pressure being applied as is suggested can occur in the police questioning stage.
- ▶ By the time of trial, an accused will have had legal advice and will be in a position to give well-considered answers.
- ▶ The accused knows the case that the prosecution has made against him or her, as the accused does not have to testify until after the close of the Crown case.
- ▶ At trial, the jury will be aware that the accused has not testified, but will probably not know about the pre-trial questioning.

Eminent judges of the High Court have argued for the existence of the right to silence (**privilege against self-incrimination**) in the following judgments.

In *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, at 346, Murphy J explained that the privilege is

part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of the human personality.

Privilege against self-incrimination is said to be necessary to preserve the presumption of innocence, and to ensure that the burden of proof remains on the prosecution. In *Cornwell v R* (2007) 231 CLR 260, at 176, Kirby J said:

such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrongdoing from the evidence of others, not from the mouth of a person accused, given otherwise than by his or her own free will.

9.7 THE RIGHT TO LEGAL REPRESENTATION

Article 11 of the *Universal Declaration of Human Rights*:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.



In reading through the procedure of criminal trial, as set out above, it will be clear to you that lawyers play an important role in the whole proceedings. The responsibility of the government has been to provide a **fair and just forum** for hearing the case and to conduct the prosecution against the accused. Yet, it has been asked how fair a trial can be if the accused is not given skilled legal representation? Does an accused have sufficient knowledge of the law and legal procedure to make the trial fair? Does the accused have sufficient control over his or her emotions to objectively conduct his or her own defence?

Accused persons have always had the right to be represented by a lawyer. This is contained in s616 of the Code. However, the financing of the representation has been the individual's responsibility, not that of the state. This was the view of Barwick CJ in *McInnis v R* (1997) 143 CLR 575:

'It is proper to observe that an accused does not have a right to be provided with counsel at public expense. He has, of course, a right to be represented by counsel at his own or someone else's expense.'

If the state does not pay for legal counsel, does this mean that wealthy Australians, in our adversarial system, have a better chance of a fair trial and therefore an acquittal than do others? This was the view of Lord Devlin writing *The Judge*, Oxford, Oxford University Press, 1979:

'indeed, where there is no legal representation, and save in the most exceptional case of a skilled litigant, the adversary system, whether or not in theory, in practice breaks down'.

The principle has been that, where an accused is unrepresented, the judge will assist by 'lending a helping hand' to guide the accused through the trial to ensure his defence is put to the jury.

The High Court of Australia has considered this issue in the following case.

CASE STUDY

Dietrich v R (1992) 177 CLR 292

Facts: Dietrich was convicted on a charge of importing heroin contrary to s233B(1) *Customs Act 1901* (Cth) before a Victorian County Court. He applied for legal aid and was refused unless he pleaded guilty to the charge. At his trial lasting 40 days, Dietrich was legally unrepresented. After conviction he appealed to the Victorian Court of Criminal Appeal and was unsuccessful. He appealed to the High Court.

Legal Issue: Was there a miscarriage of justice in his trial by virtue of the fact he was not provided with legal representation?

Decision: The High Court found there was no absolute right to legal representation through the provision of legal counsel at public expense, but, it held that in criminal trials for serious offences, where the judge felt an accused could not get a fair trial due to lack of a legal counsel, the judge could stay (stop) the trial until legal representation could be obtained.

In Dietrich's case the majority of the High Court (5:2) quashed his conviction and ordered that there be a new trial.

Read this extract from judgment of Deane J in *Dietrich v R* and answer the questions that follow.

The common law does not impose upon the government or any section or member of the community an enforceable duty to provide free legal advice or representation to anyone. What the common law requires is that, if the government sees fit to subject an accused person to a criminal trial, that the trial must be a fair one. Inevitably, compliance with the law's overriding requirement that a criminal trial be fair will involve some appropriation and expenditure of public funds; for example, the funds necessary to provide an impartial judge and jury; the funds necessary to provide minimum court facilities;... the funds necessary to provide interpreter services to an accused and an accused's witnesses who cannot speak the language...

CASE STUDY CONTINUED...

The effect of the common law's insistence that a trial be fair, is that, if the funds and facilities necessary to enable a fair trial to take place are withheld, the courts are entitled and obliged to take steps to ensure that their processes are not abused to produce what our system of law regards as a grave miscarriage of justice, namely, the adjudgment and punishment of alleged criminal guilt otherwise than after a fair trial.

As a general proposition and in the absence of exceptional circumstances, a trial of an indigent person accused of a serious crime will be unfair if, by reason of lack of means and the unavailability of other assistance, he is denied legal representation.

1. Is there a right to legal representation at public expense? [C]
2. When is an accused person entitled to legal representation funded by the public? [C]
3. Who can make that decision? [C]
4. Which people in the community could be considered 'indigent'? [C]
5. Deane J refers to 'serious' cases, but does not define this. How would you define a serious case and give examples. [C] [S]
6. Deane J provides 'circumstances in which a criminal trial will be relatively fair notwithstanding that the accused is unrepresented.' [C]

He includes:

- ▶ *Where the accused wants to be unrepresented and refuses legal counsel.*
- ▶ *Where the accused has financial means to pay for a lawyer but decides he doesn't want to spend money on that.*
- ▶ *Non-serious offences 'where there is no real threat of deprivation of liberty'.*

Do you agree with Deane J that the trial would be fair in these circumstances? [A] [E]

7. One of the consequences of legal aid funding being directed to criminal offences is that other areas of the law, including family law matters, will receive less. Is it right that the legal aid priority be given to criminal law matters? [A] [E]

9.8 CRIMINAL APPEALS AND DOUBLE JEOPARDY

It was not until 1908 that the right of appeal in criminal trials was established in England by statute. This is despite the existence of the right of appeal in civil cases for many years prior to 1908, and some miscarriages of justice where persons were wrongly convicted and executed. The only way a convicted person could have an unsafe verdict of guilty overturned prior to 1908 in England was by clemency, that is, being pardoned. In Queensland, the Court of Criminal Appeal was established in 1913.

Today, a person convicted of a criminal offence may **appeal against conviction or against the severity of the sentence**. The Crown may also appeal against an accused person's sentence being too light. The Queensland criminal appellate courts are the District Court and the Court of Appeal of the Supreme Court. The Crown **cannot appeal an acquittal**. Once a judge or jury finds a person not guilty, he or she is acquitted of that offence and generally can never be tried for that same offence again. Even if new, compelling evidence comes to light there cannot be a new trial. This is the **rule against double jeopardy**. It is a rule that has been recently modified in both England and New Zealand with considerable debate here in Australia as to whether the rule is an important safeguard or runs counter to common sense.

GROUNDS OF APPEAL

A person appealing against conviction can allege that there has been a miscarriage of justice because

- ▶ there has been an error of law or fact, or a mixture of errors of law and fact; and/or
- ▶ the verdict is unsafe, for example where a judge misdirects the jury, wrongly allows evidence to be admitted which is inadmissible, or makes some other procedural mistake.

A recent case which continues to attract public interest, and in which the convicted person appealed against his conviction to the Queensland Court of Appeal, and then faced a further appeal by the Crown to the High Court, is the case of *R v Baden-Clay*. The High Court appeal and decision is set out below.

CASE STUDY

The Queen v Baden-Clay [2016] HCA 35 (31 August 2016)

Facts: Mr Baden-Clay was found guilty of the murder of his wife in the Supreme Court. He appealed his conviction to the Court of Appeal on the ground that the jury's verdict was unreasonable. The Court of Appeal allowed the appeal, set aside the respondent's conviction on the charge of murder, and substituted a verdict of manslaughter. The Crown appealed to the High Court seeking an order setting aside the Court of Appeal's decision, so that the original decision of the jury of guilty of murder was upheld. Mr Baden-Clay was the respondent in the High Court and the accused (defendant) in the original trial.

The evidence at trial

Mr Baden-Clay's evidence: Mr Baden-Clay gave evidence that he and his wife had no fight or disagreement the night she disappeared. When he awoke the next day she was not at home. Initially he was not concerned as she often went for an early morning walk. He said he was in a hurry and cut himself shaving. He reported his wife missing to the police at 7:15am when his wife had not returned. Her body was found 11 days later 13 km from her home on a bank of Kholo Creek.

On the morning of 20 April 2012, Mr Baden-Clay admitted to police that he had had an affair, but told the police that it had ended. He said he and his wife had been to a counsellor who suggested that each night they spend fifteen minutes when his wife could "vent and grill" him about the affair. He said they had spent a fifteen minute session talking about some difficult things the previous night.

When cross-examined, Mr Baden-Clay denied that he fought with his wife on the evening of 19 April or the morning of 20 April. He denied that he left his children

alone in the house to go to the Kholo Creek bridge. He denied that he took any steps to dispose of his wife's body.

Mr Baden-Clay's relationship with Ms McHugh

Mr Baden-Clay had been in a sexual affair with Ms McHugh since August 2008. It ended in September 2011 when Mrs Baden-Clay found out about it. Ms McHugh gave evidence at the trial that the affair resumed in December 2011 and things came to a head with Mr Baden-Clay promising to leave his wife by 1 July 2012. There was a real estate conference which Ms McHugh and Mrs Baden-Clay were to attend on 20 April. Ms McHugh telephoned Mr Baden-Clay on 19 April telling him it was unfair for his wife and her to be together at the conference without his wife knowing the affair had resumed. Mr Baden-Clay told Ms McHugh he was thinking of selling the business and that he would do that after he had left his wife. Ms McHugh said that she believed that the respondent was "taking more of a stand" and that "something was going to be different this time".

Ms McHugh gave evidence that she attended the conference on 20 April. She called Mr Baden-Clay at lunchtime asking where his wife was. He told her that his wife was missing. On that day, he told her that they "need to not... communicate and lay low." On 21 April, Mr Baden-Clay called Ms McHugh and told her that the police would want to speak to her and that she should tell the truth. He asked her whether she had told the police that they were together again, and she replied "yes".

In his evidence, Mr Baden-Clay admitted that he had told Ms McHugh that he loved her and that he had undertaken to leave his wife by 1 July. However, he said that he had never loved her and merely did that to "placate" her. He admitted that he told her that he did not love his wife, but insisted that he actually did.

CASE STUDY CONTINUED...

The forensic evidence: Dr Nathan Milne, forensic pathologist, was unable to determine the cause of death because of the significant level of decomposition of the body. In his opinion the deceased did not die of natural causes. There were no signs suggestive of drowning or that the deceased fell into the water and drowned. Other medical experts, including some who treated her, held no concerns that she was suicidal.

Leaves found on the body were from trees of six species that grew at the respondent and his wife's home; four of these did not grow at the site at which the body was found.

Blood matching the deceased's DNA profile was found in the rear section of her car, which had only been acquired in February 2012.

Tests on the respondent's mobile phone showed that it had been placed on a charger, adjacent to the side of the bed on which he slept, at 1:48 am, at a time when he claimed he was asleep.

Mr Baden-Clay's injuries: Three experts gave evidence that there were two categories of injuries to the respondent's right cheek. One set of scratches were caused by fingernails and another fresher set were consistent with having been caused by a razor moved from side to side across the face.

The issue of intent at trial

The Crown case was that Mr Baden-Clay became involved in an altercation in which he killed his wife with the intention of doing so or of causing her grievous bodily harm.

Mr Baden-Clay's case was that he had nothing to do with his wife's death. Mr Baden-Clay's counsel provided a document to Judge Byrne (the trial judge) listing four hypotheses to account for the death: drowning; falling from a height to her death or to cause drowning; alcohol and/or sertraline toxicity; or the effects of serotonin syndrome, which led to her drowning or falling from a height to her death. Judge Byrne, the trial judge, canvassed with Mr Baden-Clay's counsel the possibility of

a direction to the jury that the defence contended in the alternative that the conduct in question did not tend to prove an intentional killing. Mr Baden-Clay's counsel said the problem with that was "it's not our contention" and the direction was not put before the jury by the trial judge.

The Court of Appeal decision

The Court of Appeal considered that there was a reasonable hypothesis that the respondent was guilty of manslaughter, but was not guilty of murder, because he did not have the requisite intention to kill his wife or cause her grievous bodily harm. That hypothesis was:

"that there was a physical confrontation between the appellant and his wife in which he delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm; and, in a state of panic and knowing that he had unlawfully killed her, he took her body to Kholo Creek in the hope that it would be washed away, while lying about the causes of the marks on his face which suggested conflict."

Legal issue: Should the High Court overturn the decision of the Court of Appeal?

Decision: The High Court pointed out that the Court of Appeal's conclusion was not based on evidence. It was mere speculation or conjecture rather than acknowledgement of a hypothesis available on the evidence. There was no evidence presented at trial that suggested that the respondent killed his wife in a physical confrontation without intending to kill her. Mr Baden-Clay gave evidence that he was not present when his wife's death occurred, and therefore he could not have been the unintentional cause her death.

In addition, the Court of Appeal's hypothesis was never put to the jury by Mr Baden-Clay's legal representative, either directly or indirectly. The High Court stated that once it was clear that the hypothesis adopted by the Court of Appeal was not put to the jury at trial, and was not available on the evidence, the appeal should be allowed and the conviction of Mr Baden-Clay for murder should be restored.

1. What evidence could the jury rely on to decide that Mr Baden-Clay **intentionally** killed his wife? Was there evidence on which the jury could rely that Mr Baden-clay **accidentally** caused his wife's death? [C] [A]
2. What four reasonable possibilities as alternatives to murder did Mr Baden-Clay's asked Judge Byrne to put to the jury in his summing up/directions? Why was accidental or unintentional killing not one of these? [C] [A]
3. What was the reasonable hypothesis outlined by the Court of Appeal that Mr Baden-Clay was guilty of manslaughter not of murder? [C]

CASE STUDY CONTINUED...

4. Was there any reason why the jury could not have formed its own view about whether or not there was a reasonable possibility, based on the evidence, that Mr Baden-Clay killed his wife accidentally? Give your reasons. [A]
5. Do you agree with the High Court's decision to overturn the Court of Appeal and restore the jury's verdict of murder? Give your reasons. [A]



INQUIRY



WHAT IS THE RULE AGAINST DOUBLE JEOPARDY? SHOULD THE RULE BE OVERTURNED OR MODIFIED, AND IF SO, IN WHAT CIRCUMSTANCES?

DOUBLE JEOPARDY

The character of the inquiry process is described in the Preface. You will do a number of different activities in this inquiry. They will enable you to complete the learning processes the syllabus says form the basis of the inquiry process.

THE PRINCIPLE - THE RULE AGAINST DOUBLE JEOPARDY

[It is] a universal maximum of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.

Sir William Blackstone. Commentaries on the law of England (1789)

No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure for each country.

Article 14 (7) International Covenant on Civil and Political Rights (1976)

There are several reasons for the principle, or rule as it is frequently called, against double jeopardy. First, it allows criminal proceedings to have finality so that an accused person and the community can know where the matter has really ended. Hence, when a person is acquitted of a criminal charge, he or she can then get on with life without the worry of a possible new trial ever arising from that same incident. Second, it protects an accused from being punished more than once for the same act or omission when it is possible that there is more than one offence that could apply. For example, if a person is tried with the offence of dangerous driving causing death they cannot at a later time be tried for manslaughter for the same wrongful act.

PRACTICAL APPLICATION

FIRST DOUBLE JEOPARDY KILLER JAILED

SOURCE: JOSHUA ROZENBERG, LEGAL EDITOR, THE TELEGRAPH, (WWW.TELEGRAPH.CO.UK/NEWS), 12 SEPTEMBER 2006, (EXCERPTS ONLY)

The first person in 800 years to be charged with a crime of which he had previously been cleared stood up in court number 1 at the Old Bailey yesterday and pleaded guilty to murder.

Billy Dunlop's softly spoken plea marked the end of Mrs Ming's 15 year campaign to change the ancient double jeopardy rule and bring her daughter's killer to justice.

Dunlop, 43, stood trial twice in 1991, charged with Mrs Hogg's murder, but a jury failed to reach a verdict on each occasion. By convention, prosecutors did not ask for a third trial where juries twice failed to agree, and he was formally cleared. As a result of Mrs Ming's campaign, the law that prevented an acquitted person being tried again for the same offence was changed last year, when a provision in the Criminal Justice Act 2003 (UK) came into force. When there is 'new compelling evidence' pointing to the guilt of a former defendant, the Court of Appeal may quash an acquittal and order a retrial. That order was made in Dunlop's case earlier this year.

In fact, Dunlop had formally admitted murdering Mrs Hogg during a police interview in 1999. He told the police he was aware at the time that a change in the law was under consideration by the Law Commission.

Dunlop, who had previously had a relationship with Mrs Hogg, was always the prime suspect. Scientific evidence linked him to the crime. Unable to prosecute him for the murder of which he had been acquitted, the Crown Prosecution Service took the unusual decision to charge him with lying on oath during the murder trials. He was sentenced to serve six years after admitting perjury in Teeside Crown Court in 2000, to follow on from the seven year sentence he was already serving for another crime.

James Spencer, QC, prosecuting at that trial, said: "Had he not committed perjury, he would have been convicted of murder, but because he had committed perjury he has got away with murder." Or he would have done, if the law had not been changed after 800 years.

1. What was the basis on which Billy Dunlop was acquitted in 1991? [C]
2. When did Billy Dunlop admit that he murdered Miss Hogg? What reason did he give for making this admission? [C]
3. Why was Billy Dunlop charged with perjury and not with murder in 2000? [C]
4. For how many years did Julie Hogg's mother, Mrs Ming, wage a public campaign to change the law so that Billy Dunlop could be charged with murder despite the fact that this was prevented by the rule against double jeopardy because he had already been acquitted? Billy Dunlop told a shocked television audience some years after he was acquitted, that he had indeed strangled Julie Hogg. What effect do you think this had on the public campaign for the repeal of the double jeopardy protection rule? Search for newspaper articles about Billy Dunlop and Julie Hogg's murder to support your opinion. [C] [A] [S]
5. *Intended to protect the innocent from persecution and repeated trials until a satisfactory verdict is reached, the double jeopardy law has also shielded the guilty, allowing them to parade their freedom once they had been acquitted, beyond the reach of justice.*

SOURCE: THE NORTHERN ECHO, A LOCAL NEWSPAPER SUPPORTING JULIE HOGG'S FAMILY.

Do you think the amendments to the rule against double jeopardy in the Criminal Justice Act 2003 (UK) strike the right balance between the accused and victims? Give your reasons? [A] [E]

RESEARCH

In New South Wales the law was changed in 2006 so that it was possible to charge persons who had been acquitted of certain serious crimes again with the same offence. Find out about these changes and about why they were made. Prepare a report which covers what you consider were the legal issues and identified the outcomes which were adopted to move the criminal justice system in New South Wales forward to a different position on double jeopardy. [C] [A] [E] [R]

Until late 2007, the law in Queensland was that a person could not be punished twice for the same offence (s16 *Criminal Code*) in that it is a defence to any charge that the accused person has already been tried, convicted or acquitted of that same offence (s17 *Criminal Code*).

In Queensland, it was the case involving **Raymond Carroll** that caused people to rethink whether the double jeopardy provision is used unfairly by guilty persons to evade punishment. It raised the question whether the state has an overriding responsibility to ensure that the criminal justice system is sufficiently balanced and is not skewed towards protecting criminal offenders over victims.

CASE STUDY



Series of three criminal court cases against Raymond Carroll

Facts: In 1973, 17 month old baby Deidre Kennedy was taken at night from her cot, sexually abused, strangled to death, then abandoned on the roof of a toilet block in the city of Ipswich. There were bruises on her legs that experts said were consistent with teeth marks. After years of investigation, Raymond Carroll, a RAAF electrician at the time of the murder, was eventually charged. At his trial in February, 1985, he denied involvement and gave sworn evidence that he had not killed the baby and that he was at the Royal Australian Airforce Base in South Australia at the time. There were witnesses who supported the fact that he had in fact attended the course in South Australia but there was one witness who gave sworn testimony that Carroll had been seen in Ipswich on the day of the murder. Odontologists (forensic dentists) gave evidence regarding the bite marks on the baby's leg using cast impressions to link these to Carroll. There was also similar fact evidence given by Carroll's former wife who testified that he had bitten the thighs of his own baby daughter after locking himself in a bedroom with her. In March 1985, the jury returned a verdict of guilty and Carroll was convicted of her murder.

Appeal against conviction for murder.

R v Carroll 19 A.CRIM.R 410 (1985)

In November, 1985, Carroll appealed his conviction to the Court of Appeal.

Legal Issue: Was the evidence admitted during his trial prejudicial and inconclusive?

Decision: The Queensland Court of Appeal upheld the appeal and overturned the conviction, entering an acquittal. This was due to differences in expert opinion as to whether the bite marks on the baby's body precisely matched those of Carroll's teeth. Carroll had his own expert witness who contested the findings of the Crown's odontologists. The court found the evidence was inconclusive and ruled inadmissible the testimony of Carroll's first wife. The verdict therefore was held to be unsafe and unsatisfactory.

The case was re-opened in the mid 1990s when witnesses came forward who claimed that Carroll had admitted his guilt to them and when further evidence was produced that Carroll was not at the South Australian Base at the

CASE STUDY CONTINUED...

time of the murder. Advances in forensic evidence also confirmed a stronger match with the bite marks. Despite this new evidence, the rule against double jeopardy meant that Carroll could not be charged with Deidre Kennedy's murder a second time.

To get around the double jeopardy rule the Crown decided, in February 1999, to charge Carroll with perjury, which is lying under oath, pursuant to s123(1). The indictment stated that in giving evidence in a judicial proceeding, namely the trial for the murder of Deidre Kennedy, Carroll, had "knowingly given false testimony to the effect that he did not kill Deidre Kennedy". Carroll's counsel submitted that the indictment for perjury should be stayed on the basis that these new proceedings constituted an abuse of process. The trial judge ruled that double jeopardy did not apply and there was no abuse of process because the evidence in 2002 was different and stronger than that presented at the first trial.

For a second time, the jury found Carroll guilty and he was convicted and sentenced for perjury.

Appeal against conviction for perjury

R v Carroll QCA 394 [2001]

Legal Issue: Did the trial for perjury constituted an abuse of process because of the similar issue in the murder trial and the trial for perjury?

Decision: The Court of Appeal unanimously upheld the appeal concluding that the perjury trial was effectively a re-trial and was therefore an abuse of process as 'the principle of double jeopardy' had been substantially breached. All common law courts have the inherent power to prevent an abuse of process.

Appeal to the High Court Australia

R v Carroll HCA 55[2002]

Legal Issue: Did the perjury trial amount to an abuse of process?

Decision: There was unanimous agreement of the five justices of the High Court that both trials came to focus upon the same issue - did the respondent kill Deidre Kennedy? Gaudron and Gummow JJ found: "the laying of that indictment was vexatious or oppressive in the sense necessary to constitute an abuse of process; in substance there was an attempt to relitigate the earlier prosecution". McHugh J explained that, "the long established policy of the law is that an acquittal is not to be contradicted or undermined by a subsequent charge that raises the same ultimate issue or issues as was or were involved in the acquittal."

However, the decision of the High Court of Australia did not put an end to the debate on reform of double jeopardy. So, although the highest court in Australia had clearly and unequivocally ruled that the double jeopardy protections were entrenched in our system of justice, the **court of public opinion was not satisfied**. Just as had occurred in England, the newspapers and other media outlets took up the cause, demanding changes to the double jeopardy laws along the lines of the legislation in the United Kingdom. The common law is always subject to the will of Parliament so legislation can modify a court ruling, though it does so cautiously. The advocates wanted legislation to be enacted across the country to allow for a retrial where new evidence became available. The catchcry was to introduce a 'Deidre's law.' Many newspaper articles and editorials as well as television and radio programs promoted the cause and Deidre's mother became the figurehead for the reform. *The Australian* newspaper was so strident in its objection to the Carroll acquittal that it recommended a civil trial should be mounted against him.

A **public petition** in Queensland for the immediate implementation of a Deidre's law collected over 300,000 citizen's signatures. The first state to pass legislation along English lines was New South Wales in October, 2006. Queensland followed suit in late 2007 and amended Chapter 68 of the *Criminal Code*

Today, **two very limited exceptions to double jeopardy** are now possible.

Section 678B QCC allows the court to order a retrial for murder when there is **fresh and compelling evidence** and when it is in the interest of justice for there to be a retrial. To be fresh, it must be evidence that could not have been available at the original trial, such as data only available from a later developed forensic technique. Sloppy police work will not suffice. Compelling means reliable and significant.

Section 678C QCC allows the court to order a retrial for ‘a 25 year offence’ notably murder if there is a **tainted acquittal**. What is tainted acquittal? It is one where the jury verdict was the result of fabricated evidence given by either the accused or another defence witness (what is known as an administration of justice offence such as perjury which has been proven beyond reasonable doubt). Or it could be an acquittal given by a jury when it is later proven that there was undue pressure or bribes given, and taken, by one or more jurors to ensure the acquittal.

Unlike the reforms in Britain and New South Wales, Queensland law does not allow **retrospective** operation. This means the Deidre Kennedy case will never be reopened.



WHAT DO YOU THINK?



1. Deidre Kennedy's mother has expressed regret that the law is not retrospective and feels the reforms have not gone far enough. Do you agree, or do you feel the retrospective operation would be unfair? [A] [E]
2. In your opinion do these changes to the law mean that the sanctity [respect and finality] of a jury verdict would be undermined? [R]

REVIEW

1. Describe the following: [C]

trial | jury | the presumption of innocence | the onus of proof |
standard of proof | the right to silence | the privilege against self-incrimination

2. Describe and explain the following concepts and principles: [C] [A]

- (a) The attributes of a fair trial.
- (b) Article 14 of the *International Covenant on Civil and Political Rights* (1976).
- (c) The essential character of a court according to Gaudron J in *Nicholas v the Queen* (1998) CLR.
- (d) The basis for saying that juries make fair and impartial decisions.
- (e) The recent changes in Queensland to the jury system.
- (f) The arguments in favour of abolishing juries.
- (g) The powers judges have to deal with ‘rogue’ jurors.
- (h) How the court rules of evidence ensure a fair trial.

TOPIC 3: CRIMINAL TRIAL PROCESS

CHAPTER 10: CRIMINAL DEFENCES AND EXCUSES

FOCUS SUBJECT MATTER

10.1 CRIMINAL RESPONSIBILITY

10.2 CRIMINAL DEFENCES AND EXCUSES OF GENERAL APPLICATION

10.3 PARTIAL EXCUSES FOR MURDER

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ a guilty mind must accompany a prohibited act for a person to be convicted of a crime;
- ▶ the Queensland *Criminal Code* sets out what defences and excuses are available to accused persons in Queensland; and
- ▶ the conduct of a fair trial requires that an accused person should be able to rely on the defences and excuses available to him or her under the *Criminal Code*.

10.1 CRIMINAL RESPONSIBILITY

The criminal justice system allows the defendant to give evidence as to his or her state of mind **at the time of committing an offence**. This is because it is an established principle of the common law that a person should not be convicted of a criminal offence unless he or she had a 'guilty mind' (mens rea) which accompanied the wrongful act or omission. In Queensland, it has been replaced by statutory provisions that deal with the same mental element of 'guilt'.

These sections are mainly found in Chapter 5 of the *Criminal Code 1899* (Qld), which is titled 'Criminal Responsibility'. If a person accused of any criminal offence in Queensland can prove that one of these Chapter 5 excuses or defences applies to his or her case, then he or she will not be criminally responsible for the act or omission. Once the evidence supporting an excuse or defence has been raised by the accused, it is up to the prosecution to negate it beyond reasonable doubt. For example, if in a trial the lawyer for an accused raises evidence of self-defence or accident then the Crown has to prove beyond reasonable doubt that the accused was not acting in self-defence, nor was it an accident.

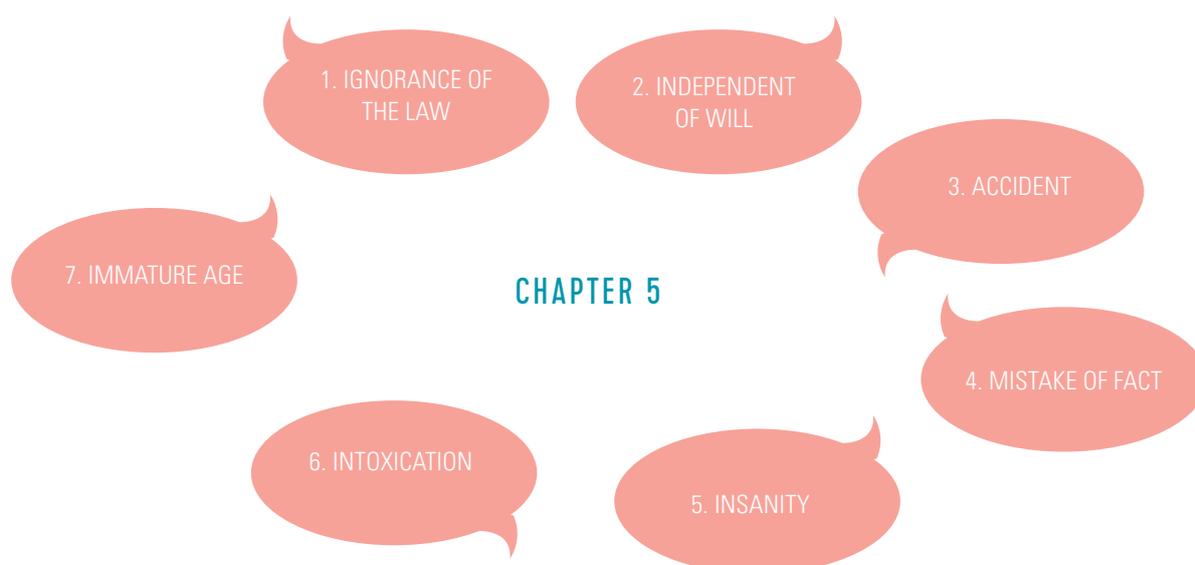
Most excuses and defences are complete, and if successfully made out, mean the accused cannot be convicted of the offence. If it is a partial excuse or defence, then usually the accused will receive the penalty for a lesser offence.

A defence or excuse operates just like a genuine excuse you might give your teacher:

'I did something that is wrong, but I have a good reason or excuse for doing that wrong thing and so I should not be punished.'

10.2 CRIMINAL DEFENCES AND EXCUSES OF GENERAL APPLICATION

In this section we look at seven of the defences and excuses in Chapter 5 of the Code which are especially important for determining whether a person can be held to be criminally responsible for their act or omission.



1. IGNORANCE OF THE LAW – BONA FIDE CLAIM OF RIGHT [S22 CRIMINAL CODE]

In criminal law 'ignorance of the law is no excuse'. This means that accused persons cannot use the fact that they did not know what they did was a criminal offence to avoid being convicted.

However, the section also says that a person is not criminally responsible for an offence relating to property if the act is done with a **bona fide** (which means honest) claim of right and without intention to defraud. For example, you would have an excuse under this section to a charge of unlawful use of a motor vehicle, if it could be shown that you honestly believed you were legally entitled to use the car. This could happen if there was a long standing arrangement allowing you to use it and you had not yet received the note stating this arrangement was over. Your claim of right to use the car was honest. If you had received the note and decided to pretend you had not seen it, your claim would be false, deceitful and fraudulent and the excuse would not apply.



WHAT DO YOU THINK?



In 2006, a new offence of 'scalping' came into operation. It became a crime to sell tickets for major events at inflated prices. The first person charged and convicted of this offence had put up for sale on an Internet auction site, Ebay, six tickets for the first State of Origin game at Suncorp Stadium. When arrested for scalping, the six tickets which she had originally bought for \$260.40 had reached \$425.00 in bidding. The accused argued that she did not know selling tickets at inflated prices was a crime and if she had known, she would not have done it.

1. In your opinion, was it fair or not that she was convicted of, and fined for, this offence? [E]
2. What is the reason for 'ignorance of the law' not being a lawful excuse? [E]

2. INDEPENDENTLY OF THE EXERCISE OF THE WILL (S23 (1) (A) CRIMINAL CODE)

A person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will. An act here means a **physical action** over which a person would normally have bodily control, such as pulling a trigger on a gun or thrusting a knife into another's chest. So, a person who does such an act without their conscious mental control may be held not responsible for their actions. Acts done as a reflex by someone, or while they are sleepwalking, or suffering from concussion arising from a sudden blow to the head, or who are in great psychological shock, may be found to have done the act independently of their will.

CASE STUDY

Cooper v McKenna [1960] Qd R 406

Facts: While playing football, the accused received a severe blow to his head and was knocked unconscious. He was still suffering from concussion when he drove home after the game. He was charged with dangerous driving.

Legal Issue: Did he have conscious control over his driving or was it an act occurring independently of his will?

Decision: There was sufficient evidence that his actions were involuntary because of the concussion suffered. He appeared to be driving without any real knowledge or awareness of what he was doing. Hence, he could not be convicted of the offence of dangerous driving as he was not criminally responsible for it.

Note: On appeal to the Queensland Court of Criminal Appeal, Matthews and Stable JJ. upheld this decision. However, they did note that the use of this excuse 'must be closely scrutinised. It is common knowledge that 'blackout', to use one of the titles, is one of the first refuges of a guilty mind and a popular excuse'.

1. Do you agree with the two Appeal Court judges that the use of this excuse must be closely scrutinised? [E]
2. Why would the court have given this warning? [E]

In recent years there has been increasing use of sleepwalking as a defence to serious criminal acts, including rape and murder. Sleepwalking is an act that occurs while a person is in a sleep state and may extend to a range of other behaviours including nonsensical talking. In extreme cases, activities such as driving, emailing, and cooking can be performed while a person is in this state of low consciousness called somnambulism. Is it possible to do a criminal act whilst sleepwalking? Yes. There are cases where it has been argued that an act occurred independently of the person's will. However, this excuse is not always successful in court.

CASE STUDY

R v Silich (Supreme Court, Western Australia, 2010)

Facts: After his father and mother went to bed, Silich said he fell asleep on the couch about 1am. He was heavily intoxicated and was still affected by alcohol when he woke the next morning to discover his parents lying dead on the bedroom floor. They had been kicked to death. Silich had no recollection of waking during the night or hurting them in any way. Forensic evidence showed that it was Silich's boots that had inflicted the fatal injuries. Later he did admit to kicking them to death, but argued he had no memory of doing so.

Legal Issue: Had Silich killed his parents whilst sleepwalking? If so, he was not criminally responsible for their deaths as the act - the kicking - was done independently of his will. Evidence was given that he had sleepwalked as a child. Defence counsel also argued there was no evidence of tension between Silich and his parents on the night they were killed. Evidence from friends showed he was not a violent man. The defence's secondary position was that Silich was 'massively affected by alcohol' and had no intent to kill in which case the jury should return a verdict of manslaughter.

The prosecution's case was that the sleepwalking claim did not stand up given the number of violent hits his parents had taken. The hits 'were not aimless. They were directed blows, they were controlled...he kept kicking his parents until they were dead. He did that with an intention to kill.'

Psychiatrist at the trial, Dr Varghese, gave evidence that 'complex and purposeful actions were limited while sleepwalking' and it is unlikely that meaningful acts of violence would be committed during a state of sleepwalking.

Jury Decision: Guilty of murder. Sentenced to life imprisonment.

1. What role did expert evidence play in the trial? [C]
2. Counsel for the defence could not prove Silich had been sleepwalking but claimed it did not have to as it was for the jury to decide if the prosecution had proved Silich wasn't sleepwalking. Is this correct or not? [A]
3. Do you think this was a fair outcome? Give reasons why you would support or reject the jury's decision. [E]
4. Do you think that the s23 excuse of act independent of will should be used in such cases or should the defence of insanity (see commentary on defence 6) be preferred? [A]

Sleepwalking as a defence is also raised in rape and sexual assault cases. In 2006, a man in Toowoomba claimed he had no memory of having intercourse with his best friend's girlfriend. The trio had been out drinking prior to all falling asleep at the friend's home. A sleep physician gave evidence that it was 'highly probable' the incident happened as a result of sleepwalking because the accused had two previous incidents of sleepwalking. However, expert psychiatric witnesses for the prosecution said it was unlikely sleepwalking played a role. The prosecutor told the jury that the accused was an opportunist who had developed the sleepwalking defence because he got caught out: "There has been an attempt in subterfuge here to hide behind a defence . . . that had no merit whatsoever". The jury found the accused guilty.



WHAT DO YOU THINK?



Many women's groups have been concerned at the use of the sleepwalking excuse in sexual assault cases. Suzanne Jay, of the Canadian Association of Sexual Assault Centres, responding to an acquittal based on sleepwalking, wrote: 'It's another case of the courts not taking a woman seriously, adding yet another to the list of excuses men use for sexual assault.'

1. What other excuses could she be referring to which have been used in rape cases? [S]
2. Write a submission to the Queensland Law Reform Commission setting out whether you support, or do not support, the application of s23 to the consequences of sleepwalking episodes. [A] [E]
3. Do you think this was a fair outcome in the Toowoomba rape case? Give reasons why you would support or reject the jury's decision. [A] [R]

3. ACCIDENT - AN UNFORESEEN EVENT [S23(1)(B) CRIMINAL CODE]

For centuries the criminal law has recognised the excuse of accident and held that a person is not criminally responsible for an event which occurs by accident. In 2011, the law was amended in Queensland to remove the word 'accident' from s23 of the Code. In its place the well established definition of what, in case law, amounted to an accident for the purposes of s23 (1) (b) was inserted. This definition came from the important High Court case of *Kaporonovski* which is set out earlier for its ratio in Chapter 2.6 and is summarised below. Section 23 now states that a person is not criminally responsible for an event that:

(i) the person does not intend or foresee as a possible consequence; and

(ii) an ordinary person would not reasonably foresee as a possible consequence.

The event is the consequence of an act. Typically it is the injury received. Therefore the issue becomes, was an injury of that type intended or foreseen by the accused, and was it foreseeable by an ordinary person? For example, if a person is chopping wood, and the head of the new axe falls off unexpectedly and wounds a passer-by, the wounding would be an accident. The chopper did not intend to injure the passer-by, and neither the chopper, nor would an ordinary person foresee, the axe-head falling off a new axe.



Ch 2.6



INQUIRY



DOES THE NEW OFFENCE OF UNLAWFUL STRIKING CAUSING DEATH (S314A OF THE CODE) MEET COMMUNITY EXPECTATIONS AND PROVIDE A SATISFACTORY RESPONSE TO THE CRITICISM OF THE DEFENCE OF ACCIDENT?

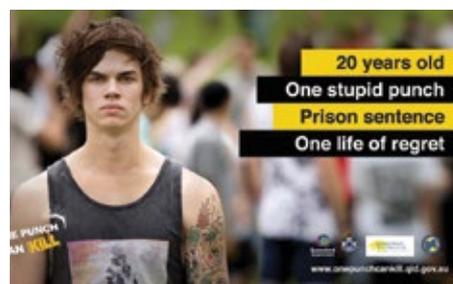
Around 2005 and 2006, in the Australian community, there was a significant number of deaths caused by alcohol - fuelled violence among young people. These were reported widely in the media, and a campaign was started by the families of the victims to change the law to make the defence of accident unavailable in such circumstances.

The One Punch can Kill™ is the original anti violence awareness campaign that originated in 2007 after the murder of Queensland teenager Matthew Stanley. The campaign targeted the rising level of youth violence through a series of advertisements. Four bus advertisements presented messages related to consequences of committing an assault. An advertisement featuring Sophie Halipilias presented the perspective and message from a victim's mother. The ad was aired and played in movie cinemas across Queensland.

In 2010 the Queensland Police Service handed the management of the campaign to the Queensland Homicide Victims' Support Group. Since this time the One Punch Can Kill™ campaign has developed an interactive multimedia education program for high school students, sporting clubs and community organisations. The program is designed as a crime preventative measure to reduce levels of youth violence by educating Queensland youth on 3 focus areas

- ▶ Health: harm associated with drug and alcohol use
- ▶ Justice: Queensland criminal justice system
- ▶ Social behaviours: Use of social media and peer behaviours

The One Punch Can Kill™ campaign continues to build vital partnerships with business, sporting organisations, the media and government to deliver the One Punch Can Kill™ message across Queensland. The new One Punch Can Kill™ campaign is developing a new website, school fight advertisement, educational and teaching resources for high school students across Australia. The new One Punch Can Kill™ social media campaign is designed to address the use of social media by youth in the promotion and publication of violence.



RESEARCH

1. In Chapter 1, s314A of the Code is reproduced as an example of a new law. Write your own summary of the meaning of this new law. Why does the defence of accident not apply to this new offence? [C] [A]
2. In Chapter 3.3, there are excerpts from a number of newspaper articles which raise the issue of the sentences which are being given by the courts to persons who have recently committed the offence of **unlawful striking causing death**. Go to the Internet and find examples where such offences have occurred, both before and after the new offence was created. Make a chronological list from 2004 indicating if the offender was found guilty or pleaded guilty, and the punishment which resulted. Was there a trend in the frequency of these offences? [C] [A]



Ch 1.1

PRACTICAL APPLICATION

TEEN GUILTY OF KILLING MATTHEW STANLEY

SOURCE: AMANDA WATT, WWW.COURIERMAIL.COM.AU, 7 SEPTEMBER 2007, (EXCERPTS ONLY)

THE grieving father of teen bashing victim Matthew Stanley is relieved his killer has today admitted guilt but says his claims of remorse meant little to the family.

The 17-year-old offender faced Brisbane Supreme Court this morning where he pleaded guilty to manslaughter over the death of Matthew, 15, outside a suburban party on or about September 24 last year.

Legal-Aid barrister Soraya Ryan told the court this morning her client had shown a "mature acceptance of responsibility" for the incident by pleading guilty.

She also revealed he had rejected the potential option of pleading not guilty and relying on the defence of accident if the matter went to trial - a defence that could have been open to him in the circumstances.

Other defendants have succeeded in beating murder and manslaughter charges this year partly by relying on the controversial accident defence. The defence is based on the premise that the accused person or an ordinary person in their position could not have foreseen death as the outcome of their actions.

Ms Ryan said the teen's response had been that "it just wouldn't be right to walk away".

"The enormity of the offence has never left him," Ms Ryan said.

But outside court, Matthew's emotional father Paul Stanley - now a campaigner against youth violence since his son's death - said the statements of remorse fell flat and later described his son's killer as a "bully and a coward".

Mr Stanley said the family were at least relieved they now did not have to face up to a lengthy trial.

"He was guilty, that is all there is about it, he pleaded guilty, he did it, simple as that," Mr Stanley said.

"It really is a big comfort to us that we don't have to go through what was predicted to be a two week court case, listening to the pathology report and all that sort of thing. That was something we certainly weren't looking forward to."

He said if he was an outsider looking in at today's developments - and not the victim's father - he might say the admission of guilt was "refreshing" given recent high-profile acquittals of young men for murder and manslaughter.

When asked if the juvenile's stated remorse meant anything to him he replied: "Not in the slightest".

Members of the juvenile's family were in court but declined to speak publicly.

1. What reasons does barrister Soraya Ryan give to explain why her client pleaded guilty? [C]
2. What defence was available to the client of Soraya Ryan on which he did not rely? [C]
3. On what premise does the article say the defence of accident is based? [C]
4. Why is the accident defence described as 'controversial'? [C][A]
5. Describe the reaction of Matthew Stanley's father to the fact that his killer pleaded guilty. What did he say was 'a big comfort' to him and his family? Do you think he should have given his son's killer credit for showing remorse? [C] [A] [E]
6. Soraya Ryan thought that her client could have relied on the defence of accident. If he had done so and been successful he would have escaped punishment altogether. By pleading guilty he spent time in jail. If he had gone trial and being acquitted would that have been a fair outcome? Give reasons for your answer. [A] [E]

CASE STUDY

R v Little (2008) Queensland Supreme Court trial

Facts: Jonathon Little was in Fortitude Valley's Brunswick Street Mall in December 2005. Little was having an argument with his girlfriend on his mobile phone as he walked through the restaurant and club precinct of the Valley. Little, aged 20, had never met 26-year-old Stevens when Stevens said a 'smartarse alec thing' to Little. Little told police he snapped and lashed out, punching Stevens once in the face. Stevens was knocked to the pavement. According to one witness, he then lined up the unconscious Stevens as he would a football and kicked him between the head and shoulder. Little left Stevens there but was arrested a half hour later. Little was shocked when he was told by police that Stevens' brain injuries were so serious he was on life support. Stevens died of a subarachnoid haemorrhage. He also had a large quantity of alcohol in his system. Medical evidence was given that it was most likely that the fatal blow was the

punch rather than the kick to the head. Little was charged and then stood trial for murder.

Legal issue: Was Steven's death an accident? This required the jury to decide whether an ordinary person could reasonably have foreseen Steven's death or serious injury as an outcome of Little's actions, that is, one forceful punch or the kicking of an already unconscious man in the head. If the jury was satisfied that the death was not foreseeable by an ordinary person and Little did not foresee it, then the excuse of accident means by law they must acquit the person of both murder and manslaughter.

Decision: The jury found Little was not guilty of murder or of manslaughter. As he was acquitted of the offence, he was a free man.

1. What is the legal benefit of arguing the excuse of accident in cases like this rather than either self-defence or provocation? [A]
2. Given the facts of how the victim in this case received his injuries, do you agree or disagree, that an ordinary person in the same position would not have reasonably foreseen death or grievous harm as an outcome? [A] [E]
3. Homicide Victims Support Group acting chief executive Jonty Bush, claimed the defence of accident is puzzling. She said: "It appears to be OK for people to go around and hit someone as long as they say 'I'm sorry it was an accident, I didn't believe death would be the consequence of what I did' ". In your opinion, is accident a valid excuse to murder? Is this interpretation of accident legally correct? [A] [E]
4. Juries represent the community in the criminal justice system. Jurors have to weigh up all of the evidence in a case. As it is not possible for the media to report all that a jury hears in a lengthy trial, do you think it fair to have media commentary on the jury's final decision? [E]

Given the significant concern in the community, reflected in the media, and in the publicity campaign in which the victims of prominent 'one punch can kill' (OPCK) cases were involved, the Queensland government, needed to respond. The Attorney-General asked the Law Reform Commission to review and report to the government on whether the law needed to be changed. They were to consider the 'nature and frequency of the use of the excuse of accident', 'whether the current excuse of accident, including current case law, reflects community expectations' and 'whether the current provisions are readily understood by a jury and the community'. Many submissions were received. Many options were considered, including abolishing the accident excuse altogether or introducing a new offence of assault causing death (to apply where accident would otherwise be a complete defence to a murder or manslaughter charge).

The Commission's report recommended that the Code should continue to contain the excuse of accident and endorsed the test that had been applied ever since *Kapronowski* (outlined earlier in this chapter). However, the Commission recommended that the actual term 'accident' be omitted from the section. They were concerned that the term, 'accident', created misunderstanding within the community, as it may be thought to refer to an occurrence that happens without fault, or brought about by a tragic or random, unexpected act. The meaning of accident in the community therefore was different from the **technical legal meaning**, namely an **event which is unintended, unforeseen or unforeseeable**.



WHAT DO YOU THINK?



1. What is the difference between an event that was 'unforeseen' and one which was 'unforeseeable'? [C] [A]
2. Do you agree with the Queensland Law Reform Commission that use of the word 'accident' in the Code has confused the community? If so, will removing the word 'accident' address community concerns? If not, what do you think would be a better option? [A] [E]
3. Do you think that using the phrase, 'unintended, unforeseen or unforeseeable event', will be clearer or easier for a jury? [A]
4. There is a special criminal offence category of dangerous driving causing death which can be used in preference to murder and manslaughter when a person dies in a car accident. If you were a juror in the *Little* case, would it have been useful, or not, to have had a separate offence of assault causing death? [R]
5. You work for the Queensland Attorney-General. She asks you to prepare a statement to be released to the media in support of the new s314A of the Code, namely *Unlawful striking causing death*. The statement is to summarise the reasons in favour of the new offence. [A] [E] [R]

4. MISTAKE OF FACT (S24 CRIMINAL CODE)

A person who does an act under an **honest and reasonable but mistaken belief** in the existence of any state of things is not criminally responsible for the act to any greater extent **than if the real state of things had been such as he or she had believed it to exist**.

To be a mistake under this section, the accused must have a mistaken belief about a fact or set of facts. A mistake as to the law does not relieve one of criminal responsibility. Hence, a person who possesses or sells a prohibited substance, not knowing that it is one of the drugs listed in the *Drugs Misuse Act 1986* (Qld) is not making a mistake of fact. This is a mistake of law because it is about the legal categorisation of a substance. In addition, this belief must be reasonable and honest. A reasonable mistake is one that a reasonable or ordinary person could also have made in those circumstances.

An example of the kind of mistake which is frequently raised in drug offences is one where people believe that there are no prohibited drugs under their control (that is, in their possession, either on them, in their luggage, or in their home) – essentially that the drug was 'planted' on them. Another is when a person is mistaken about a particular substance or item. A person might claim that he or she believed they bought a potted basil herb plant but it is, in fact, a marijuana plant. The mistaken belief, however, has to be both reasonable and honestly held. If this mistaken belief is established, it relieves a person of criminal responsibility only to the extent that the real state of affairs is as he or she mistakenly believed them to be.



This is not a complete excuse because all it does is say that the accused can rely on his or her mistake only to the extent of that mistaken belief. For example, if a person has heroin in his or her possession but mistakenly believes it to be another prohibited substance classified with lower penalties, he or she can be convicted of possessing the latter substance and receive the lower penalty. Another example is,

if a person breaks and enters a dwelling house before 6am believing it is after 6am, that person may be guilty of housebreaking only and not burglary. (Remember, burglary is committed only between 9pm and 6am.) They are still guilty of an offence, but an offence with a lesser penalty.

With drink driving offences the operation of s24 is expressly excluded. This prevents a person from raising the excuse that he or she honestly and reasonably believed they were drinking a beverage with a low, or no, alcohol content.

HYPOTHETICAL

Consider the following scenarios and advise on whether the excuse of mistake of fact under s24 would assist in the accused's defence. [C] [A]

1. Annabelle is aware that her flatmate has brought into their flat a white powdery substance kept in the jar in the pantry. One day the flatmate puts a label with the words 'rat poison' on the jar. Annabelle is suspicious because she has seen her flatmate taking small quantities out of the jar, but Annabelle has not seen any rats at all. Annabelle and the flatmate are charged with possession of a dangerous drug, namely cocaine.
2. Ben's coach said Ben needed some stimulants prior to competition and gave Ben a bottle of tablets with instructions to take these the morning before a competition. They were in fact a prohibited narcotic, which receives a maximum penalty under the Act. Ben said he believed the tablets were stimulants. Ben's coach said he had no idea that either was prohibited in Queensland.

5. INSANITY (S26 AND S27 CRIMINAL CODE)

Since Roman times and throughout the following centuries, what was then called 'being mad' has been a way persons could be excused from criminal responsibility for harm caused by their actions. It comes from the moral position that it is **ethically and legally wrong to punish a person who suffers from a severe mental impairment or illness** which stops them either controlling their actions, or understanding what they are doing, or knowing that it is wrongful. Whilst insanity is a defence to all criminal offences in Queensland, not every form of mental impairment meets the requirements for the insanity defence. The requirements for the insanity defence in all Australian jurisdictions come from a famous English case of M'Naghten. In 1843, Daniel M'Naghten shot and killed the English Prime Minister's private secretary mistakenly thinking he was the Prime Minister. M'Naghten, a Scot, had 'morbid delusions' that he was being persecuted by the British government. His acquittal on grounds of insanity caused an outcry at the time and subsequent debate in the House of Lords led to the formulation of what is known as the M'Naghten rules, from which our s26 is derived.

To prove that a person should not be held to be criminally responsible for an act on grounds of insanity, it must be shown that, at the time of doing the act or omission, that person was in 'such a state of mental disease or natural mental infirmity as to:

1. deprive him of capacity to understand what he is doing; or,
2. deprive him of capacity to control his actions; or
3. deprive him of capacity to know that he ought not to do the act.'

What amounts to mental disease and natural infirmity is a **legal question** but expert psychiatric and medical evidence is important in the determination. The court has to distinguish mental disease such as various forms of psychoses from other medical conditions such as epilepsy and hyperglycaemia and also from other states of mind such as jealousy, anger, revenge or lack of self-control.

Every person is presumed to be of sound mind until the contrary is proved. Therefore, evidence which establishes that insanity was more probable than not needs to be proved by the accused. Insanity is,

therefore, an **exception to the general rule that the burden of proof in a criminal trial rests with the Crown (prosecution)** and that a defence must be negated beyond reasonable doubt.

In Queensland the mental state of an accused is now determined by the **Mental Health Court**, rather than by a jury. This court consists of a Supreme Court judge who is assisted by two psychiatrists. The judge, using the advice given by the two psychiatrists, determines whether an accused was suffering from 'unsoundness of mind' at the time the criminal act or omission was committed, or whether the person suffered from diminished responsibility if the charge is murder. The court also decides whether the person is mentally fit to plead to the charge. In other Australian states, a jury makes a factual determination based on expert testimony of psychiatrists as to whether a person was insane or not. The jury will return a **special verdict** of not guilty by reason of mental illness.

If the court finds the person was of sound mind and is fit to stand trial, the case is returned to the criminal court. If there was a determination of insanity, a forensic order is made which means the person is detained in an authorised mental health facility for treatment or care. His or her progress in the facility is monitored by the **Mental Health Review Tribunal**.

PRACTICAL APPLICATION

EUNJI BAN: BRISBANE JURY RULES ALEX MCEWAN NOT FIT TO CONTINUE WITH MURDER TRIAL

SOURCE: BY ELLIE SIBSON, WWW.ABC.NET.AU, 5 OCTOBER 2017, (EXCERPTS ONLY)

Alex Reuben McEwan is not mentally fit to continue to stand trial for the murder of Korean woman Eunji Ban, a Supreme Court jury in Brisbane has decided. He (McEwan) has admitted to killing the young Korean woman but denied it was murder. He was planning to use insanity as a defence.

The jury were told they would need to decide whether he was mentally fit to continue the trial, but there would not be a determination of the murder charge. Prosecutor David Meredith told jurors... that the prosecution could continue after Mr McEwan received treatment.

Forensic psychiatrist Dr Donald Grant told the court that Mr McEwan was instructed by demons in his head to attack the prosecutor in the trial on Tuesday and his hallucinations have increased since the start of trial. Defence barrister John Allen told the jury they should accept Dr Krantz's evidence that Mr McEwan was not fit for trial because of psychotic hallucinations.

"The defendant is just not able to properly appear, understand and pay attention to evidence, and therefore be able to give sensible instructions to his lawyers." Mr Allen said. "If he is to defend the charge against him he will be required to give evidence - he simply cannot have a fair trial".

Mr McEwan will now be transferred to a mental health facility. His fate in relation to the trial will be determined at a later date.

1. What is the charge against Mr McEwan? [C]
2. Has the trial already commenced? [C]
3. How has Mr McEwan pleaded? What defence has he indicated he will rely on? [C]
4. What evidence did Dr Donald Grant give about Mr McEwan's mental health? [C]
5. What submissions did defence barrister John Allen make to argue that Mr McEwan's trial should not be continued? Were these submissions reasonable having regard to Dr Grant's psychiatric evidence? [C] [A]
6. Is it possible that Mr McEwan will eventually be tried for murder? If, in that trial, Mr McEwan pleads not guilty and relies on the defence of insanity, who will determine if he is successful or not in maintaining that defence? [C] [A]



WHAT DO YOU THINK?



1. Do you agree that the Mental Health Tribunal is the better forum to determine 'fitness to stand trial' than the criminal court? [A] [E]
2. If, as it has been argued, there is a belief in the community that the insanity defence can be abused, what factors may have contributed to this viewpoint? [A]
3. Do you think the question of insanity in a homicide case should be a legal or a medical determination, or both? [E]
4. Should the families of murder victims be advised when the Mental Health Tribunal approves either the temporary or permanent release of the victim's killer? Or could this adversely affect the privacy of the mentally ill person and impact upon their integration back into the community? [A] [E]

6. INTOXICATION (S28 CRIMINAL CODE)

An accused may plead intoxication if his or her mind was **so disordered by drugs or alcohol** that he or she was deprived of the capacities required under s27. That is, capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act. It can only be used if the intoxication has been unintentional. An example would be if a person is given a 'spiked' drink. If you voluntarily and knowingly drink alcohol or take drugs, this part of s28 will not apply. The law presumes that a person who drinks, and drinks to excess, intends to become intoxicated to some extent. The onus of proving unintentional intoxication rests on the accused and, if successful, the accused must be acquitted on the ground of insanity.

Drugs and alcohol affect mental functioning and so they are particularly relevant to offences where 'intention' is an element of the offence. The issue becomes: **can a drunk or drugged person actually form an intention?** Clearly it is a question of degree. Under the influence of small amounts of drugs or alcohol, a person may still be capable of forming an intention to commit a criminal offence. If so, the element of intention will not be negated by intoxication. However, if a person, because of intoxication, is not capable of forming an intent then he or she cannot be found guilty of criminal offences for which intent is an element; for example, murder, which has intention to kill as an element. They can, however, be convicted of the lesser homicide offence of manslaughter, because intention is not an element of that offence.

7. IMMATURE AGE (S29 CRIMINAL CODE)

This section states that a person **under the age of ten years** is not criminally responsible for any act of omission. This means they are considered legally incapable of committing any offence.

It also states that a person **under the age of 14 years** is not criminally responsible for an act unless it is proved that, at the time of doing it, he or she had the capacity to know that he or she ought not to do it. This means that the prosecution has to prove that the child understood and knew what was done was seriously wrong, in the sense of being morally wrong. It must be more than being mischievous.



CASE STUDY

R v B CA 369 of 1997 (Unreported)

Facts: B was a 12-year-old student at a Queensland school. He was frequently disciplined and counselled at school, including for aggressive behaviour towards other students. One day a teacher saw him with a knife pointed at some children. She rushed over. He then turned and pointed the knife at her and lunged towards her with it. Another teacher came and he gave up the knife. B was charged with assault.

Legal Issue: As he was 12, did he have the capacity to know what he was doing was wrong?

Decision: The jury found him guilty of the offence and the Court of Appeal upheld their decision. Pincus J. said: 'It must be proved that at the relevant time the person has capacity (I emphasise capacity) to know that the person ought not do the act. This is, of course, different from

actual knowledge. Pincus J. pointed to three matters:

(1) In prior discussions the boy had understood the wrongfulness of aggressive behaviour; (2) after the assault he was very defensive about his actions; and (3) he was not of an 'unusually immature moral sense as to be incapable of understanding that it was wrong to threaten a teacher with a knife.'

1. Explain why B's actions amounted to an assault, even though no physical harm was done. [A]
2. What is the significance of the word, 'capacity', in s29? [A]
3. What other evidence could be used in cases of children under 14 years to establish that they had the capacity to know what they were doing was wrong? [A] [R]

10.3 PARTIAL EXCUSES FOR MURDER

PROVOCATION, DIMINISHED RESPONSIBILITY & PRESERVATION IN A DOMESTIC RELATIONSHIP

There are three partial excuses that are relevant only when a person is charged with murder. These are provocation (s304) diminished responsibility (s304A) and preservation in a domestic relationship (s304B). If they are successfully proven, the accused is not totally relieved of criminal responsibility, but will have a murder conviction reduced to manslaughter. This is called **voluntary manslaughter**.



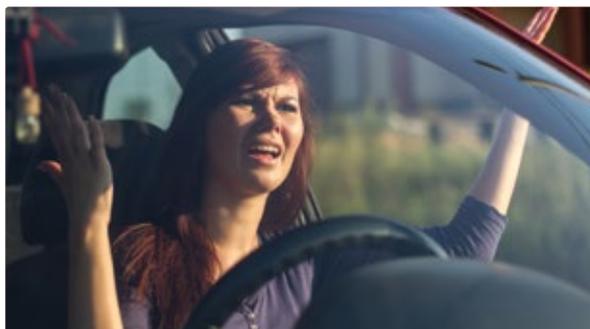
PROVOCATION [S304 CRIMINAL CODE]

Section 304 is used to assist an accused who would otherwise be found guilty of murder (with its mandatory life punishment) to receive the lesser penalty that comes with a manslaughter conviction. Where all the elements of murder, including causation and intention, can be proved beyond reasonable doubt, an accused may argue he or she was provoked into killing his or her victim. Provocation has been a controversial excuse. It was introduced into England at the time when the common law made duelling unlawful. Until then, men could lawfully carry weapons and fight duels to protect their 'honour'. It has been criticised ever since as a defence that suited men, rather than women. At the time England had capital punishment for murder and this was a way to prevent men defending their honour from being executed.

For provocation to apply, four things are necessary:

- a. a provocative incident;
- b. the accused must actually have lost control in direct response to the provocation;

- c. what was said or done to the accused was such that an ordinary person would also have lost their self-control; and
- d. the accused must have acted suddenly, on the spur of the moment (before there was time for 'passion to have cooled' as some cases say).



Passion here refers to any intense emotion or mix of strong feelings, such as anger, jealousy, vengeance and hurt. The defence of provocation gives **recognition to human weakness**. Essentially, it says that in extreme, unexpected situations any one of us may lose self-control and do something quite out of character. That does not excuse the act but should be taken into account in assessing how blameworthy a person is and the punishment he or she should receive. To kill when provoked is in law less blameworthy than a cold, calculated and pre-meditated killing. A jury is asked in cases of this nature whether what the accused did in response to the provocation was something an ordinary person would do if faced with that same degree of provocation. Blackstone the great English jurist said that the difference 'principally consists in this – that manslaughter arises from the heat of the passions, and murder from the wickedness of the heart'. *Blackstones's Commentaries 1V 190*.

CASE STUDY

Stingel v R (1990) 171 CLR 312

Facts: For about six months Stingel went out on a regular basis with a girl from his school. They broke up. Stingel remained infatuated with her and frequently followed her to places. He had threatened her with violence unless she came back to him. She had a restraining order issued against him.

Some months later Stingel found her late one night with another young man, Taylor, in a parked car. He went up to the car, opened the door, and saw they were engaged in sexual activity. Stingel became angry. He spat at them and Taylor told him to "piss off" and called him an insulting name. Stingel went back to his own car, smoked a cigarette, then took out a butcher's knife that he had in the car, and stabbed Taylor to death.

Legal Issue: Could provocation operate here to reduce murder to manslaughter?

Decision: No. The jury convicted Stingel of murder and this was upheld by the High Court of Australia. Of particular importance in the reasoning was 'what an

ordinary person' of Stingel's age would have done when faced with a similar provocative situation. The court said: 'No jury acting reasonably, could fail to be satisfied beyond reasonable doubt that the conduct of the deceased, including his insulting remark and the sexual activities in which he and A were allegedly engaging, was not of such a nature as to be sufficient to deprive any hypothetical ordinary 19-year-old of the power of self-control to the extent that he would go to his own car, obtain a butcher's knife and fatally stab the deceased with it ... the appellant's reaction to the conduct of the deceased fell far below the minimum level of the range of powers of self-control that must be attributed to any hypothetical 19-year-old.'

1. Why would the court hold that age was relevant to a person's level of self-control? [A] [E]
2. Read again the four requirements for s304 provocation. Identify which facts of Stingel's case were relevant for each requirement. [A]

In Queensland, a review of provocation was also undertaken by the Queensland Law Reform Committee in 2008. Cases such as *Sebo* (see the next page) raised questions about whether taunts and threats to leave a relationship were sufficient to amount to provocation for murder and allow for a lesser sentence than mandatory life imprisonment to be imposed.

CASE STUDY

R v Sebo [2007] QCA 426.

Facts: Sebo, 28-year-old, admitted he killed his girlfriend, Taryn Hunt, who was 16 at the time. The two had been in a sexual relationship for almost two years and Sebo said he was deeply in love with her. He said that, after they both left a party one evening, he raised the issue of rumours about her seeing other people. Taryn was somewhat 'tipsy' and began to taunt him about her other lovers. She said he was easy to cheat on and she was not going to stop seeing other men. This made him so angry that he lost self-control and in his jealous rage used a steering wheel lock to strike her repeatedly on the head. She died from these injuries.

Legal Issue: As Sebo admitted to the killing, the only issue for the jury was one of provocation.

Decision: Not guilty of murder, guilty of manslaughter. The jury had accepted the provocation defence. He was sentenced to 10 years.

1. Look at what was required under s304 of the Code. What was Sebo's argument in support of provocation? [A]
2. 12 jurors agreed that Sebo was provoked. Do you agree or disagree with the jury decision? [A] [E]

3. Was this voluntary or involuntary manslaughter? [A]
4. Do you think that an admission that 'I killed her because she said she did not love me any more' is a sufficient ground, or not, for reducing murder to manslaughter? [E]
5. Consider the amendments to the law of provocation noted below in s304 (2) and (3) and determine if the decision would have been the same in the Sebo case if the killing had occurred in May 2011. [A] [E]



From April 2011, other than in circumstances of a most extreme and exceptional character, provocation (s304(1) of the Code) does not apply if the sudden provocation is based on **words alone**, (s304(2) of the Code) or when there is a **relationship between two persons** and the sudden provocation is based on anything done by the deceased to end the relationship; or to change the nature of the relationship (s304(3) of the Code).

DIMINISHED RESPONSIBILITY (S304A CRIMINAL CODE)

If a person's mind is in an 'abnormal state' at the time when a killing was committed, the defence of diminished responsibility may operate to reduce what would otherwise be murder to manslaughter. The abnormal mental state must have been such that the **person could not control actions, nor know what was being done was wrong**. This mental state is also determined by the Mental Health Tribunal. Diminished responsibility differs from insanity because:

- ▶ insanity can be used as a defence for all criminal charges while diminished responsibility is limited to murder;
- ▶ insanity requires the accused to lose completely certain mental capacities while diminished responsibility only requires a substantial impairment of those capacities; and
- ▶ where a defence of insanity succeeds, the accused is 'not guilty by reason of insanity' and will be admitted to a psychiatric hospital until he or she is no longer insane, while diminished responsibility still results in a manslaughter conviction.

KILLING FOR PRESERVATION IN AN ABUSIVE DOMESTIC RELATIONSHIP (S304B CRIMINAL CODE)

In a small number of domestic violence cases, victims get to a point where they kill their abuser. Traditional provocation did not always assist in reducing murder to manslaughter. This was because the violence had been on-going over a period of time, rather than being a sudden provocative act, and also because the killing may have been planned in advance rather than being a spontaneous act. Hence the act was not in the heat of the moment 'before passion had cooled'. Former NSW Chief Justice Murray Gleeson noted that with provocation, 'the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.'

In 2010 Queensland amended the Code to specifically include a new form of provocation - killing for preservation in an abusive domestic relationship. It is similar to s304 provocation in that the elements of murder must be established and the Crown has the onus of proof. It also operates to reduce a charge of murder to that of manslaughter but on the basis that the person believed that it was necessary for his or her preservation from death or grievous bodily harm. It must be proved there was a history of an abusive domestic relationship between the two. This partial excuse is in addition to, not instead of, other defences and excuses.



Therefore, a victim of abuse charged with the murder of his or her abuser can raise the complete defence of self-defence for the purposes of an acquittal, the partial defences of diminished responsibility or provocation to reduce a charge of murder to manslaughter, as well as the partial defence of preservation from an abusive domestic relationship.



WHAT DO YOU THINK?



Susan Falls was charged with the murder of her abusive husband Rod. She was acquitted. In her interview with *Woman's Day* she described the abusive relationship. She was abused for 20 years. The abuse started immediately she was married. Her life was one of an untold agony and constant beatings. After picking him up at the Powerboat Club one night, Rod accused her of embarrassing him in front of his friends and proceeded to use her as a punching bag for three hours, throwing her around the lounge room, and choking her until she passed out. He threatened to stab her with scissors. He forced her to stay all night when she was six months pregnant on the roof area of their two-storey house. She refused him sex because she was too sore from a previous beating and he raped her. The last straw was demanding that she kill one of their four children. Rod forced her to draw out the name of one of the children from a hat because she refused to choose. He said the child would be killed on her mother's birthday. It was her youngest son.

Susan decided the only option was to end Rod's life. She laced his meal with 25 sleeping pills, shot him twice in the head, then disposed of his body in bushland.

The jury had to assess the reasonableness of the accused's belief that she faced extreme danger and had no other reasonable way out. In *R v Falls* (unreported) Judge Applegarth said, in the context of self-defence (of which the common law defence of Battered Wife Syndrome formed part):

It doesn't matter that at the moment she shot Mr Falls in the head he didn't at that moment offer or pose any threat to her. He had assaulted her. There was the threat that there would be another one and another one and another one after that until one day something terrible happened. It might have been the next day, it might have been the next week, but the risk of death or serious injury to her was ever present.

1. Susan Falls was acquitted before the law was changed in Queensland to introduce s304B of the code. Do you think the evidence before the jury was such that the decision to acquit her was due to the Battered Wife Syndrome defence, and if the jury had acquitted her based on this defence, was it a fair verdict? [A] [E]



WHAT DO YOU THINK?



2. In Susan Falls' case, would the jury have come to a different decision if s304B had been available to the defence? Give your reasons. [A] [E]
3. Does this new defence give a balance between necessarily punishing those who would otherwise be guilty of murder and providing some legal protections for victims of serious domestic abuse? [A] [E]
4. Do you think it was necessary to introduce a new separate defence? [E]
5. How does the onus of proof for s304B operate? [C]
6. Should the onus of proof be reversed to make it harder to rely on the defence under s304B? [A] [E]

OTHERS EXCUSES AND DEFENCES PROVOCATION (S268/S269 CRIMINAL CODE WHERE IT IS AN ASSAULT OFFENCE)

Provocation also can apply to some offences other than murder. These are the offences which have **assault as an element**. In these assault cases it relieves the person who was provoked of criminal responsibility. That is, it acts as a complete excuse. For assault offences, there are two additional requirements to the four discussed under the s304 partial excuse to murder. These are, that 'the force used is not disproportionate to the provocation' and that it 'is not intended, and is not likely, to cause death or grievous bodily harm.'

SELF-DEFENCE (S272 CRIMINAL CODE)

Most people would consider that a person should be able to defend themselves if attacked. The law thinks so too. It is not open-ended, however. The law says that people are only able to use an amount of force that is 'reasonably necessary' to defend themselves. If, in defending yourself, you use more force than is reasonably necessary, you cannot rely on 'self-defence' as an excuse for your response.

If, in defending yourself against attack, you kill your attacker or cause grievous bodily harm, self-defence will only apply if the attack would have caused a reasonable person standing in your shoes to think that he or she might be killed or have grievous bodily harm committed by the attacker.

If the person claiming self-defence actually provoked the assault, self-defence can only be used as an excuse if there was a threat of death or grievous bodily harm.

PRACTICAL APPLICATION

From Robert Reid's report in *The Courier Mail*, July 30, 2002.

Facts: In 2002, a Cairns year 12 student was charged with the murder of her younger brother, aged 15 years. She told police she was working on her computer when her brother stormed into the room demanding a CD. He then threw a CD case at her, striking her on the lip, and when she threw it back, he left the room, threatening to get a knife and kill her. Her brother who was taller and heavier than she was did return with a knife which he threw at her. She then

threw her jewellery box at him and picked up the knife. He said again he was going to kill her. He returned with a cricket bat. Their mother tried to push him away but he was abusive and still threatening his sister.

She told police: "He had the bat and I had the knife ... he was swinging the bat and punching me ... I stabbed him the first time, I slashed him across the chest, and that made him even more angry ... I stabbed him again and

PRACTICAL APPLICATION CONTINUED...

pulled it out ... I think I got him in the heart. He wouldn't stop and I had to defend myself or I'd be dead now and not him."

The knife severed the boy's aorta and he died in hospital.

1. With what offence was the Year 12 girl charged? [C]
2. What is the level of force to be used for self-defence to be successfully pleaded? [A]
3. Why is it significant that the brother allegedly threw a CD? [A]
4. How could the brother's size have been relevant to the defence? [A]
5. Could she have argued provocation? [C] [A]
6. Why would self defence have been a better excuse for her to argue? [A]
7. On the facts outlined above should she, in your opinion, have been found criminally responsible for her brother's death, or not? [A] [E]
8. The magistrate found there was a *prima facie* case to answer and she was committed to stand trial. Some months later, she was advised by her lawyers that the Director of Public Prosecutions had dropped the charge because it recognised that she was not criminally responsible for the death. Why would the Department of Public Prosecutions make the decision not to proceed to trial? Do you agree with the decision of the Director of Public Prosecutions? Give your reasons. [A] [E] [R]

There are related forms of self-defence. One is **defence of others** (s273 *Criminal Code*) and another is **defence of dwellings** (s267 *Criminal Code*). Again the level of force used must be believed to be reasonable for the circumstances.

REVIEW

1. Describe the following: [C]

criminal responsibility | insanity | diminished responsibility | intoxication
the Mental Health Court | partial excuses for murder

2. Describe and explain: [C] [A]

- (a) The excuse of 'honest claim of right'.
- (b) The legal test for an event which occurs by accident.
- (c) Mistake of fact.
- (d) An act which occurs independently of the will.
- (e) The meaning of provocation, and the offences to which it applies.

3. Describe and explain the difference between insanity and diminished responsibility. [C]

4. Describe and explain the defence options open to a person in an abusive relationship who kills his or her abuser. [C]

TOPIC 3: CRIMINAL TRIAL PROCESS

CHAPTER 11: BARRIERS TO JUSTICE AND EQUITY

FOCUS SUBJECT MATTER

11.1 A FAIR AND IMPARTIAL APPROACH

11.2 CHILDREN

11.3 ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES
(INDIGENOUS AUSTRALIANS)

11.4 PERSONS WITH A DISABILITY

11.5 GENDER EQUALITY

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ it is an overriding consideration for the criminal justice system in Australia to treat persons who come before it in whatever capacity, impartially and fairly;
- ▶ children have the same rights as adults, but that special arrangements and protections have been set in place taking into account their special needs and vulnerability;
- ▶ Indigenous Australians have been and continue to be greatly disadvantaged in our criminal justice system;
- ▶ there is a very large range of persons with a disability who enter the criminal justice system;
- ▶ the criminal courts have developed different ways of meeting the needs of persons with a disability to ensure fair and impartial outcomes for them; and
- ▶ historically, women have been disadvantaged in the criminal justice system; many laws have been changed or created, and continue to be, to ensure the scales of justice are more fairly balanced in favour of women.

11.1 A FAIR AND IMPARTIAL APPROACH

In the first edition foreword of the *Equal Treatment Benchbook* (Supreme Court of Queensland, published by the Supreme Court Library, 2nd edition 2016) Justice de Jersey, the Chief Justice of Queensland at the time, said:

Equal treatment of participants in court proceedings is fundamental to the judicial role. The prospect of differential treatment – whether of litigants, lawyers, or witnesses – is repugnant. All judges and magistrates, commissioners and tribunals members, would strive to avoid it. A risk, however, is that even a conscientious approach may not these days pick up the subtleties of a particular situation.

No judicial officer or tribunal member could be expected, in the absence of a work of this character, to comprehend all those subtleties, or necessarily recognise an instance of them.

It will therefore be extremely helpful to have the benchbook readily available.

All states in Australia have publications to assist judicial officers in the performance of their duties. For example, both New South Wales and Victoria have similar publications to the Queensland *Equal Treatment Benchbook*, both of which have been recently updated. It has become increasingly important for judicial officers to be aware that they are responsible for the decisions that affect the lives of people who come before them in the courts, and that some of those persons will have special needs. In Queensland, the *Equal Treatment Benchbook* provides a **set of standards** against which the operation of the criminal justice system in the Courts can be measured.

11.2 CHILDREN

In 2014/2015, the Australian Institute of Health and Welfare reported that, on an average day in Australia, about 5600 young people (10 years and older) were under youth justice supervision due to their involvement, or alleged involvement, in crime. 15% of this cohort of young people were being supervised in detention, the remainder being supervised in the community. The majority were male (82%) and almost half were Indigenous (43%). Indigenous young people aged 10-17 were about 15 times as likely as non-Indigenous young people to be under supervision on an average day (see Australian Institute of Health and Welfare, Bulletin 133 April 2016).

This section of Chapter 11 considers various ways in which children interact with court processes in the criminal justice system.

As more and more studies of the behaviour of children, both as offenders and victims, have been conducted by social scientists, the criminal justice system has changed to recognise that young children are vulnerable because of physical and mental immaturity, and in particular, there is reliable research to show that abuse and neglect of children can lead to altered brain functionality. There is a link between child abuse and neglect or involvement with the child protection system and subsequent youth offending (see Judy Cashmore, *The Link between Child Maltreatment and Adolescent Offending, Systems Neglect of Adolescents*, 2011, 89 *Family Matters* 34-35).

In Queensland, legal adulthood commences at 18 years (and adult criminal responsibility at 17). The age at which a child can be charged with an offence is stated in the Criminal Code where the offence is set out. For example, a 14-year-old child can be charged in the Supreme Court with murder. Serious offences are heard in the Supreme Court, but otherwise children appear in the Children's Court Divisions of the Magistrates and District Courts, whose processes are governed by the *Children's Court Act 1992* (Qld). The Criminal Code states that all children under the age of 10 do not have criminal responsibility and therefore cannot be charged with an offence.



Ch 6

CHILDREN AND THE COURTS

Children have the same human rights as adults and can also have the capacity to make decisions affecting those rights and their lives. When a child appears in court as a **victim, a witness, or an offender**, the court needs to know that the child has achieved:

a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.

This is the **test for capacity** set out by the majority in the High Court in *Marion's Case*, (*Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218). This recognises that each child is different because of the way mental development occurs. In addition, research into children's comprehension of legal systems and court processes has shown children and young people lack understanding of the system in which they are to take part. The research has concluded that lack of understanding of the system can lead to considerable anxiety for a child victim or witness participating in court proceedings.



YOUNG VICTIMS AND WITNESSES

Years of experience, and recent research conducted by the court, and from overseas in New Zealand and the United States, has been available to assist judges and lawyers in the conduct of court cases involving children and young people. Parts of s21A of the Evidence Act 1977 (Qld) are reproduced below for you to consider.

PRACTICAL APPLICATION

21A Evidence of special witnesses

(1) ... *special witness* means

- (a) a child under 16 years; or
- (b) a person who, in the court's opinion-
 - (i) would, as a result of mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
 - (ii) would be likely to suffer severe emotional trauma; or
 - (iii) would be likely to be so intimidated as to be disadvantaged as a witness;

PRACTICAL APPLICATION CONTINUED...

if required to give evidence in accordance with the usual rules and practice of the court; or

(c) a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a participant in a criminal organisation; or

(d) the person-

(i) against whom domestic violence has been or is alleged to have been committed by another person; and

(ii) who is to give evidence about the commission of an offence by the other person; or

(e) a person-

(i) against whom a sexual offence has been, or is alleged to have been, or is being committed by another person; and

(ii) he was to give evidence about the commission of an offence by the other person.

(1A) This section does not apply to a child to the extent division 4A applies to the child.

(1B) A party to a proceeding or, in a criminal proceeding, the person charged may be a special witness.

(2) Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon application made by a party to the proceeding, make or give 1 or more of the following orders or directions--

(a) in the case of a criminal proceeding--that the person charged or other party to the proceeding be excluded from the room in which the court is sitting or be screened from the view of the special witness while the special witness is giving evidence or is required to appear in court for any other purpose;

(b) that, while the special witness is giving evidence, all persons other than those specified by the court be excluded from the room in which it is sitting;

(c) that the special witness give evidence in a room--

(i) other than that in which the court is sitting; and

(ii) from which all persons other than those specified by the court are excluded;

(d) a person approved by the court be present while a special witness is giving evidence or is required to appear in court for any other purpose in order to provide emotional support to the special witness;

(e) that a video recording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the video recorded evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness;

(f) any other order or direction the court considers appropriate about the giving of evidence by the special witness, including, for example, any of the following-

(i) a direction about rest breaks for the special witness;

(ii) a direction that questions for the special witness be kept simple;

(iii) a direction that questions for the special witness be limited by time;

(iv) a direction that the number of questions for a special witness on a particular issue be limited.

*Division 4A of the Evidence Act 1977 (Qld) deals with the arrangements the court must make for a child who is a witness in a proceeding where the defendant has a **prescribed relationship** to the child. A prescribed relationship is one where the defendant is the parent, grandparent, brother or sister, uncle, aunt, nephew, niece or cousin of the child, or where the defendant lives in the same household as the child or has the care of, or exercises authority over, the child in a household on a regular basis. For these arrangements to apply the proceeding against the defendant must relate to an offence of a sexual nature, or an offence involving violence.*

PRACTICAL APPLICATION CONTINUED...

These arrangements are for the protection of the child. Section 21AB (part of *Division 4A*) requires the child's evidence to be pre-recorded in the presence of a judicial officer, but in advance of the proceeding. If this is not possible, the child's evidence must be given at the proceeding with the use of an audiovisual link or with the benefit of a screen. *Division 4A* goes on to set out other requirements which must be followed, for example, preventing repetitive questioning and delay when the child is being cross-examined.

1. Who is a special witness under s21A of the *Evidence Act*? [C]
2. What are the arrangements which can be made for a special witness under s21A(2) of the *Evidence Act*? [C]
3. Describe the additional protections which the court must make where a child is a witness to a sexual offence or an offence of a violent nature involving a person in respect of which the child is in a prescribed relationship. What reasons can you give to explain why these additional protections were added to the Act? [C] [A]

HYPOTHETICAL

Facts: Kyle walks to and from school with some fellow students that live in his neighbourhood. Kyle's neighbourhood is 3 kilometres from the local state high school where they all go to school. On the way they pass a private high school and often interact with its students. Some of these students also live in Kyle's neighbourhood and he knows them personally because he attends community activities and the local church with them. There are usually 4 or 5 in Kyle's group. A regular is an older boy, Sean, who is 17, and is mature for his age. There has recently been some ill-feeling between the two schools because of sport rivalry, which has escalated to name-calling, swearing and occasionally throwing small objects at each other. One day the two groups clash on the footpath. Kyle is knocked down, cutting his knee when he falls. Sean comes to his help and pushes two boys away from Kyle, and in the process, one of them (Jake) trips on the uneven footpath, hits a low brick fence, and breaks his forearm. Jake's parents take him to the police and make a complaint. Sean is charged with assault causing grievous bodily harm. Because he is 17, the matter is heard in the District Court. Kyle is frightened of Jake and is in the same bible study group at the local church. Sean's lawyer asks him to give evidence at Sean's trial, and after talking to his parents, he agrees to do it if one of them can be with him during the process.

Legal issue: How can Kyle be assisted to give his evidence under the Evidence Act 1977 (Qld) in the trial?

Decision: Section 21A of the Evidence Act applies to Kyle because he is a child under 16. Division 4A of the Act does not apply because he is not in a prescribed relationship with the defendant Sean. It will be necessary for Sean's lawyer to set out the circumstances which justify special arrangements for Kyle as a special witness and make submissions to the judge as to what arrangements are appropriate.



1. If Sean was Kyle's brother would this make a difference to the legal position applying to Sean under the Evidence Act? [C] [A]
2. Imagine you are Sean's lawyer. Prepare submissions to the judge explaining why Kyle is a special witness under s21A of the Evidence Act and set out the arrangements that you consider to be appropriate for Kyle to give his evidence. [C] [A] [E] [R]



YOUTH JUSTICE ACT 1992 (QLD)

The *Youth Justice Act 1992* (Qld) governs how youth defendants (those who are not yet 17 years of age) are to be dealt with by the courts. Youth defendants charged with a Supreme Court offence are committed to trial in the Supreme Court. All other offences are dealt with by the Magistrates or District Courts, and are therefore dealt with by the Children's Court, subject to the *Youth Justice Act*.

The Children's Court is a **closed court**. The only persons who are allowed to be present are set out under s20 of the *Children's Court Act 1992* (Qld). These include the child, a parent or other adult member of the child's family, a victim or a person who is representative of the victim, a witness giving evidence, a party or person representing a party to the proceeding (for example a police officer or lawyer), and if the child is an Aboriginal or Torres Strait Islander person, representatives of the child's community. Section 20 does allow other persons to be present, subject to the court's discretion, and requires the court to exclude an alleged victim of the child's offence if the court considers that person's presence would be prejudicial to the interests of the child.

RESEARCH

Youth Justice Act 1992 (Qld)

Schedule 1 Charter of Youth Justice Principles

4. *Because a child tends to be vulnerable in dealings with a person in authority, a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child.*
14. *Programs and services established under this Act for children should—*
 - (d) *encourage attitudes and the development of skills that will help children to develop their potential as members of society.*
16. *A child should be dealt with under this Act in a way that allows the child to be reintegrated into the community.*

1. What do the above excerpts from the *Charter of Youth Justice Principles* suggest to you should be the approach in all matters where children are charged with an offence and brought before the court system? [C] [A] [E] [R]
2. Locate the *Youth Justice Act 1992* (Qld) on the Internet and read its provisions. Do you think the provisions of the Act reflect the approach of the *Charter of Youth Justice Principles*? Identify what you consider to be three of the most important features of the Act for the conduct of criminal hearings involving children. Give reasons for your choice. [C] [A] [E]

THE RESTORATIVE JUSTICE PROCESS

Section 22 of the *Youth Justice Act 1992* (Qld) applies if the child admits committing an offence to a police officer. In this circumstance a police officer, subject to procedures in the section, may refer the child to a **conference process** which generally involves the victim and the child meeting so that an agreement can be reached whereby the child is not charged with or convicted of the offence. The meeting can involve the parents of the child and legal representation. It can involve the child agreeing to some form of restitution, for example, doing community service with a charity nominated by the victim, or by making a financial contribution to a charity.

The police officer must decide if the referral to the restorative justice process is appropriate, and can only do so if the child agrees to comply, and if it is appropriate to proceed to charge the child if the referral does not go ahead. The police officer must also consider:

- ▶ the nature of the offence;
- ▶ the harm suffered by anyone because of the offence; and
- ▶ whether the interests of the community in the child would be served by having the offence dealt with under a restorative justice process.

PRACTICAL APPLICATION

In the earlier hypothetical in this section, suppose Sean is only 15, and the police officer who interviews him decides to obtain permission to refer the matter to a restorative justice process. Assume Sean agrees, and prepare a plan in writing setting out the arguments to put forward to all parties, including Sean, to enter into a restorative justice agreement. Outline the parties you would involve, including the parents of all children and representatives from the administration of both schools. In your answer justify the inclusion or exclusion of different parties. [C] [A] [E] [R]

11.3 ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (INDIGENOUS AUSTRALIANS)

In this chapter, unless necessary for the purpose of being more specific, we will refer to Aboriginal and Torres Strait Islander People as **Indigenous Australians**. As at 30 June 2015, the National Prison Census recorded that **27% of Australia's prison population (9885 prisoners)** identified as being Indigenous Australians. It also revealed that the rate of imprisonment of Indigenous Australians increased by 45% between 2005 and 2015. The rates of non-indigenous prisoners increased by 18% over the same period. 77% of prisoners who were Indigenous Australians had experienced adult imprisonment prior to their current term compared to 50% of non-Indigenous prisoners. (See Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015* (11 December 2015))

These statistics reflect poorly on our criminal justice system, and particularly because of the obvious social and economic disadvantages experienced by our Indigenous Australians, who have been the subject of so many reports, enquiries, commissions, and policy interventions to try to improve their circumstances. Many attempts have been made to describe and explain the position of Indigenous Australians in the criminal justice system. The Australian Institute of Criminology identifies the risk factors associated with increased contact of indigenous Australians with the criminal justice system as being the misuse of alcohol, socio-economic disadvantage, childhood exposure to violence and abuse, the younger age profile of the indigenous population, previous involvement with the criminal justice system and psychological distress. (See *Indigenous Justice* (29 August 2013) Australian Government).

The *Equal Treatment Benchbook* identifies a number of issues that it considers are of particular significance in the context of Indigenous Australians involved in the criminal justice system. These are also contained in a report of the New South Wales Public Defender entitled *Admissibility of Admissions, Aboriginal and Torres Strait Islanders Suspects* (August 2012), quoted in the following Practical Application.

PRACTICAL APPLICATION

LANGUAGE DIFFICULTIES

- ▶ *Many Aboriginal people are not fluent in English and many are illiterate. In 2006, there were 517,000 Indigenous people in Australia. It has been estimated that there are about 55,000 speakers of indigenous languages in Australia, the majority of whom would have poor or limited understanding of English. Research conducted in remote areas in the Northern Territory found police reluctant to engage interpreter services. The difficulties of finding interpreters can mean courts water down the requirement to conduct interviews with interpreters.*
- ▶ *Many common words in English are used very differently by Indigenous Australians. Some words and concepts do not translate.*
- ▶ *Indigenous Australians may not be accustomed to question/answer form and may be more comfortable with the use of narratives.*
- ▶ *Confusion can arise from either/or questions.*
- ▶ *In some communities aboriginal languages have a system similar to English. This is sometimes reflected in a suspect's inability to answer a question about the number of people present at a particular location.*
- ▶ *Chronic middle ear infections in large numbers of Aboriginal people mean suffering hearing loss. In *Ebatarinja v Deland* (1998) 194 CLR 444, the High Court said that 'underdiagnosed hearing impairment in a convicted person could, in some circumstances, render that conviction unsafe. It is recommended that every indigenous Australian having communication difficulties should have a hearing assessment before interview.*

CULTURAL DIFFICULTIES

- ▶ *Reluctance of an Indigenous Australian suspect to discuss a particular topic may be because culturally only certain people are allowed to discuss the matter.*
- ▶ *Use of long silences in conversations, gestures and reluctance to make eye contact can be misinterpreted.*
- ▶ *Some aboriginal people have difficulties distinguishing between what they know personally and what they have been told. Some questions that do not raise offence in other cultures may be offensive to an indigenous Australian person (e.g. Aboriginals do not refer to the name of the deceased).*
- ▶ *Deference to authority and a propensity to answer leading questions in the way Indigenous Australian suspects consider the questioner wants, mean they may agree with statements put to them by police. An issue of particular concern is 'gratuitous concurrence', that is, freely saying 'yes' in response to a yes/no question, regardless of the suspects understanding of the question or their belief in the truth or falsity of the proposition. 'Yes' often does not mean 'I agree'. It often means 'I think that if I say 'yes' you will see that I'm obliging, and socially amenable and you will think well of me, and things will work out between us'.*

THE CAUTION

- ▶ *Many indigenous Australian suspects have difficulty understanding the caution. Asking a suspect 'Do you understand that?' may not be helpful.*
- ▶ *Misuse of the term 'have to' in 'you do not have to answer the question' can also be unhelpful.*
- ▶ *Telling a suspect they do not have to answer questions and asking them to answer a question ('do you understand this?') can be confusing.*
- ▶ *Often suspects choose a close friend or family member who may not have any better understanding than a suspect of their role in the rights of the suspect.*

PRACTICAL APPLICATION CONTINUED...

1. You have been asked by Legal Aid Queensland, to be the lawyer representing a woman accused of murdering her husband. Both she and her husband are Aboriginals. Consider the above information about the problems of Indigenous Australians encountering the criminal justice system, and prepare a list of matters/guidelines that you will observe when preparing the defence of the accused woman, who is pleading not guilty. Set this out in writing as a checklist for you to observe in the preparation of her case. [C] [A] [E] [R]
2. From the guidelines you have prepared in question 1, what principles can you identify which would ensure that Indigenous Australians are treated fairly in the criminal justice system? Which two Acts of Parliament contain most of the laws that must be followed when applying these principles? Identify which of these principles you think are essential to a fair trial for an Indigenous Australian defendant and the fair treatment of an Indigenous Australian victim/witness. Give reasons. [C] [A] [E] [R]

THE ANUNGA RULES

The first attempt to provide protection to Aboriginal suspects, called the **Anunga Rules**, were guidelines formulated by the Northern Territory Supreme Court in 1976 for the questioning of Aboriginal suspects. These have the force of precedent in the Northern Territory and do not necessarily lead to statements being excluded if they are not followed, but in *R v Anunga* (1976) 11 ALR 412 the courts said 'police officers who depart from them without reason may find statements are excluded'.

PRACTICAL APPLICATION

THE ANUNGA RULES

In *R v Anunga* the Supreme Court of the Northern Territory set out guidelines (now known as the 'Anunga Rules') for the interrogation of Indigenous persons. These guidelines are as follows:

- (1) When an Aboriginal [or Torres Strait Islander] person is being interrogated as a suspect, unless he [or she] is as fluent in English as the average white [person] of English descent, an interpreter able to interpret in and from the Aboriginal [or Torres Strait Islander] person's language should be present, and his [or her] assistance should be utilised whenever necessary to ensure complete and mutual understanding.
- (2) When an Aboriginal [or Torres Strait Islander person] is being interrogated it is desirable where practicable that a 'prisoner's friend' (who may also be the interpreter) be present. The 'prisoner's friend' should be someone in whom the Aboriginal [or Torres Strait Islander person] has apparent confidence... .
- (3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, 'Do you understand that?' or 'Do you understand you do not have to answer questions?' Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal [or Torres Strait Islander person] to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal [or Torres Strait Islander person] has apparent understanding of his [or her] right to remain silent... .
- (4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.
- (5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources... .

PRACTICAL APPLICATION CONTINUED...

- (6) Because Aboriginal [and Torres Strait Islander] people are often nervous and ill at ease in the presence of white authority figures like [police officers] it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should also be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.
- (7) It is particularly important that Aboriginal [and Torres Strait Islander] and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.
- (8) Should an Aboriginal [or Torres Strait Islander person] seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal [or Torres Strait Islander person] states he [or she] does not wish to answer further questions or any questions the interrogation should not continue.
- (9) When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

Consider the principles set out in the Anunga Rules, and compare them to the principles that you considered should be included in the law of Queensland in question 2 to the previous Practical Application. Now that you have had the opportunity to read the Anunga Rules, how would you change your answer, if at all? Give reasons. [C] [A] [E]

In Queensland it has been held by the Court of Appeal, that although the description of the Anunga Rules as 'guidelines' suggests they are not intended to be binding as a matter of law, it is relevant to consider a breach of the rules in determining whether it is fair to admit an interrogation of an Indigenous Australian into evidence. The *Equal Treatment Benchbook* points out that the guidelines now form part of the Queensland Police Services Digital and Electronic Recording of Interviews and Evidence Manual which is binding on officers and staff. It also points out that the Anunga Rules have been transformed into legislation, in part, by various provisions of the *Police Powers and Responsibilities Act 2000 (Qld)* PPRA, which is illustrated in the following table:

Anunga Rules		PPRA Provisions	
1	Right to an interpreter during police questioning.	s433	Right to interpreter
2	Right to communicate with a friend	s418	Right to communicate with friend, relative or lawyer
3	Appropriate cautioning	s431	Cautioning of persons
4	Appropriate questioning	-	
5	Continued investigation of matters despite receipt of a confession	-	
6	Availability of refreshments and facilities	-	
7	Questioning when person is intoxicated or tired	s423	Questioning of intoxicated persons
8	Legal assistance	s420	Questioning of Aboriginal people and Torres Strait Islanders
9	Preserving personal dignity during searches	s630	Protecting the dignity of persons during search



Ch 6

You have already considered the role played by the *Police Powers and Responsibilities Act 2000* (Qld) in **Topic 2: Criminal Investigation Process**. Here you have examined the way in which the police are required to follow the Act and apply it. The role of the court is to ensure that the application of the Act by the police is correct.



RESEARCH



Search the Internet for examples where Indigenous Australians have been dealt with inappropriately by the criminal justice system, or where this has been an issue for them in the court system. Select one of these cases or one of the following, and write up a case study, using the format that the authors use in this textbook--**Facts, Legal Issue, Decision**. It may assist you to do this for *Purcell v Quinlan* (1995) QSR 8 SEPTEMBER 1995, *R v Wilson* (1997) QCA 265, *R v Brown* (2006) QCA 136 or *R v Martin* (2011) QCA 342. To access these, simply search the full names and go to the Queensland Supreme Court Library, whose internet site should be available. There are many more cases in the Northern Territory Supreme Court.

CASE STUDY

R v Bowen (2004) QSC 364

Facts: The accused Cedric Colin Bowen (Bowen) was charged with unlawfully killing his brother Fred. Bowen was an Aboriginal person. The police were called to his residence early in the morning, in an isolated place. A transcript of a record of interview taken by the police at the time discloses that the accused told the investigating police officer he did not want to say anything until he had talked to legal aid. The accused was told of his right to consult a friend or relative and to arrange for them to be present and he said that arrangements had been made for 'Justice lady down there, Gladys' to make those arrangements. Throughout the record of interview it is clear that none of these things happened and he wanted a lawyer to be present as well as a friend. Despite this the police officer proceeded to ask questions about his personal details and about the ownership of a firearm. When the accused was given the standard caution, he said, 'Okay, that's why I am waiting for a call from David Kempton'. Mr Kempton was a solicitor.

At the commencement of the trial, the defence raised the issue of the admissibility of the record of interview.

Legal issue: Should the trial judge exclude the record of interview from the evidence?

Decision: Initially the trial judge explains the application of s251 of the *Police Powers and Responsibilities Act*. Section 251 relates to the question of Aboriginal people being questioned. He says:

the framework is that certain restrictions apply if a police officer wants to question an Aboriginal person in his

company about an indictable offence, and reasonably suspects that the person is an adult Aboriginal person, and does not reasonably suspect that because of the person's level of education and understanding, he is not at a disadvantage by comparison with members of the Australian community generally. He must do and refrain from doing certain things.

Essentially, the requirements are to inform the person that he or she is entitled to arrange for a lawyer to be present during questioning, and that the police will contact a representative of legal aid as soon as reasonably possible. Also, the police must not question the Aboriginal person until a support person is present, if practicable. Under the Act (s8) evidence to which s251 applies is not expressly excluded, but it is within the discretion of the judge to exclude it.

The trial judge in this case **excluded the evidence**, 'not only because of the aspect of the right to silence, but also because of the issue of weighing the cogency and probative value of the evidence against the possible prejudice which may unduly be caused'.

The trial judge discharged the jury and ruled that the matter should be set down for a new trial.

1. Do you think that if a judge decides that there has been a breach of s 251 of the Act, the evidence caught by the breach should be **expressly excluded** by the Act? Give reasons. [A] [E]
2. Are there any other sections under the Act applicable to Indigenous Australians, which, if breached by the police, should result in the **express exclusion** of relevant evidence? [A] [E]

ABORIGINAL WOMEN

In addition to the problems faced generally by Indigenous Australians set out above, Aboriginal women have been found to have particular difficulties. In *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), the Queensland Criminal Justice Commission identified a number of issues which continue to apply because the various social and cultural factors that existed then still exist today. These issues were said to contribute to a reluctance by Aboriginal women to give evidence. They are:

- ▶ the high incidence of domestic and family violence against Aboriginal women, causing low self-esteem and feelings of fear and shame;
- ▶ women's issues ('women's business') are only discussed and dealt with by women. For example, Aboriginal women do not discuss matters concerning sex or genitals, which may make it particularly difficult to give evidence concerning sexual assault;
- ▶ Aboriginal women find making a complaint difficult because of community pressure. They are afraid of bringing shame upon themselves and their families;
- ▶ Aboriginal women do not trust the police, because they are afraid of being harassed by them, and the apparent lack of care and sympathy for their plight, especially in sexual assault matters;
- ▶ the court room environment can be intimidating at the best of times, let alone when you are an Aboriginal woman from a remote community; and
- ▶ generally the legal profession does not appreciate the issues facing female Aboriginal witnesses and defendants, as its personnel lack training in that regard.

The difficulties experienced by Aboriginal women in the criminal court process who have been involved in domestic and family violence can only really be fully appreciated by examining the case studies. It is beyond the scope of this book to examine this in detail, but students will find many writings on the topic by conducting online research. We can, however, present to you a case which illustrates the difficulties faced by a defendant who was found guilty of the murder of her *de facto* husband.

CASE STUDY

R v Kina (1993) QCA 480

Facts: Robyn Bella Kina (Kina) was convicted in the Queensland Supreme Court of murdering her *de facto* husband Anthony David Black (Black). Kina did not give evidence at her trial, and her chance of acquittal depended solely on the possibility that the jury might not be satisfied from the prosecution evidence that she intended to cause death or grievous bodily harm.

A petition for pardon was delivered to the Governor on behalf of Kina on 24 May 1993. The Attorney-General referred the case to the Court of Appeal to be determined as if Kina had appealed.

The grounds for appeal included that Kina could not receive a fair trial resulting in a miscarriage of justice because of problems, difficulties, misunderstandings and mishaps occurring in the communication of her instructions to the lawyers who prepared her case and represented her upon her trial.

Essentially none of Kina's evidence or that of her witnesses which would have raised issues of provocation, self defence and the lack of the necessary intent, was presented at trial. In her affidavit, presented to the Court of Appeal, Kina gave the following evidence...

Childhood: Kina's life, from childhood, was filled with abuse, trauma and hardship. Her father was violent towards her mother and the children, whom he used to regularly flog. When she was seven or eight years of age, she was sexually molested by an uncle, and these incidents continued regularly for about three years. Kina began to engage in sexual intercourse while still very young, and began to use contraceptive pills when she was almost 12. At this time her mother left her father. She said in her affidavit:

8... I was in school at Caboolture and my father took me out of school at the age of 12 to look after my

CASE STUDY CONTINUED...

three surviving younger brothers and sisters. I always felt very insecure and frightened. I was frightened of my father but was also frightened of the welfare authorities taking the younger children away because my father used to drink most of his money and kept beating the children.

9. It was at this time that I started prostituting myself to get some money together to run the household. I also started drinking at this time and on looking back I think I was an alcoholic at the age of 12. I was definitely an alcoholic by the age of 14.

Kina's childhood continued to be troubled by prostitution, drug taking, and bad behaviour. She developed depression and diabetes, and took an overdose of serapax, her depression medication, in 1984, and was hospitalised for several days. After a brawl at a hotel at the Stradbroke Island in October 1978, she was convicted of unlawful wounding and assault occasioning bodily harm and sent to prison for a period.

Relationship with the deceased, Black: Kina initially met Black when she was a prostitute, but almost immediately went to live with him, and says that he was the only man she ever loved. He was violent to her during all of the relationship. Black gambled and drank excessively. Kina gives evidence that in April or May of 1985 Black started to demand anal sex, about which she said "it made me feel dirty", and when she refused he punched her, and forced her to do this without her consent. On two occasions, to get his way, he threatened to throw her from a balcony and a window several stories high. Kina gave evidence that when Black was on shiftwork she went out with other men and other friends, and when he found out he took her to his work at the Toowong Shopping Centre construction site and made her climb to a higher level where she stayed for fear of the ladders that she needed to climb down to leave. On two occasions while she was there he forced her to have sex with him in front of his workmates and invited them, after he finished, to participate. In her words "all of the others then had sex with me, one after another. I do not know how many there were. This went on for about two hours while I lay on the concrete, cold and naked on a night in August". Kina also gave evidence that Black would tie her up to their bed whenever he went on the night shift and did not take him with her, returning in the morning and having sex with her before he released her, sometimes not releasing her immediately until he had had breakfast and returned and had sex with her again. She says—"Only then did he untie me. I hated it".

At times over the next few years Kina would leave Black and stay with her relatives, but then she would return

or Black would find her. During this time the relationship continued in the same character. Immediately before the incident when Black was killed, Kina's 14 year old niece, Enid Morris, was living with her. On 20 January 1988, the date of the incident, there was an argument during which Black demanded anal sex. Kina refused and Black became aggressive and punched Kina in the face and stomach. He said to her that if she would not have sex with him in that way that her niece Enid would. Kina's evidence was that she became extremely upset and left the room slamming the door behind her. She was going for a shower and passed the kitchen when she saw their kitten and went in to give it some milk. She saw the sharp knives in a container and took one, and went back to the bedroom. In her words:

When I went into the room with the knife, I did not intend to stab him. I just wanted to threaten him with it so he would not go near Enid. When he saw me come back into the room, he jumped off the bed and grabbed a chair and came towards me. He kept coming until he was very close to me. I thought he was going to hit me with the chair, and I knew that once he started hitting me with the chair he would not stop. Then he said to me: "You won't use that you gutless c...". I did not mean to kill him. I did not mean to injure him seriously. I was not aiming at his heart. When I saw that I had stabbed him, I threw the knife away. He staggered and fell to the ground. I was extremely upset. I said to him that I was sorry and that I loved him and also said: "Please don't die". I held him in my arms. I asked my niece Enid to go and get an ambulance.

Kina's legal representatives: Initially Kina was represented by the Aboriginal Legal Service. A statement was taken by a Ms Hamilton who provided an affidavit to the Court of Appeal. Ms Hamilton stated that Kina "outlined several instances where the deceased had assaulted her, or treated her badly in some other way," but she never did so without adding words to the effect that she probably deserved what had happened or caused him to do that by my behaviour. Ms Hamilton stated "I did not include all of these observations in her statement, as I considered that many of her observations about her own behaviour were unfair, and caused by her extreme guilt over the death of Mr Black." After the committal, the Aboriginal Legal Service applied for public defence funding but the matter was allocated to The Public Defender to instruct at trial. Subsequently, the evidence before the Court of Appeal essentially made it clear that the lawyers involved on behalf of The Public Defender all had not received any special training in communicating with Aboriginal women, and the initial instructions were taken by a junior male clerk. The brief finally prepared

CASE STUDY CONTINUED...

for Counsel did not include the initial statement Ms Hamilton obtained from Kina, even though the difficulties in communication led to the matter being returned to the Aboriginal Legal Service to instruct Mr Shanahan at trial.

Other witnesses: Evidence was given by other witnesses which corroborated Kina's version of events. Importantly, a social worker, Mr Berry, prepared a report prior to the trial which was delivered to The Public Defender's office. This report, annexed to his affidavit, set out many of the matters which were raised in Kina's Affidavit. He received information from the defendant, Kina, that her legal representatives wished that he "would not interfere with proceedings." Mr Berry saw Kina in his counselling capacity after the trial, and assisted her development to improve her self-esteem. There is a history in Kina's affidavit before the Court Of Appeal which explains her difficulty giving evidence at the trial and providing full statements to her legal representatives. She said:

My own reasons for not wanting to give evidence were that I was scared, shy and embarrassed. I found it hard to talk and I was unable to speak out about the threat to Enid and what I had to say seemed to be irrelevant to my legal representatives so I just did what they suggested. On Monday, 5 September 1988, Mr Shanahan and Ms Hamilton came and spoke to me in the cells of the Supreme Court. They asked me to sign two (2) documents about my admitting the cause of death to Tony and secondly, that I did not wish to give or call evidence. By this date it was clear that that was what they wanted me to do.

Two psychiatrists gave evidence, both of whom provided a credible analysis as to why Kina could not talk about many of the things that happened to her prior to trial, and why the threat Black made to sodomise her niece was repressed.

Legal issue: Should the Court of Appeal grant Kina a pardon?

Decision: The Court Of Appeal said:

... it surely cannot be a proper basis for detriment to an accused person that, for reasons not associated with the offence charged, that person is substantially deterred from communicating effectively in preparing for or participating in his or her trial...

The legal system for the most part works well, but we must not shut our minds to the reality that sometimes matters go awry and produce a miscarriage of justice...

In this matter, there were insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of:

- (i) her aboriginality;*
- (ii) the battered woman syndrome; and*
- (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased.*

These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.

In the exceptional events which occurred, the appellant's trial involved a miscarriage of justice. Accordingly, the appeal should be allowed.

11.4 PERSONS WITH A DISABILITY

In its *World Report on Disability* (2011), the World Health Organisation (at page 3) says:

Disability is a part of the human condition. Almost everyone will be temporarily or permanently impaired at some point in life, and those who survive to old age will experience increasing difficulties in functioning. Most extended families have a disabled member, and many non-disabled people take responsibility for supporting and caring for their relatives and friends with disabilities. Every epoch has faced the moral and political issue of how best to include and support people with disabilities. This issue becomes more acute as the demographics of societies change and more people live to an old age.

In the Australian community, Commonwealth and State legislation has steadily improved the status and rights of persons with a disability. The **National Disability Insurance Scheme (NDIS)** now has bipartisan support from all political parties. Relevant legislation such as the *Disability Discrimination Act 1992* (Cth), the *Anti-Discrimination Act 1992* (Qld), and the *Disability Services Act 2006* (Qld) have helped to move our community to recognise the efforts of families and various organisations who provide help to those who have impairments of all kinds. The *Queensland Disability Services Act 2006* sets out the rights of persons with disabilities and the responsibilities of government funded service providers. The Act requires each Queensland Government department, including the Department of Justice and Attorney-General, to develop a disability service plan. The *DJAG Disabilities Service Plan 2014-2016* can be accessed online at www.justice.qld.gov.au.

Queensland courts provide assistance to persons who have problems in the areas of language, physical participation, sensory disabilities, intellectual disabilities, acquired brain injuries, and psychiatric disabilities. Legislation and court rules govern the court's obligations. In its processes, judges attempt to meet the needs of court personnel, victims, accused persons (defendants), jurors, and witnesses alike. What follows is an attempt to give you some factual situations in the form of a hypothetical scenario to enable you to understand the decisions that might be made to enable persons with disabilities to achieve fair outcomes.

HYPOTHETICAL

Diam and Abid

Facts: Diam was born in Australia to Asian parents. Her parents had migrated to Australia when they were children as refugees. Diam was brought up as a Christian and belonged to the local community church where her family worshipped every Sunday. Diam's father was a lay preacher, and often preached on Sundays when the church pastor was unable to do so. Abid and his wife Aishah were respected members of the church congregation. They also had two other children who were older than Diam and had left home.

When Diam was born her birth was complicated and difficult. For a time during her birth, she could not breathe, and suffered brain damage, which left her with significant intellectual disabilities. For example, her memory was poor. She could not easily absorb, comprehend and recall information. Her ability to speak and understand English was impaired, and the impairment was increased by the fact that her parents had tried to get her to learn to speak their native language. Aishah was fluent in her native language and spoke it to the children at home when they were young.

The children's upbringing, including that of Diam, was strict and old-fashioned. When they were naughty, they often received physical punishment from either parent. Punishment was not harsh, although occasionally Abid would use his leather belt when he felt it was warranted. The children were usually hit on their legs.

Diam left school as soon as she could at 15 years of age. She went to work at a laundry operated by a retirement village owned by her church. She was happy there, and came to know her fellow workers and the people in charge well. They were like family to her. She had been there for four years when one day she arrived at work with large bruises on her upper left arm and her left buttock. When asked about them, she began crying but was able to tell a senior lady (Gladys) that her father had hit her with his belt. The senior lady telephoned the police who came to the laundry and took a statement from Diam in the presence of Gladys. Initially the attending police officer asked questions to obtain a statement from Diam, and found her uncooperative and frightened. Gladys was able to calm her and insisted that the officer let her tell her story in her own way. It emerged that Diam and her mother had argued on Sunday morning after church because Diam wanted to go home straight away to watch TV. When they got home, Aishah remonstrated with Diam and refused to let her watch her TV program. Diam argued with her mother and tried to take the remote control from her and there was a physical confrontation. Her father became upset and demanded she submit to discipline. The incident escalated and Abid took off his belt to discipline her but Diam resisted and was hit on the arm as well as on her buttock, and then forcibly removed to her room.

Abid was charged with assault. He was arrested and taken to the police station where he was interviewed.

HYPOTHETICAL CONTINUED...

During the interview, he telephoned his lawyer who advised him to make no comment and to exercise his right to silence. Abid was released on bail and gave his lawyer a statement about the incident. He said that at the church after the morning service, he and his wife were very embarrassed when Diam swore at his wife after she told her to be patient and wait until they were ready to go home as they were talking to other parishioners. This was why Aishah would not let Diam watch TV when they arrived home. His description of the incident at home coincided with the version that was given by Diam to the police, although this did not become apparent until there were negotiations with the Police Prosecutor prior to trial. Abid stated that although Diam was an adult, he and his wife treated her as a child because of her intellectual disability. He did say that she was now physically larger than his wife and that she had become more assertive in her relationships with them. He was remorseful and prepared to attend counselling to assist him to manage the family relationships better. Aishah confirmed the details of the incident and was also remorseful and prepared to attend counselling. Abid felt, however, that on this occasion he and his wife were provoked, and that because of the history of the family, his attempt to discipline Diam meant that he should plead not guilty.

Although there was an opportunity prior to the Summary Trial Callover for a conference between the Police Prosecutor and Abid's lawyer to negotiate an outcome without trial, this did not occur and directions were made by the Magistrate for the trial to proceed. The Police Prosecutor submitted that Diam should give evidence by way of a pre-recorded video. The Magistrate did not allow this and made an order that Diam was to give oral evidence by video so that she could not see her father who was in the court room. Diam did not see the room where she was to give evidence before the trial, and was accompanied by a police woman she met on the day, not by Gladys. No request was made for Gladys to be present with Diam when she gave evidence.

At the trial, Diam gave evidence of her injuries (a photograph of them was shown to her), and evidence was led from her of her argument with her mother about watching TV. She could not recall when this occurred or the prior argument at the church and was unable to recall when and by whom the bruising to her left arm and left buttock was caused. The Police Prosecutor adopted the usual method of leading evidence by attempting to obtain a chronological and orderly statement from Diam, which appeared to confuse her, and she eventually became visibly upset. The Magistrate, in the circumstances, felt

she that had no alternative but to bring Diam's evidence to a close.

Counsel for Abid submitted that he had no case to answer, and that the Crown case's evidence led on Diam's behalf was insufficient to prove his guilt beyond reasonable doubt. The magistrate concurred and acquitted Abid.

Legal issues:

1. Should the Magistrate have made a direction that Diam pre-recorded her evidence prior to the trial?
2. Should the Magistrate have required Gladys to be present during the trial while Diam gave evidence and if she was cross-examined?
3. Should the Crown (Police Prosecutor) appeal against the Magistrate's decision to the District Court?

Decision:

1. After the decision was made to acquit Abid, the matter was referred by the police to the Director of Public Prosecutions for review. The DPP decides to appeal against the decision and you are asked to draft the grounds of appeal. Prepare these in writing. [C] [S] [A] [R]
 2. Assume the Appeal Judge grants the appeal. Set out the reasons for judgment and the orders that you think are appropriate. Consider the different orders that might be made and give reasons for rejecting those you do not choose. [C] [S] [A] [R]
- **Re-trial:** An order is made for a retrial. You work for the DPP and the case is assigned to you. You conduct the following preparations for the new trial.
1. The police recorded the first interview with Diam in an electronic form. It can be used to give Diam's evidence in court. Write out what you think she would have said in the interview. [C] [S]
 2. Arrange for a report by a police psychologist to interview Diam. Ask her to consider:
 - Will she be disadvantaged if she is required to give oral evidence?
 - Will she be frightened of going to court?
 - Will it be difficult for her to face her father in court?
 - Will she have difficulty remembering what happened?

HYPOTHETICAL CONTINUED...

- ▶ How will she cope with being cross-examined?
 - ▶ How can the court make it possible for her evidence to be given fairly, given her intellectual disability?
- Put yourself in the position of the psychologist. What do you think her report will say? [C] [S] [A] [E] [R]
3. Prepare submissions to the Magistrate setting out the directions for trial which you think she should make to assist the Police Prosecutor to present Diam's case appropriately and fairly. You might like to refer to s21A of the *Evidence Act 1977* (Qld) to understand the powers the Magistrate can use to do this. [C][A][E][R]

11.5 GENDER EQUALITY

While the *Equal Treatment Benchbook* supports equal treatment of all users of the court irrespective of gender, it is appropriate for statistical and historical reasons, to consider an issue concerning women. Historically, most laws were drafted and passed by male parliamentarians. Nevertheless, this could not stop law reform from happening in 1975 when the *Family Law Act (Cth)* introduced no fault divorce laws and a fairer system of property distribution consequent upon marriage breakdown. However, for women, in many areas, the battle to be protected from disadvantage, continues. In the criminal justice system we have seen stronger **Domestic Violence Laws**, changes to the *Bail Act*, and legislation making **stalking** a criminal offence.

RAPE AND OTHER SEXUAL ASSAULTS

In 2013–2014, the prevalence of sexual assaults and related offences in Australia grew by 19% from the previous year, representing the largest increase as the principal offence of any type of offending (see Australian Bureau of Statistics, *4519.0 Recorded Crime–Offenders, 2013–2014–Key Findings*, 25 February 2015).

The national **Crime Victimization Survey** estimated that in 2013–2014, 48,300 adults in Australia (approximately 83% women) had been victims of at least one sexual assault, including rape, in the 12 months prior to the survey. The same data showed that approximately 62% of adult victims did not disclose the most recent incident of sexual assault to the police. Victims' reasons for not reporting sexual assault to the police are similar to those identified in relation to non-reporting of domestic violence: **fear of retribution, a lack of appreciation of the seriousness of the issue, and shame and humiliation, as well as a fear of being disbelieved.** (See Australian Bureau of Statistics, *4530.0 Crime Victimization, Australia, 2013–14–Key Findings*, 17 February 2015).

It came as no surprise, then, that the **Women's Legal Service** and **rape victims** reacted to the ABC *Four Corners* program which went to air on 7 May 2018, addressing the issues in the NSW case of *R v Lazarus*, in which the alleged rape victim was prepared to appear. The *Four Corners* program is included as a research activity in the inquiry which follows.





INQUIRY



SHOULD QUEENSLAND AND NEW SOUTH WALES CHANGE THEIR LAWS RELATING TO CONSENT IN RAPE CASES TO BRING THEM INTO LINE WITH TASMANIA AND VICTORIA?

PRACTICAL APPLICATION

QUEENSLAND WOMAN WHO SUFFERED HORRIFIC INJURIES DURING SEXUAL ENCOUNTER CALLS FOR REFORMS TO CONSENT LAWS

SOURCE: JOSH ROBERTSON, ABC. NET.AU, 23 MAY 2018 (EXCERPTS)



A woman whose accused rapist was acquitted despite causing her shocking injuries says she feels betrayed by Queensland's legal system and says sexual consent laws need to change.

Jayne (not her real name) left a trail of blood through Surfers Paradise and underwent emergency surgery for a 10cm internal laceration after a sexual encounter on a beach in 2010 took a disastrous turn.

The Queensland Women's Legal Service (QWLS) (Ms Sarkozy) said the case is a prime example of why the State rape laws are the worst in Australia and need reform. The Gold Coast mother suffered severe bruising from waist to tailbone, which she said made it painful even to sit in a courtroom months later when a 28-year-old man faced rape and grievous bodily harm charges.

The Crown argued what began as a consensual sex between the two turned violent and Jayne pleaded for him to stop. But a jury in 2011 acquitted the man, who could rely on a 109-year-old defence to rape in Queensland law: that he had a mistaken but honest and reasonable belief that she was consenting to that escalation in the sex act.

Speaking out publicly for the first time, Jayne said the verdict left her in disbelief, so much so that she "had to get the court transcript because it made no sense to my mind."

The QWLS said Jayne was not the only woman to suffer grave injuries and then watch the accused rapist get off in court after arguing he wrongly but honestly believed she was consenting.

The NSW Government is reviewing its consent laws to address what it says is a 'systemic' problem with sexual assault cases, following the high profile case of teenager Saxon Mullins. NSW already denies a mistaken belief defence to those who show 'reckless indifference' to a victim's consent.

In Tasmania since 2004, under Australia's most progressive rape law reforms, 'if you have not had consent communicated in a positive manner, then your mistaken belief does not hold up in court and you will not be acquitted of the charge,' Ms Sarkozy said. Tasmanian Law Society Vice President Evan Hughes said that the state's reforms to sexual consent laws had worked well for 14 years.

1. In your own words, describe what you mean by the term 'consent'. Apply your own understanding of 'consent' to Jayne's situation. Would you say she consented using your own definition? [C][A]
2. Identify the words used in the article to describe the meaning of consent in a rape case in each of Queensland, New South Wales, and Tasmania. Compare them with each other. How are they different, and how are they similar? In which jurisdiction do you think Jayne's alleged rapist would be more likely to be found guilty? [C] [S] [A] [E]

THE STAKEHOLDERS

The law changes when the various interested parties become involved because of some significant event, such as the *Four Corners* program which examined the Lazarus case, and the disclosures made by 'Jayne' the victim of an alleged rape, and express their views about what the law should be in the future. Of course, in the case of the law of consent, the number of offences is almost overwhelming, so that it is an issue before the public very regularly. The next practical application identifies stakeholders who responded to Jayne's plight.

PRACTICAL APPLICATION

LAWYERS CALL FOR OVERHAUL OF QLD RAPE LAWS

SOURCE [WWW.9NEWS.COM.AU/NATIONAL/23 MAY 2018](http://WWW.9NEWS.COM.AU/NATIONAL/23_MAY_2018) (EXCERPTS)

Bill Potts, one of Australia's most senior criminal defence practitioners, said regular law reform was necessary to reflect changes in society and welcomed discussion on creating a clearer definition of consent. Mr Potts said clarity on consent would give justice to victims of crime, those charged with criminal offences and jurors.

Women's Legal Service solicitor Julie Sarkozy said the offence of rape is easier to defend in Queensland than in any other state, because defendants can still argue they mistakenly believed they had consent.

The service, which provides free legal advice and social support to domestic violence victims, wants the Queensland government to follow the lead of New South Wales Attorney-General Mark Speakman who has referred consent laws to the Law Reform Commission following a recent high-profile rape trial which revolved around the issue.

Queensland Opposition Leader Deb Frecklington has urged Anastacia Palaszczuk's Labor Government to take similar action... Queensland Attorney-General Yvette D'Ath said the State government would await the NSW findings before it considered taking action. "We have a strong criminal code in Queensland with a clear definition of consent and a maximum penalty of life for rape," she told AAP.

1. List each of the persons reacting to the issue of amending consent laws. Describe the group to which each of them belongs and explain why each of them as a member of that group might have expressed a particular point of view. [C] [S] [A]
2. Imagine you are a member of the Women's Legal Service. Prepare submissions on behalf of the service to present to the Attorney-General, putting all the arguments in favour of a review of the consent laws relating to rape and sexual offences in Qld. [C] [S] [A] [R]

THE LAW IN QUEENSLAND

CRIMINAL CODE 1899 S348

348 CONSENT

(1) In this chapter, "consent" means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

(2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—

(a) by force; or

(b) by threats or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

CRIMINAL CODE S349

Rape

This section states that a person who rapes another person is guilty of a crime which carries a maximum sentence of life imprisonment. It goes on to define the meaning (elements) of the offence, and states that in every case the actions of an accused which constitute rape must be carried out **without the other person's consent**. The exception is that a child under the age of 12 is incapable of giving consent.

CRIMINAL CODE S24

Excuses

The code makes express provision in s24 for an excuse where the accused acted under an **honest and reasonable, but mistaken, belief in the existence of a state of things**. Clearly, the consent of a woman (victim) would be a 'state of things', and s24 would be applicable in the crime of rape. The accused would need to show that the belief was **based on reasonable grounds**.



PRACTICAL APPLICATION

Read ss348, 349, and 24 of the Criminal Code 1899 (Qld) and Josh Robertson's article reporting Jayne's case above before answering the following questions:

1. Sections 348, 349 and 24 of the Code deal with separate ideas and issues. State what each of these is in your own words. How are they connected and applied? [C][A]
2. Make up a short scenario for each of sub-sections 2 (a) to (f) of s348. Vary the outcomes by careful selection of facts, and write your own answer saying what outcome you intended. Give your reasons. [C] [S] [A] [E] [R]

THE LAW IN VICTORIA AND TASMANIA

The purpose of including some discussion about the laws of Victoria and Tasmania is to highlight the fact that there are differences from the law in Queensland. This will give you a perspective to decide for yourself which approach to the laws of consent to rape you prefer. Clearly 'Jayne' regards the law in Queensland as being unfair to her.

PRACTICAL APPLICATION

VICTORIAN CRIMES ACT 1958 s36

Consent

- (1) ... consent means free agreement.
- (2) Circumstances in which a person does not consent to an act include, but are not limited to, the following-
- (a) the person submits to the act because of force or the fear of force, whether by that person or someone else;
 - (b) the person submits to the act because of the fear of harm of any type, whether by that person or someone else or an animal;
 - (c) the person submits to the act because the person is unlawfully detained;
 - (d) the person is asleep or unconscious;
 - (e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;
 - (f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;

Note

This circumstantial may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.

- (g) the person is incapable of understanding the sexual nature of the act;
- (h) the person is mistaken about the sexual nature of the act;
- (i) the person is mistaken about the identity of another person involved in the act;
- (j) the person mistakenly believes that the act is for medical or hygienic purposes;
- (l) the person does not say or do anything to indicate consent to the act;
- (m) having given consent to the act, the person later withdraws consent to the act taking place or continuing.

VICTORIAN CRIMES ACT 1958 s38

Rape

- (1) A person (A) commits an offence if--
- (a) A intentionally sexually penetrates another person (B); and
 - (b) B does not consent to the penetration; and
- (c) A does not reasonably believed that B consents to the penetration.

TASMANIAN CRIMINAL CODE ACT 1924

14A Mistake as to consent and sexual offences

- (1) In proceedings for an offence against section 124, 125B, 127 or 185, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused--

PRACTICAL APPLICATION CONTINUED...

(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

(b) was reckless as to whether or not the complainant consented; or

(c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

1. Draw up a table with 3 columns: the first column for Queensland legislation, the second combining Victorian and Tasmanian legislation which is the same or generally similar to the Queensland legislation and the third listing and those parts of Victorian and Tasmanian legislation which are different. Use key words to identify each. Select three pairs which are the same and three which are different, and explain your reasons for choosing them. [C] [S] [A]
2. Assuming Jayne's evidence is accepted by the jury, apply the Tasmanian and the Victorian legislation to the facts of her case and prepare a closing argument to present to a Tasmanian jury and also to a Victorian jury arguing for the alleged rapists to be convicted. Divide the class into two equal groups: a 'Tasmanian jury' and a 'Victorian jury'. After hearing submissions each jury must give its verdict to the rest of the class. [C] [S] [A] [E] [R]

LAW REFORM IN NEW SOUTH WALES

Recently the question of whether to amend the laws of NSW with respect to consent where a person is charged with rape, was raised on an ABC *Four Corners* program on 7 May 2018. The program was so successful that its repercussions were felt in Queensland and no doubt in the other states and territories of Australia. The NSW Attorney-General has referred the matter to the NSW Law Reform Commission to report.

CASE STUDY

R v Lazarus [2017] NSWCCA 279 (27 November 2017)

Facts: The applicant, Luke Lazarus, approached the complainant (Saxon Mullins) while she was on the dance floor of the Soho nightclub at King's Cross at about 3:59 am. Lazarus informed her he was part-owner of the nightclub and then asked if she would like to go to the DJ booth. They went towards it, and then Lazarus led her to an adjoining VIP area. Almost straight away they went along a corridor out of the back of the nightclub into an alleyway. Here they commenced kissing and after about 2 minutes the complainant felt uneasy and told the applicant she wanted to return to her friend inside the nightclub. The complainant alleged the applicant continued to kiss her and said "put your f...g hands on the fence" in a tone that had "aggression in it". The applicant removed her underwear and stockings and allegedly tried to have sex with her unsuccessfully. The complainant allegedly repeated the request to return to her friend in the nightclub, but the applicant told her "just get on your hands and knees and arch your back". The complainant alleged she did what she was directed to do out of fear. The Crown case stated that the applicant

sexually assaulted the complainant by placing his penis in her anus. On the evidence of both the complainant and the applicant the incident did not take very long, maybe five to ten minutes. The complainant met her friend outside the nightclub and attended the Chatswood police station at about 11:30 am that morning.

This is the second appeal to the NSW Court of Criminal Appeal in this matter. There were also two trials and an application for a judge only trial.

The first trial. The applicant, Luke Lazarus, was charged on 14 May 2013, with having raped Saxon Mullins, pursuant to s611 of the Crimes Act 1900 (NSW). He was convicted and sentenced to 5 years imprisonment from 27 March 2015, with a non-parole period of three years.

The first appeal. Lazarus appealed his conviction to the Court of Criminal Appeal. On 12 April 2016 the appeal was allowed, the conviction quashed and a new trial ordered (*Lazarus v R* [2016] NSWCCA 52). The appeal was upheld on the basis that the trial judge misdirected the jury.

CASE STUDY CONTINUED...

Application for an Order for Trial by Judge alone.

This application was brought by Lazarus under s132 of the *Criminal Procedure Act 1986* (NSW). The presiding judge determined in accordance with s132 that it was in the interests of justice for the accused to be tried by Judge alone.

The second trial. Judge Robyn Tupman found Lazarus not guilty on 4 May 2017. She concluded that the Crown had not made out the elements in the Act beyond reasonable doubt. The relevant section in the *Crimes Act 1900* (NSW) states:

(3) Knowledge about consent. A person who has sexual intercourse with another person without the consent of the person knows that the other person does not consent to the sexual intercourse if:

(a) the person knows that the other person does not consent to sexual intercourse; or

(b) the person is reckless as to whether the other person consents to the sexual intercourse; or

(c) the person has no reasonable grounds for believing that the other person consents to sexual intercourse.

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

(d) including any steps taken by the person to ascertain whether the other person consents to sexual intercourse, but

(e) not including the self-induced intoxication of the person.

Judge Tupman concluded her decision by saying that the Crown had not satisfied her that the accused had no reasonable grounds for believing that the complainant was not consenting to the act of penile/anal sexual intercourse and as such the accused was acquitted.

However, the NSW Criminal Court of Appeal, said that Judge Tupman did not apply s61HA(3)(d) of the *Crimes Act 1900* (NSW) correctly, and should have directed herself, as she would have directed a jury, that they must consider the reasonable steps taken by an accused person to ascertain whether the complainant was consenting. The Criminal Court of Appeal said 'nowhere in her Honour's reasons is there any reference, express or implied, to s61HA(3)(d) and thus no express or implied statement of the relevant principle'. It concluded therefore that the principle was not applied, and the judge's error established. Further, it commented that the taking of a 'step' for the purpose of the section by an accused person must involve the taking of some positive act, and the accused, Lazarus, did not do this. It followed that one of the grounds of appeal by the Crown was made out.

The NSW Criminal Court of Appeal went on to point out that, in the circumstances, it was obliged to consider whether or not it was in the interests of justice to quash the acquittal and order a new trial or not to overturn the previous decision. In the circumstances, the court decided not to order a re-trial. It recognised that a criminal trial is an ordeal for a complainant, and that it is also an ordeal for an accused. Among the reasons for making this decision were:

- ▶ any re-trial would take place more than five years after the event;
- ▶ the circumstances bringing about the possibility of a re-trial were not the fault of the respondent (Lazarus) or those acting for him;
- ▶ it was the second occasion on which the respondent (Lazarus) had been in this situation; and
- ▶ the respondent (Lazarus) had already been in jail for 10 months before being released following the previous judgment the subject of this appeal.

1. In which jurisdiction was the case of *R v Lazarus* heard? [C]
2. Did Judge Robyn Tupman decide that Lazarus was not guilty? Examine the facts of the case above. Were there any steps taken by Lazarus in the course of the incident in the lane which could be said to fall within the scope of s61HA(3)(d)? What did the NSW Court of Appeal say that Judge Tupman should have done if she had interpreted the meaning of the section correctly? Do you think the section ought to be rewritten to make its meaning clearer? Give your reasons. [C] [S] [A] [E]
3. Do you think that Lazarus would have been found guilty under s14A(1)(c) of the *Tasmanian Criminal Code Act (1924)*? Give your reasons. [C] [A] [E]
4. Would you change the law of NSW relating to consent in rape cases to a version similar to or the same as that in Tasmania? If so, what changes would you make? If not, why not? Give your reasons. [C] [S] [A] [E] [R]

RESEARCH

In this Inquiry you have been referred to **court cases and legislation**, which are **primary sources**. This is where you obtain/find **accurate versions of the law and how it has been applied**. Other sources, such as television programs and newspapers (online and print) are useful for reading the opinions of journalists, stakeholders, and sometimes of the accused and victims. In this instance, the complainant, Saxon Mullins, chose to appear on a Four Corners program on 7 May 2018 on the ABC. See also the following newspaper articles for coverage of the case.

Court of consenting opinion, Michaela Whitbourn, the Sydney Morning Herald (12-13 May 2018)

Lazarus says ABC painted him as 'guilty man getting away with crime', Michaela Whitbourn, the Sydney Morning Herald (18 May 2018)

REVIEW

1. Describe each of the following: [C]

The Equal Treatment Benchbook | Children's Court Divisions
the test for capacity in *Marion's case* | a special witness who is a child
other special witnesses under s21a of the *Evidence Act*

2. Describe and explain each of the following: [C] [S]

- (a) The arrangements that can be made for special witnesses under s21A of the *Evidence Act*. Give some examples.
- (b) The *Charter of Youth Justice Principles*.
- (c) The Restorative Justice Process
- (d) The language and cultural difficulties which disadvantage Indigenous Australians when encountering the criminal justice system.
- (e) The strategies and arrangements the court can use to ensure a person with a disability is able to achieve a fair outcome in the court process.
- (f) The issues raised by the Women's Legal Service and rape victims in response to the ABC *Four Corners* program which went to air on 7 May 2018 telling the story of the NSW case of *R v Lazarus*, in which the alleged rape victim was prepared to appear.

3. How does *R v Kina* illustrate the various issues faced by Indigenous Australians when they encounter the criminal justice system? To what extent are these issues addressed by the *Anunga Rules*? Prepare a policy paper for consideration by the Queensland Attorney-General in which you make significant proposals for change to the criminal Justice system so that the likelihood of *Kina's Case* repeating itself is reduced. [C] [S] [A] [E] [R]

TOPIC 4: PUNISHMENT AND SENTENCING

CHAPTER 12: SENTENCING OF CRIMINALS

FOCUS SUBJECT MATTER

12.1 INTRODUCTION

12.2 PRINCIPLES (PURPOSES AND FACTORS) AFFECTING SENTENCING DECISIONS

12.3 THE RANGE OF SENTENCING AND POST-SENTENCE OPTIONS

12.4 ANALYSING PRINCIPLES OF SENTENCING TO PREDICT OUTCOMES

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ principles, including the various purposes and discretionary factors, weighed up by judges in arriving at sentencing decisions in Queensland;
- ▶ the range of sentencing orders and post-sentence options available to judges and other organisations, such as the Parole Board, in Queensland; and
- ▶ the process of analysing the principles of sentencing as they apply to scenarios to predict sentencing outcomes (decisions).

12.1 INTRODUCTION

Most judges regard sentencing in the criminal court as their most awesome responsibility. At that climactic moment when the jury returns a verdict of “guilty” or the accused pleads “guilty”, a coalition of considerations weighs down upon the judge now obliged to pass sentence: fairness to the accused, solace to the victim, satisfying the community’s reasonable expectations. Judges do their conscientious best to balance these considerations.

Paul de Jersey, former Chief Justice of Queensland, 2001.

According to the Queensland Sentencing Advisory Council’s (QSAC’s) online publication, the Queensland Sentencing Guide (June 2018), which may be accessed on its website at sentencing.council.qld.gov.au, **sentencing** is ‘... the process of determining and applying the appropriate penalty for a person who has committed an offence. It is a complex exercise that involves a court taking into account a range of factors including the maximum penalty for the offence; the nature and circumstances of the offence and its seriousness, including any harm caused to a victim; the extent to which the offender is to blame for the offence; and sentences imposed for similar cases committed in similar circumstances.’ (p. 3)

The focus of sections 12.2, 12.3 and 12.4 of this chapter is on:

- ▶ comprehending the principles (purposes and factors) that affect sentencing decisions (12.2);
- ▶ comprehending the range of sentencing and post-sentence options available to judges and other agencies, such as the Parole Board of Queensland (12.3); and
- ▶ analysing the principles of sentence in order to predict the most likely sentences and post-sentences which will be imposed in different cases (12.4).



12.2 PRINCIPLES (PURPOSES AND FACTORS) AFFECTING SENTENCING DECISIONS

THE PURPOSES OF PUNISHMENT

The traditionally accepted way of dealing with criminal behaviour, which is behaviour deemed to be unacceptable to the whole community, has been to punish the offenders. There are a number of theories or reasons for punishment of criminals which are set out in the *Penalties and Sentences Act 1992* (Qld), but punishment (or retribution) is only one of them! Indeed, according to the QSAC's Queensland Sentencing Guide (2018), 'No one purpose is the main or dominant purpose for sentencing in all cases. In each case the judge or magistrate will consider the features of the offending and the offender, and decide which purpose or combination of purposes will apply.' (p. 20) Queensland judges and magistrates, therefore, must weigh up all of the different purposes of sentencing to determine which one or more of them is most appropriate in terms of the sentence/s to be imposed on the convicted criminal in the unique circumstances of each case. These purposes are as follows:

1. RETRIBUTION

2. DETERRENCE

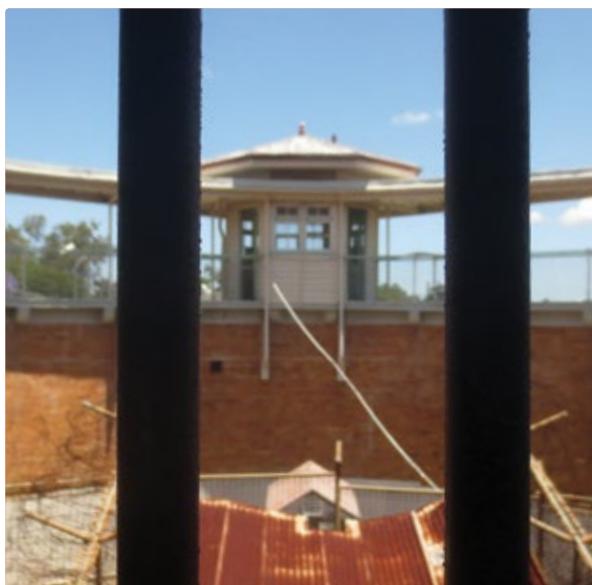
3. DENUNCIATION

4. PREVENTION

5. REHABILITATION

1. RETRIBUTION

There is something of the '*eye for an eye, tooth for a tooth*' about this theory of punishment. Some offences are so serious or prevalent that, the theory says, society should be able to extract its retribution on the offender. In this way, it is seen as morally right for society to punish offenders directly for the hurt they caused to others. It is the oldest of the five theories and was a popular purpose of sentencing in colonial Australia. **The major focus of this theory is on the wrongdoing of the offender and the seriousness of the offence.** In one form of this theory it is held that the punishment should be directly proportional to the severity and to the nature of the offence. It is often manifested in the saying 'the punishment should fit the crime.' At times it is referred to as 'the just desserts' approach.



2. DETERRENCE

The deterrent theory of punishment operates in two ways. First, there is **specific deterrence** which says that individual offenders must be punished so they learn not to commit further offences. The punishment is to deter them from re-offending. Second, there is **general deterrence** which operates as a warning to others so that they may be deterred from committing similar offences.

One of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so.

R v Radich [1954] NZLR 86, 87.

Deterrence has been used to justify very severe penalties for certain types of offences. An example is drug offences under the *Drugs Misuse Act 1986* (Qld). However, the establishment of the Drug Court in this State was an acknowledgment that severe penalties are not always effective deterrents.

You can see that the deterrence theory depends upon both the severity of the punishment being known by potential offenders and on their having that severity in mind prior to committing an offence. However, many offences, including serious offences such as murder, are committed on the 'spur of the moment' by people who have never offended before and are unlikely to offend again.



3. DENUNCIATION

This theory says that imposing punishment is one of the most effective ways to denounce unacceptable behaviour. It is a way of educating the whole community as to what is appropriate behaviour. It is a symbolic, collective statement of society's disapproval of the criminal behaviour and reinforces that certain acts are wrongful.

'...the community delegates to the Court the task of identifying, assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct'

Inkson v R (1996) 6 Tas R 1, 16.

4. PREVENTION

The focus of this theory is the **protection of society**. The theory says society can best be protected by **preventing those offenders that seem likely to re-offend from doing so**. This can be achieved by keeping offenders in prison for long periods, even for life in the case of very violent, dangerous offenders.

In some instances, particularly where there is a real indication that an offender is likely to repeat that sort of offence, it is seen as necessary to prevent such a person from repeating the offence, by taking away the opportunity to do so. For example, a court might remove the offender from a position in which he might be able to commit offences of indecent assault on children.

Another application of the prevention theory is to prevent or minimise the likelihood of crime from being committed by preventive measures such as good surveillance, detention monitors and increased security. A preventative approach against graffiti offences includes the use of graffiti resistant materials and paints, restrictions on the sale of spray paints, making non-water soluble marker pens illegal and maintaining lighting and electronic surveillance cameras over public areas such as train stations.

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

Mason CJ, Brennan, Dawson and Toohey JJ, *Veen v The Queen [No 2]*(1988) 164 CLR 465, 476–477.

5. REHABILITATION

For the greater part of the 20th century and now in the 21st century the rehabilitation theory of punishment appears to have been dominant. It emphasises treatment and therapy in the belief that if you can identify and eliminate the underlying causes of a person's criminal behaviour a lawabiding member of society could emerge. The aims are to change the offender's personality, beliefs, skills or habits so that he or she will not re-offend, and to **return the offender to normal life in the community**. Perhaps the development of psychology in the 20th century and consequent awareness of the origins and complexity of human behaviour explain the growth of the rehabilitative theory. However, purely practical considerations also play a part, such as the expense of keeping prisoners in already overcrowded jails.



WHAT DO YOU THINK?



Read the following quotations about criminal justice and identify which of the above purposes for sentencing of criminal offenders is/are embodied in each quotation. [C] [A]



Men are not hanged for stealing horses, but that horses may not be stolen. (George Savile Halifax, Lord (1633-95), English statesman, author. Political, Moral, and Miscellaneous Thoughts and Reflections, "Of Punishment" (1750))

If he who breaks the law is not punished, he who obeys it is cheated. This, and this alone, is why lawbreakers ought to be punished: to authenticate as good, and to encourage as useful, law-abiding behavior. The aim of criminal law cannot be correction or deterrence; it can only be the maintenance of the legal order. (Thomas Szasz (b. 1920), U.S. psychiatrist. The Second Sin, "Punishment" (1973))

The generality of men are naturally apt to be swayed by fear rather than reverence, and to refrain from evil rather because of the punishment that it brings than because of its own foulness. (Aristotle (384-322 B.C.), Greek philosopher. Nicomachean Ethics, Bk. 10, Ch. 9)



WHAT DO YOU THINK? CONTINUED...



Let us have compassion for those under chastisement. Alas, who are we ourselves? Who am I and who are you? Whence do we come and is it quite certain that we did nothing before we were born? This earth is not without some resemblance to a gaol. Who knows but that man is a victim of divine justice? Look closely at life. It is so constituted that one senses punishment everywhere. (Victor Hugo (1802-85), French poet, dramatist, novelist. *Les Misérables*, Part 4, Bk. 7, Ch. 1 (1862))

In its function, the power to punish is not essentially different from that of curing or educating. (Michel Foucault (1926-84), French philosopher. *Discipline and Punish: The Birth of the Prison*, Part 4, Ch. 3 (1975))

Retaliation is related to nature and instinct, not to law. Law, by definition, cannot obey the same rules as nature. (Albert Camus (1913-60), French-Algerian philosopher, author. *Resistance, Rebellion and Death*, "Reflections on the Guillotine" (1961))

All in all, punishment hardens and renders people more insensible; it concentrates; it increases the feeling of estrangement; it strengthens the power of resistance. (Friedrich Nietzsche (1844-1900), German philosopher. *The Genealogy of Morals*, Essay 2, APH. 14 (1887))

Distrust everyone in whom the impulse to punish is powerful! (Friedrich Nietzsche (1844-1900), German philosopher. *Thus Spoke Zarathustra*, pt. 2, Ch. 29 (1883-91))

Our system is the height of absurdity, since we treat the culprit both as a child, so as to have the right to punish him, and as an adult, in order to deny him consolation. (Claude Lévi-Strauss (b. 1908), French anthropologist. *Tristes Tropiques*, Ch. 38 (1955), commenting on the system of justice)

Any punishment that does not correct, that can merely rouse rebellion in whoever has to endure it, is a piece of gratuitous infamy which makes those who impose it more guilty in the eyes of humanity, good sense and reason, nay a hundred times more guilty than the victim on whom the punishment is inflicted. (Marquis de Sade (1740-1814), French author. Letter, 21 May 1781, to his wife from Vincennes prison (published in *Selected Letters*, no. 8, ed. by Margaret Crosland, 1965))



WHAT DO YOU THINK?



1. The *Penalties and Sentences Act 1992* (Qld) states that judges can use a combination of two or more of these purposes when sentencing. In your opinion, could, or does, this result in inconsistency in punishments given? [E]
2. Which of the five purposes do you think is the most effective? Give reasons for your answer, including your criteria for determining effectiveness. Should it be the sole purpose? [E]
3. It has been said that a series of competing sentencing purposes leads to a 'cafeteria system' in which judges can pick and choose at whim. Should there be a hierarchy of sentencing aims? If yes, set out which purpose you think should have priority and which should be the last. If no, give reasons for your opinion. [E]
4. Are there other purposes that could, in your opinion, be added to the list? For example, New Zealand legislation provides that a purpose of sentencing is 'to provide for the interests of the victim of the offence' and United Kingdom legislation provides that a purpose of sentencing is 'the making of reparation by offenders to persons affected by their offences.' [E]
5. Same crime, same time? In some non-common law countries judges have no discretion when sentencing. They impose the penalty laid down in the statute, without variation. This is sometimes referred to as truth in sentencing. What would be the advantages and disadvantages of introducing such a sentencing system in Queensland? [E]
6. Should there be minimum as well as maximum penalty for all offences? [E]

SENTENCING FACTORS FOR JUDGES TO CONSIDER

Although a sentencing judge or magistrate must stay within the penalty range set out in the Act, the fact that there is a range means he or she can exercise discretion when imposing a penalty. As a general rule the **maximum penalty** prescribed in the *Criminal Code* or other Act is reserved for the most serious examples of the particular offence. This explains why offenders can receive different sentences even though they have been convicted of a similar offence. It occurs because there are **many factors a judge or magistrate has to take into account when imposing a sentence**.

As well as balancing the competing demands of the five purposes or aims of punishment, the courts also take into account other factors when sentencing offenders. The court has to weigh up the seriousness of the offence, the circumstances that led to the commission of the offence, the background of the offender, the effect of the sentence on the offender and others, the behaviour of the offender since committing the offence, and the effect of the offence on the victim and the community.

As explained in the QSAC's Queensland Sentencing Guide (2018), the factors to be considered by judges in arriving at the most appropriate sentence/s for each case will be either mitigating or aggravating, which are described in the 2018 Guide as follows. **Mitigating factors** (or circumstances) are details about the offender and their offence that tend to reduce the severity of their sentence. **Aggravating factors** (or circumstances) are details about the offence, the victim and the offender that tend to increase the person's culpability and the sentence they receive.

The factors that judges and magistrates in Queensland should consider are listed in s9 of the *Penalties and Sentences Act*, and include:



- ▶ imprisonment should only be imposed as a last resort;
- ▶ whether violence has been used;
- ▶ how common the offence is;
- ▶ the distress caused to innocent people (for example, the effect of burglary upon home owners);
- ▶ whether the offence is a 'one off' or part of a series of offences (for example, one offence of stealing compared to a number of break and enter offences committed by the same person);
- ▶ how much assistance the offender gave to the police; and
- ▶ the amount of time already spent in custody.



It is also necessary to take into account **factors that are relevant to the particular offender**, for example, the effect that imprisonment is likely to have on an offender's family. The fact that children may be left without a parent can be a relevant factor in determining whether an offender should go to jail. Similarly, the number of previous offences of a person is relevant, because it may be thought that a person who offends repeatedly ought to be treated more harshly or be given less of a chance than a person who has no previous convictions.

Finally, you should know that there are some offences where the sentencing discretion is removed by a statute and **mandatory sentences** are provided. For example, murder carries life imprisonment which cannot be mitigated (reduced) or varied, and a magistrate must give a term of imprisonment as part of the punishment if a person is convicted of three drink driving offences within a five year period.

However, apart from these, Queensland has not experimented with mandatory sentences although the issue has been raised at several elections. The arguments typically advanced for mandatory sentencing are that the public is supportive and that it would be an effective deterrent for repeat offenders. The main criticism of mandatory sentences is that they ignore the sentencing principle that each case has to be looked at individually and that penalties should be mitigated accordingly. An 18-year-old who is a first offender would be sentenced in the same way as a 50-year-old with a record of convictions, when it may be better for the punishment to be tailored to the personal circumstances of each. Mandatory sentences also lead to increased use of detention centres and prisons and go against the principle that prison should be the last resort option.



WHAT DO YOU THINK?



Some states in Australia and America have introduced mandatory sentencing for a range of offences, and for offenders who have been convicted of three repeated offences within a given time period – known as the ‘three strikes and you are out’ rule.

Would you be in favour of mandatory sentencing being introduced in Queensland? Conduct a mock Queensland Parliament debate on the topic that mandatory sentencing should be introduced in Queensland. [A] [E] [R]

As well as the other matters already mentioned, the following are of particular importance in sentencing offenders.

PLEAS OF GUILTY

If a plea of guilty is accompanied by genuine remorse (sorrow) then a lesser sentence can normally be expected. It is common for judges or magistrates to refer to an early plea of guilty, saving the community the cost and time associated with a full trial, as being relevant to the sentence they have given. Pleas of guilty are also very relevant in offences such as indecent dealing with young girls because a plea saves a young complainant the distress of a trial.

CO-OPERATION WITH THE POLICE

An offender who has been co-operative rather than obstructionist will have saved time and effort for the investigating officers and the court.

RESTITUTION TO THE VICTIM

Restitution means the return of property or its money value to the injured party by the offender. As with pleas of guilty, the court must be satisfied that an offer by an offender to make restitution is a genuine sign of remorse rather than merely an attempt to ‘buy’ a lesser sentence.

PRE-SENTENCE REPORTS

A judge or magistrate can request a pre-sentence report, particularly in cases where it is felt that the offender may be suffering from some psychiatric condition. The pre-sentence report is frequently given by a psychologist or psychiatrist and the judge or magistrate may give it due weight when passing sentence.



INFORMERS

Many court cases have held that offenders who act as police informers are entitled to a 'very substantial discount' in their sentences. This is particularly true in drug offences where information given by offenders may lead to the conviction of numerous other people.

INDEMNITIES

Sometimes, particularly in cases involving large 'networks' of offenders, an indemnity is offered to one person, provided they give evidence against other people in the network. An indemnity is a document given by the Attorney-General which states that informants will not be prosecuted provided they cooperate in every respect with the investigating authorities, give a truthful account of their activities and the activities of others, and give truthful evidence in subsequent prosecutions of any other person to whom their evidence is relevant.

12.3 THE RANGE OF SENTENCING AND POST-SENTENCE OPTIONS

CUMULATIVE AND CONCURRENT SENTENCES

Where a person is convicted of more than one offence, sentences can be directed to be served as follows:

- ▶ **concurrently** — sentences are served at the same time, so that the shortest sentence is subsumed into the longest sentence (also called the head sentence). There is a presumption in favour of sentences being served concurrently in Queensland with this to occur unless the court orders otherwise.
- ▶ **cumulatively or consecutively** — each sentence for each conviction is served one after the other. There are circumstances in which a sentence of imprisonment imposed must be ordered to be served cumulatively, such as where the offender has been convicted of a serious violent offence committed while in prison or while on parole.
- ▶ **partially concurrently and partially cumulatively** — some sentences are served concurrently, while others will be served after the term of the head sentence has ended or commence at a time set by the judge (so they overlap).

SOURCE: QUEENSLAND SENTENCING ADVISORY COUNCIL, QUEENSLAND SENTENCING GUIDE (SENTENCINGCOUNCIL.QLD.GOV.AU), 2018 (EXCERPTS)

The following sentencing options are available to judges and magistrates under the *Penalties and Sentences Act 1992 (Qld)*. **Non-custodial sentences** (such as a fine, community service or probation) do not involve the person being sentenced to imprisonment, while custodial sentences do comprise of a period of imprisonment for the convicted criminal. A **custodial sentence**, or imprisonment, is also referred to as **incarceration**.





ABSOLUTE DISCHARGE - RELEASE WITH NO RECORD OF CONVICTION

Under the Act the court can make an order where **no punishment or only a nominal punishment** is imposed on the offender. Before making such an order, the court must have regard to:

- ▶ the offender's character, age, health and mental condition;
- ▶ the nature of the offence;
- ▶ the impact that recording such a conviction will have on the offender's economic or social wellbeing, or chances of employment; and
- ▶ all the circumstances of the case.

When determining the character of an offender, the court looks at the number and seriousness of any prior convictions and the contributions made by the offender for the benefit of the community.

When an order not to record a conviction is made, it means that outside the court system the offender can state that he or she has not been convicted of any criminal offence. However, not recording a conviction does not mean the courts also throw away the record of that conviction. The court does keep a record of the conviction and it forms part of the criminal history of the offender. If ever the person is convicted of a subsequent offence, it will be referred to as a relevant factor in sentencing.

Not recording a conviction is available with other sentencing options such as community service and fines. Under s190 of the Act, when a person is summarily convicted of an offence relating to property, the magistrate may release the offender without imposing any sentence. This can be done when the offender has paid the victim compensation for the damaged property.

SUSPENDED SENTENCE

When a judge or magistrate sentences an offender to imprisonment for five years or less, he or she may suspend the sentence – in part or whole – where it is considered appropriate to do so. This option is really only available if the convicted person has not been previously convicted of a serious offence. The court will also set an operational period during which the offender must not commit another offence. If this occurs, the original sentence may be imposed.

FINE OPTION ORDER

A fine option order **gives a defendant an opportunity to perform unpaid community service instead of paying a fine**. It is available to offenders who can show to the satisfaction of the court that they are unable to pay a fine or that by paying the fine their families would suffer economic hardship. During the period of a fine option order, the offender may decide instead to pay the balance of the outstanding fine.

FINE

A court may impose a fine which may be in addition to, or instead of, any other sentence. In imposing a fine, the judge or magistrate also states the period of imprisonment if the fine is not paid. The offender is usually given time within which to pay the fine.



COMMUNITY SERVICE ORDERS

Like a fine option order, this order can only be made with the consent of the offender. The court must be satisfied that the offender is a suitable person to do community work. It is an alternative to imprisonment and in that respect is similar to probation. The work is unpaid and the order must require a total service period of not less than 40 hours or more than 240 hours. Such an order is often seen by courts as a 'last chance' before jail, particularly for young offenders.

PROBATION

Probation is an order releasing the offender, but requiring him or her to be supervised by an officer of the Queensland Corrective Services Commission. The offender must report to that officer regularly and is not allowed to leave the State or their home address without permission. Most importantly of all, the offender promises, as part of the order, not to break the law.

Probation is regarded as being particularly appropriate for young offenders who are thought likely to benefit most from supervision. Probation can be for a period up to three years. Sometimes special conditions are attached to probation orders, for example, that an offender undertakes psychological and psychiatric testing and treatment. If an offender breaches any conditions of her probation then she is brought back before the court which sentenced her to probation to be re-sentenced for the original offence together with a separate offence of breach of probation.

RESTITUTION OR COMPENSATION ORDER

The *Penalties and Sentences Act* gives a court power to order restitution of property or to pay compensation for damage to property or for injury suffered by any person caused by the offence. A common example of restitution is either the return of goods stolen or the payment of their value. A court can also order that compensation be paid to a police officer as well as to the victim of the crime. Applications for compensation for injuries can be made after the trial.

GOOD BEHAVIOUR BOND/RECOGNISANCE

A requirement to appear before a court if called to do so and to 'be of good behaviour' (not to break the law) for a set period (up to three years), which requires the person and anyone acting as a 'surety' to pay an amount of money if the offender breaks the law or does not comply with other conditions of the order. Other conditions that may be ordered include attending a drug assessment and/or education session. No conviction is recorded.

GRAFFITI REMOVAL ORDER

An order of up to 40 hours to remove graffiti, usually within 12 months, with or without a conviction being recorded. The same types of requirements that apply to probation orders and community service orders also apply to people subject to a graffiti removal order. The making of this order is mandatory where the person is convicted of causing wilful damage to property that is in a public place or visible from a public place by graffitiing it, or is in possession of an instrument that has, is or is reasonably suspected of being about to be used for graffiti (e.g. a spray can) unless the person is not able to comply with the order because of a physical, intellectual or psychiatric disability

DRIVER LICENCE DISQUALIFICATION

An order disqualifying a person from holding or obtaining a Queensland driver licence absolutely or for a specified period of time. Some traffic-related offences carry a mandatory minimum disqualification period which the court must impose.

INTENSIVE CORRECTION ORDER

A sentence of imprisonment of one year or less ordered to be served in the community under supervision with a conviction recorded. The offender must comply with a number of conditions, including reporting twice weekly to an authorised corrective services officer, taking part in counselling and other programs as directed and performing community service. The offender must agree to the order being made and to comply with the requirements of the order. If the offender does not comply with the conditions of the order, a court may revoke the order and order the person to serve the remaining period of the sentence in prison.

NON-CONTACT ORDER

An order prohibiting contact with the victim or another person, or going to a particular place, or within a particular distance of that place, for a set period. This can be made for a serious (indictable) offence committed against a person and whether or not a conviction is recorded. A non-contact order is separate to a protection order under the *Domestic and Family Violence Protection Act 2012* (Qld) and can be made in addition to any other order made.

BANNING ORDER

An order banning the person from entering or remaining in a certain licensed place or type of licensed place, or entering a particular area near a licensed premises during certain hours, or attending a particular public event at which alcohol will be sold. Certain criteria must be met, including that the offence involved the use, threatened use or attempted use of unlawful violence to a person or property, or an offence of drug trafficking, or supply of a dangerous drug, and was committed in licensed premises or in a public place near licensed premises. A court may make this order whether or not a conviction is recorded.

CONTROL ORDER

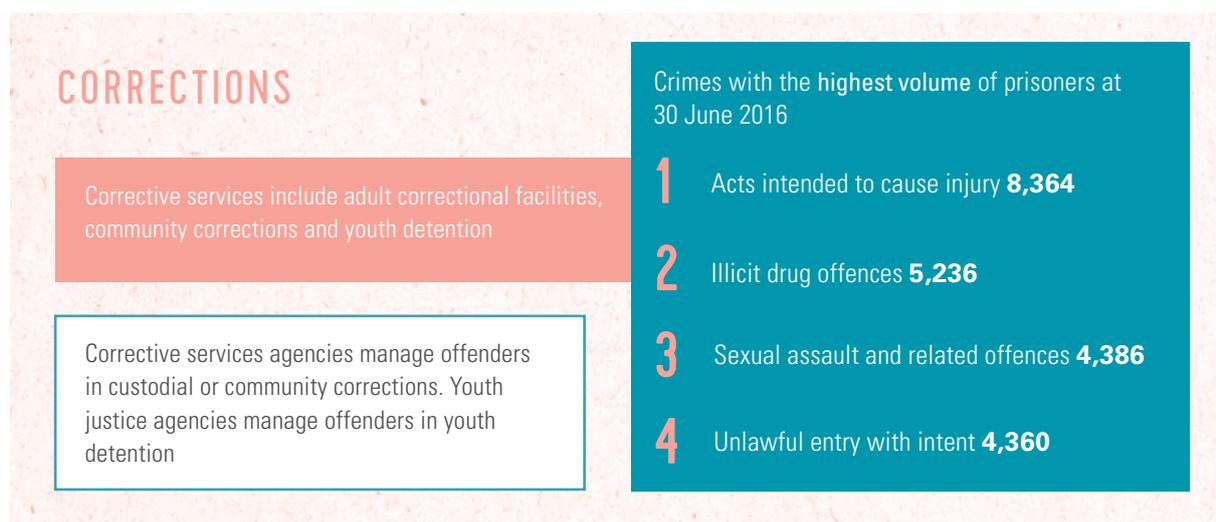
An order of up to five years, whether or not a conviction is recorded, imposing conditions on an offender with the intention of protecting the public by preventing, restricting or disrupting the offender's involvement in serious criminal activity and enabling the order to be enforced. Conditions may include, for example, the offender being required to report to police, tell police if they change address, prohibiting them from associating with a stated person or class of person or from entering or being near a stated place. Control orders only can be made if an offender is a member of a criminal organisation.

SOURCE: QUEENSLAND SENTENCING ADVISORY COUNCIL, QUEENSLAND SENTENCING GUIDE (SENTENCINGCOUNCIL.QLD.GOV.AU), 2018 (EXCERPTS)



IMPRISONMENT

According to the following infographic of the Australian Bureau of Statistics, the most common crimes for which offenders are given sentences of imprisonment in Australia are acts intended to cause injury, illicit drug offences, sexual assault offences and unlawful entry with intent, as illustrated in the infographic below.



Since the abolition of the death penalty (capital punishment) in Australia, **imprisonment is the most severe form of punishment available**, because it isolates the offender from the rest of society and restricts most of his/her rights and freedoms. Although the *Queensland Criminal Code 1899* and other criminal Acts usually specify a maximum period of imprisonment, judges and magistrates rarely apply the maximum. In imposing a period of imprisonment, the court may decide that a term for different offences be served at the same time (**concurrently**) or one after the other (**cumulatively**).

Under the current law, a **'life' sentence** is not defined. Serious offences in the *Criminal Code (Qld)* which carry a life sentence as the maximum penalty include murder, attempted murder, armed robbery, arson and rape. The period of imprisonment will be determined by when the prisoner is released on parole. Usually, a life prisoner will not be eligible for parole until after 14 years. According to the Queensland Sentencing Advisory Council's *Sentencing Guide (2018)*, the minimum time (mandatory minimum non-parole periods) that offenders sentenced to life imprisonment must stay incarcerated (in prison) is set out in the *Corrective Services Act 2006 (Qld)* as follows:

- ▶ 30 years: murder of more than one person or by a person with a previous murder conviction.
- ▶ 25 years: murder of a police officer.
- ▶ 20 years: murder other than listed above, or repeat serious child sex offence.
- ▶ 15 years: any other life sentence imposed for another offence e.g. rape.



WHAT DO YOU THINK?



Should life mean life? That is, should life sentences really be for the whole life of the criminal offender, rather than allowing parole to be applied for after a period of time specified by the sentencing judge?

Weigh up the viewpoints for and against the contention that premeditated killers and serious sexual offenders should never be freed from prison if they receive life sentences for their crimes. Base your answer on the facts, viewpoints and outcomes in the following case as well as other cases that you locate as a result of your research. Synthesise the



WHAT DO YOU THINK? CONTINUED



information which you glean from the source below and your own selected sources in an email to the Queensland Attorney-General to justify your answer/decision to the above question and its implications in terms of bringing about the most just and equitable outcomes for stakeholders affected by the sentencing of criminals who have committed the most heinous of crimes in the eyes of our society. [C] [S] [A] [E] [R]

MOTHER OF MURDERED TEEN GABRIEL MEYER WANTS KILLER DAMON FRANK CALANCA TO REMAIN BEHIND BARS

SOURCE: VANDA CARSON, THE SUNDAY MAIL (COURIERMAIL.COM.AU), 22 APRIL 2018 (EXCERPTS)

THE mother of a Queensland teenager brutally murdered by his sister's jilted lover says she "desperately hopes" her son's killer will remain behind bars. Sherrie Meyer, mother of 17-year-old Gabriel Meyer, says she and husband Doug believe killer Damon Frank Calanca "poses a serious threat of violence to the Queensland community. We wholeheartedly support the decision of the Queensland Parole Board in denying parole to Damon Calanca.

She made the comments after Calanca launched his latest bid to be released from prison, 25 years after he killed Gabriel as revenge after his sister, Fawn, dumped him and moved to the US to study at university. Fawn told Calanca she would only come home if something happened to her family.

Days later, on January 12, 1993, Calanca lured her brother, Gabriel, to his Innisfail home and gave him a drink laced with at least 14 common cold tablets. Calanca then bound the teen's hands and feet, pulled a plastic bag over his head and suffocated him. Calanca then wrapped Gabriel's body in carpet, drove it south of town, and buried it in a shallow grave.

He was sentenced to life for the cold-blooded murder. Sherrie Meyer went on to co-found the Queensland Homicide Victims' Support Group and to campaign for victims' rights.

On March 29, Calanca filed documents in the Brisbane Supreme Court asking to be freed from Southern Queensland Correctional Centre in the Lockyer Valley. Calanca, now aged 50, told the court he believes the state parole board decision to deny him parole should be overturned because it is not based on the "individual merits" of his case. He argued the parole board should have put more weight on "the professional opinions they have access to." Previous parole bids have been rejected because psychiatrists have told the court Calanca would be a danger to any of his girlfriends or their relatives if they broke up with him.

In court before Justice Martin Burns last Wednesday, Calanca said the parole board had commissioned "five community risk assessments" on him and all agreed he was a "moderate to low risk of reoffending" and that he "can be managed in the community". Justice Burns told Calanca, who was self-represented via video link from prison, that his case "probably should be" struck out, as requested by the Queensland Parole Board, because it was incomplete.

REINTRODUCTION OF THE DEATH PENALTY IN AUSTRALIA?

There is, from time to time, public pressure in Australia to reintroduce the death penalty (capital punishment) for murderers, paedophiles and terrorists.



PRACTICAL APPLICATION

Read the following authoritative source from the website of the Parliament of Australia and then answer the focus questions below it.

ATTITUDES TOWARDS THE DEATH PENALTY AT HOME AND ABROAD

SOURCE: GENEVIEVE BUTLER, PARLIAMENT OF AUSTRALIA (APH.GOV.AU), POSTED 20 FEBRUARY 2015 (EXCERPTS)

The debate over the death penalty reignited in early 2015 with the news that Indonesia would execute two Australians who had been convicted of heroin trafficking. Foreign Affairs Minister Julie Bishop said Australia would seek clemency for Andrew Chan and Myuran Sukumaran, while Shadow Minister for Foreign Affairs Tanya Plibersek also called for a stay of execution for the 'Bali Nine' drug smugglers. More than 150,000 Australians signed a petition asking for mercy for the two men, who face death by firing squad.

The pleas reflect not only the abhorrence of many towards the death penalty, but also Australia's international obligation to oppose it. Under the Hawke Government in 1990, Australia ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which is based on the principle that the abolition of the death penalty enhances human rights and human dignity. Obligations include a commitment to lobby against the death penalty internationally.

There is, however, a somewhat inconsistent attitude to the death penalty amongst Australians. Public opinion polls reveal marked differences, depending on whether those on death row are Australians or foreigners, and whether the crimes were committed in Australia or overseas.

When it comes to domestic murder convictions, Australians are resolutely opposed to the death penalty, with 67 percent preferring imprisonment, and only 23 percent favouring capital punishment, according to a 2009 poll. Swap the crime to drug offences committed overseas, and there is suddenly less opposition to capital punishment. When a January 2015 Morgan poll asked respondents: 'In Malaysia, Sri Lanka, Indonesia, Singapore and some other countries, the penalty for drug trafficking is death. If an Australian is convicted of trafficking drugs in another country and sentenced to death, in your opinion, should the penalty be carried out or not?', 52 percent answered 'yes', and 48 percent 'no'.

When terrorism offences enter the fray, views on the death penalty shift yet again. A small majority (52.5 percent) of Australians favour the death penalty for deadly terrorist acts in Australia. Former Prime Minister John Howard favoured the death penalty in Indonesia for the perpetrators of the 2002 Bali bombings, which claimed 202 lives, including 88 Australians.

However, irrespective of public opinion, federal laws, as well as United Nations conventions, preclude the reintroduction of capital punishment in Australia.

In place since the early colonial days, the death penalty was finally uniformly abolished by 2010.

The first recorded execution took place in Sydney on 27 February 1788, when Thomas Barrett was hanged for stealing food from the public stores. In the nineteenth century as many as 80 people per year were hanged for a range of crimes including sheep stealing and forgery, as well as murder and manslaughter. From Federation in 1901 until 1967, 114 people were legally executed.

The last man to receive the death penalty in Australia, Ronald Joseph Ryan, was hanged in 1967 in Victoria. He was executed for shooting a prison guard during an escape from Pentridge Prison. Ryan's defence counsel, Dr Philip Opas QC, consistently maintained that Ryan was innocent. 'I became convinced that he couldn't have done it and he didn't do it... Although I was in favour of capital punishment until the Ryan case, I felt that here was an innocent man who'd been executed,' Opas said in 2003.

PRACTICAL APPLICATION CONTINUED...

The first state to abolish the death penalty was Queensland, in 1922, while NSW was the last state to do so. NSW abolished the death penalty for murder in 1955, but retained the death penalty for treason and piracy until 1985, when the *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW) came into being.

JURISDICTION	ABOLISHED	LAST EXECUTION
Queensland	1922	1913
Tasmania	1968	1946
Commonwealth	1973	-
ACT	1973	-
NT	1973	1952
Victoria	1975	1967
South Australia	1976	1964
Western Australia	1984	1964
New South Wales	1955/1985	1940

SOURCE: M WALTON, THE DEATH PENALTY IN AUSTRALIA AND OVERSEAS, NSW COUNCIL OF CIVIL LIBERTIES, 2005

The death penalty for crimes under federal and territory laws was abolished by the Whitlam Government in the *Death Penalty Abolition Act 1973*. It was not until 2010 that the prohibition on the death penalty was extended to state laws, with the *Commonwealth Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010*. The aim of the Act was to ensure that the death penalty could not be reintroduced anywhere in Australia. Additionally, former High Court Justice Michael Kirby noted that the ICCPR Protocol 'represents an obstacle to any attempt on the part of a state or territory of Australia to restore capital punishment'.

1. What news reignited the death penalty debate in Australia in early 2015 and how did Australian politicians and citizens react to it? [C]
2. What did the Australian Government do in 1990 in order to cement its international commitment to the abolition of the death penalty internationally? On what fundamental principle was this commitment based? [C]
3. What statistics are provided in the above source to demonstrate that there is '... a somewhat inconsistent attitude to the death penalty amongst Australians'? [C]
4. Irrespective of public opinion in Australia, what laws and conventions preclude the reintroduction of capital punishment in Australia? [C]
5. In what year was the death penalty finally abolished throughout Australia? [C]
6. In what year was the first recorded execution in Sydney and for what crime? [C]
7. What was controversial about the case of Ronald Ryan, the last person in Australia to be executed by imposition of the death penalty? How might this case have led to the abolition of the death penalty in Victoria and the whole of Australia? [C] [A] [E]

RESEARCH

1. Conduct research about criminal cases in Australia, including any one or more of the following examples, in relation to which there have been **calls for the death penalty (capital punishment) to be reintroduced** on the ground that it is a just and equitable (i.e. proportional to each offender's relevant crime/s committed) punishment for the perpetrators of heinous crimes, particularly serious sexual offences and premeditated murders. [S] [C]
 - ▶ Zlatko Sikorsky's alleged assault, torture and murder of Larissa Beilby in Logan City.
 - ▶ John Edwards' killing of his two teenage children in Sydney who were in the custody of his estranged wife at the time.
 - ▶ Adrian Bayley's rape and murder of Jill Meagher in Melbourne.
 - ▶ Martin Bryant's massacre of 35 people at Port Arthur, Tasmania.

2. As you carry out your research, make sure you consider this issue from different points of view, including, but not limited to, those of the following stakeholders in our society, before **coming to a decision, and justifying your decision with reasons and evidence** drawn from your research, **as to whether you believe the death penalty should be a sentencing option for judges in Australia to impose on perpetrators of heinous crimes.** [A] [E]
 - ▶ George Christensen (a Queensland member of the Federal Parliament's House of Representatives who, in 2013, stated, "It is my personal view that when we see such heinous crimes as what we witnessed in Melbourne with Jill Meagher, who was sexually assaulted and murdered, the death penalty is probably warranted in situations like that." (SOURCE: DAILYMERCURY.COM.AU, 14 MARCH 2013).
 - ▶ Australians Against Capital Punishment (aacp.wordpress.com).
 - ▶ Amnesty International Australia (amnesty.org.au).

POST-SENTENCE ORDERS

REMISSIONS

A remission is a **shortening of a prisoner's term of imprisonment** and is granted as a reward for obeying prison rules and for good conduct. Extra remission can also be granted for doing extra work or working longer.

RELEASE TO WORK AND HOME DETENTION

The release to work scheme allows prisoners, especially long-term ones, to **adjust to a normal working life**. A prisoner may apply for this any time after they have served half their sentence. The prisoner is released during the day to perform work outside the prison but returns to spend the evening in prison. Similarly, home detention allows a prisoner to serve part of a sentence in his or her home in preparation for release from prison.

PAROLE

Parole is the **conditional and supervised release of a prisoner before he or she has served the full term of imprisonment**. Whether a person should be released on parole is a decision made by the Queensland Parole Board. The hearings are closed so there are no lawyers and no transcript of the proceedings. Prisoners are entitled to make application as often as they like. Ordinarily a prisoner is eligible for parole after serving half the imposed sentence. Anyone convicted of a serious violent crime, such as rape, torture and manslaughter, can be declared by the judge during sentencing to be a **Serious Violent**

Offender. This means they must serve 80% of their sentence before being considered for parole.

The sentencing judge or magistrate may recommend a **'non parole period'**, that is, a minimum period during which the offender is not eligible for parole. The Board is not bound to follow this recommendation, but often does. It is important to understand that, although released from jail, a prisoner on parole is still serving his or her sentence and if the conditions of parole are breached, the prisoner can be returned to jail to serve out the original sentence. A prisoner on parole (parolee) is under the strict supervision of a Community Correctional officer and conditions are imposed. These conditions are similar to those discussed above for a probation order. If the parolee does not comply with the conditions, he or she is returned to prison to complete the sentence.

PRACTICAL APPLICATION

QUEENSLAND 'NO BODY, NO PAROLE' LAWS AIM TO BRING CLOSURE TO GRIEVING FAMILIES

SOURCE: ANTHONY TEMPLETON, THE COURIER-MAIL (COURIERMAIL.COM.AU), 11 AUGUST 2017 (EXCERPTS)

QUEENSLAND's newly introduced 'no body, no parole' laws are the strongest in the country, Attorney-General Yvette D'Ath says. Killers and their accomplices will now not be released from prison until they tell authorities where their victims' bodies are located, after the legislation yesterday passed Parliament with bipartisan support.

The Government adopted Opposition amendments to expand crimes covered to include unlawful striking causing death, misconduct with regard to corpses, and accessories to the charge of manslaughter. Ms D'Ath said: "We hope this Bill sends a clear message to offenders who are convicted of a homicide offence, that if you want to get parole then you must co-operate with the police and the investigators to identify where that body is."

Speaking on the legislation in Parliament this week, Opposition corrections spokesman Tim Mander was reduced to tears as he recounted the story of the Pullen family. Leanne Pullen's son Tim was killed near Collinsville in 2012, but his body has never been recovered, despite six people being charged and sentenced in relation to the crime.

Mrs Pullen said she hoped the new laws would create an incentive for killers to provide closure for families. "I know that this legislation isn't necessarily going to make all perpetrators talk, because there's ones out there that want people to suffer," she said. "But the thought of never having parole surely is an incentive to make them talk."

Shadow Attorney-General Ian Walker said the reforms would rebalance the scales of justice in favour of families of Queensland homicide victims. "Both of these families have suffered tragedies and deserve the opportunity to say goodbye to their loved ones and give them the appropriate farewell they deserve," he said.

1. What new laws have been passed in relation to applications for parole? [C]
2. What is meant by these laws being passed '... with bipartisan support'? [C] [S]
3. What purposes are the new laws intended to achieve, according to the various stakeholders in this article? [C]





WHAT DO YOU THINK?



Read the following online news article in relation to the Queensland Parole Board's decision to deny parole to Stephen Renwick, one of the men involved in the murder of Timothy Pullen, and then answer the following question.

Was the Parole Board's decision in the following hearing, in the light of the new Queensland 'No body, no parole' laws, a just and equitable outcome in terms of fairly balancing the competing rights of Mr Renwick, who applied for parole, and the family of the victim, Mr Pullen? [A] [E]

MAN LINKED TO TIMOTHY PULLEN MURDER DENIED PAROLE

SOURCE: THOMAS CHAMBERLIN & CHRIS CLARKE, THE COURIER-MAIL (COURIERMAIL.COM.AU) 16 FEBRUARY 2018 (EXCERPTS)

ONE of the men charged over the death of Mackay man Timothy Pullen has been refused parole after a hearing was held under the state's new "No Body, No Parole" laws. Stephen Renwick is serving a five-year jail sentence for disposing of the corpse near Collinsville, west of Airlie Beach, after Mr Pullen was killed over a drug debt in April 2012.

Renwick fronted the Parole Board last month via video link. This afternoon the Parole Board published its decision, stating it was not satisfied Renwick had cooperated satisfactorily in the investigation to help police find the body of Mr Pullen. In its decision, it said it did not accept the location given by Renwick is the true area. Among reasons for the decision, it also said he had lied to police when approached in 2012.

Under the new No Body, No Parole laws, a prisoner can be freed if the Parole Board decides they have made a good attempt to "identify the victim's location". "If he was granted parole, I think our hope of ever finding Tim's remains is lost," Mrs Pullen told The Courier-Mail last month.

In the past 20 months, Renwick — who disposed of Timothy's body near Collinsville, west of Mackay — has given police two locations of where Timothy's remains were buried. When Renwick first took police to what he claimed was a bush burial site, he did not speak to investigators and took a lawyer with him. The search, which did not find anything, was part of Renwick's plea deal with the Office of the Director of Public Prosecutions.

Detectives approached Renwick again late last year, explaining the No Body, No Parole laws. He gave investigators a second location, not far from the original search site. Nothing was found again. Police had argued that Renwick knows more than he has told police and he should remain behind bars.

His mother Leanne Pullen this afternoon said the family was feeling relieved after an anxious wait for the decision. "I feel today that maybe this is a little bit of justice for Tim," she said. "I'm hoping that even if we don't get to find Tim that other families in similar situations to us ... let's hope that the perpetrators, they'll think long and hard about really being truthful and co-operative with the authorities."

Renwick and his accomplice Luke Kister were convicted in 2016 of disposing of Timothy's remains. Kister was released from prison before the No Body, No Parole bill was introduced. Benjamin Oakley — one of Timothy's killers — was also controversially released last year just before the laws came into effect. Timothy's death was in the spotlight after Corrections Minister Mark Ryan posed with the Pullens for photographs after the laws were introduced in August. At the time, the Pullens had not been told that Oakley had been granted parole and would be released in November. Renwick is now the family's only hope for answers. Renwick's lawyer Nick Dore today said: "We will be exploring all appeal options open to our client in the coming months and today's decision does not finalise the matter."

The Parole Board decision said in July 2012 Renwick refused to provide a statement or be interviewed by police and the following month lied to police about his involvement and whether he had been in the Collinsville area at the time of Mr Pullen's death. He was charged with accessory after the fact to murder in July 2013, later upgraded to murder in March 2015. Renwick pleaded guilty to accessory after the fact to manslaughter in May 2016 and the following day took police to a site where he said he disposed of the body. Nothing was found.

In September last year Renwick changed his story. He told police he had burnt Pullen's remains at a location 100-200m from the original area given to police. "The board finds that if the victim's remains were cremated at all, they were not cremated at the location identified by the applicant (Renwick)," the decision published today said.

12.4 ANALYSING PRINCIPLES OF SENTENCING TO PREDICT OUTCOMES

In this section, you will have the opportunity to analyse the principles of sentencing as they apply to each of the scenarios in order to predict an outcome in terms of the most appropriate sentencing option/s under the *Penalties and Sentences Act 1992* (Qld). Read carefully through the following excerpts from the website of the Queensland Sentencing Advisory Council (QSAC), explaining the different roles of people involved in Queensland sentencing court hearings. This is an excellent online resource for you to use in preparing for your classroom roleplaying of sentencing hearings based on the scenarios provided in the YOU BE THE JUDGE activity.



SOURCE: QUEENSLAND SENTENCING ADVISORY COUNCIL (SENTENCINGCOUNCIL.QLD.GOV.AU), 2018 (EXCERPTS)

Who does what?

There are various roles that are relevant to the sentencing process, which are as follows.

Role of judge or magistrate:

The judge or magistrate considers all submissions and determines an appropriate sentence in accordance with the law and relevant sentencing principles. Determining an appropriate sentence is a complex process in which a sentencing judge or magistrate must balance a range of factors in accordance with the law. If the sentence involves a period of imprisonment, the sentencing judge or magistrate provides reasons for the sentence imposed. These reasons are recorded and referred to as sentencing remarks. If a judge or magistrate hands down an order as part of the sentence, they ensure the offender understands the conditions of the order imposed.

Role of the prosecutor:

The prosecutor, on behalf of the state, provides the judge or magistrate with:

- ▶ all the facts and circumstances of the alleged offending
- ▶ the offender's criminal history

- ▶ submissions about the impact of the offending on the victim/s
- ▶ submissions about relevant case law and legislation, including associated sentencing principles.

Role of the defence:

The defence, representing the offender, provides the judge or magistrate with:

- ▶ information about the offender's personal circumstances
- ▶ background or any contextual information about the offending
- ▶ submissions about the steps an offender has taken towards their rehabilitation
- ▶ submissions about relevant case law and legislation, including associated sentencing principles.

Role of the victim:

Queensland legislation protects the interests of victims during sentencing. The sentencing court must take into account the harm or impact of the offender's action/s on the victim/s. A victim will generally be able to be present at the sentencing of the offender. Except in certain circumstances, court proceedings, including sentencing, are open to the public.



YOU BE THE JUDGE



SENTENCING HEARING ROLE PLAYS

This is your chance to be a **judge**, a **prosecutor** or a **defence counsel** in a sentencing hearing. Your responsibility as a judge is to use the discretion allowed by law to **decide what sentence to impose on a person who has committed a criminal offence**.

In each of the following cases, the person has already been convicted of a crime, having either pleaded guilty or been found guilty beyond reasonable doubt by you or a jury. It is now your responsibility, in each case, to carefully consider the maximum penalty prescribed in the *Criminal Code* and the **factors** relevant to your sentencing decision under Queensland's *Penalties and Sentences Act*, as set out above. Consider also the **aims** of punishment that best suit the circumstances of the crime.

Your Honour, in each case, what is your sentence?



THE SENTENCING HEARING PROCEDURE

[If the judge enters or leaves courtroom, the bailiff will direct everyone to rise]



After the guilty plea or the jury verdict of guilty, the judge asks for the *allocutus* to be administered (is usually by the judge's associate). Its purpose is to ask the offender whether he or she has anything to say why sentence should not be passed. ["You have been found guilty by the jury of the charge of (specify offence/s). Is there anything you wish to say before sentence is passed?"]



The judge calls on the prosecutor to make submissions to the court on the circumstances of the offence and any other relevant facts. The prosecutor informs the court of any previous convictions. The prosecutor also makes submissions about what is the appropriate range of sentences.



The judge calls on the defence to make submissions (in mitigation) to the court on behalf of the offender.



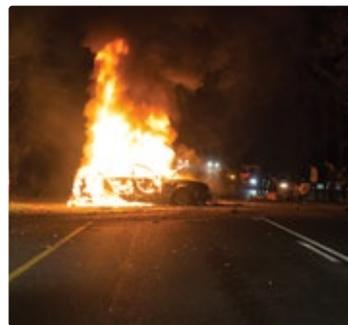
The prosecutor has right of reply.



The judge then sentences the offender, giving reasons for why the sentence is to be imposed. The offender is either free to leave the court, if no prison sentence is imposed, or is led from the court by a corrective services officer and taken into custody when a prison term is imposed.

CASE 1: R V CANDICE (QUEENSLAND DISTRICT COURT SENTENCING HEARING)**Prosecutor's submissions (to be based on the following facts and viewpoints):**

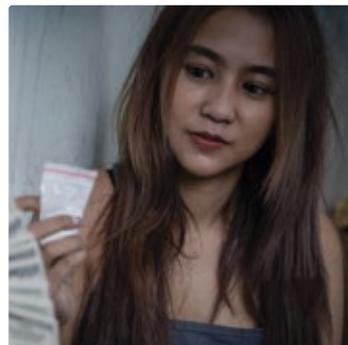
Candice is a single mother who pleads guilty to one charge of dangerous operation of a motor vehicle causing death while adversely affected by alcohol. She was behind the wheel and four times over the legal blood alcohol limit when she lost control of her car and smashed into a light pole two years ago. The crash tore Candice's black Dodge 4WD into pieces before the remaining wreckage burst into flames. Her younger sister, Sammy, died instantly and her body was trapped inside the burning wreck, while Candice was dragged out of the car to safety by bystanders. Candice had a suspended drivers licence when she crashed the SUV with a history of speeding offences and a driving under the influence offences in the years leading up to the crash that killed her sister.

**Defence counsel's submissions (to be based on the following facts and viewpoints):**

You push for Candice's sentence to be wholly suspended, arguing that time behind bars will harm her children. Candice's family also appeal for her to avoid jail for the offence. You are to hand up to the bench a victim impact statement made by Candice's older sister, in which she says, "The loss of my baby sister has been utterly unbearable, but I have forgiven Candice. I don't know how I will cope if Candice is incarcerated ... Candice has been given a life sentence by her behaviour. If she is sent to jail I will be losing my second sister." You also refer to other family members who have told the court of Candice's mental health struggles following the crash as well as her dedication to raising her two young children as a single mother and attempts to undergo rehabilitation and psychological counselling. Candice has had her licence reinstated since the crash but family members have told the court that she is extremely reluctant to drive and does not do so unless her four-year-old twins has to be driven somewhere.

Judge's sentence/s and reason/s?**CASE 2: R V ROSE (QUEENSLAND SUPREME COURT SENTENCING HEARING)****Prosecutor's submissions (to be based on the following facts and viewpoints):**

Rose, who is now 18 years of age, pleads guilty to four drugs charges, the most serious being trafficking of ice on the local streets. Rose, who left high school in Year 10, was unemployed and living in a share house with her boyfriend when police raided the home and seized 0.1 grams of ice and her mobile phone which contained text messages arranging ice sales. She told police she was a 'middleman' in the drug supply network with 13 customers.

**Defence counsel's submissions (to be based on the following facts and viewpoints):**

Let the judge know that this sentencing in the Supreme Court is a "huge wake-up call" for your client. She used ice and was only 17 at the time, naively believing she was merely "hooking" her friends up with drugs, and didn't realise she was committing a very serious crime which carries up to 25 years behind bars. Police were unable to determine how much profit she made, but Rose says she purchased drugs for her personal use with her profits. She was only charged for five drug sales in the two months at the beginning of this year. Rose has dumped her drug dealing boyfriend and moved in with her mum.

Judge's sentence/s and reason/s?

Before imposing your sentence/s, you are to remind Rose that drug trafficking attracts a maximum 25-year-jail term because the Queensland Parliament considers it to be extremely serious, "People who traffick methamphetamine are peddling misery to other users and other families of users."

CASE 3: R V ALLIRA (QUEENSLAND MAGISTRATES COURT SENTENCING HEARING)**Prosecutor's submissions (to be based on the following facts and viewpoints):**

Allira, 33, pleads guilty to 20 charges, including 18 thefts. Spanning nine months, Allira stole items from 11 different businesses including the Young Australian Hotel, Saltt Clothing, Dacey's Bar and Grill, Chemist Warehouse and Strandbags. Her shoplifting saga kicked off when she stole \$156.67 worth of items from Priceline Pharmacy. Allira still owes the businesses more than \$1135 in restitution, with her priciest theft of \$201 taking place at Dan Murphy's. Allira is currently serving an 11-month prison sentence for previous stealing offences, so she was not present in the courtroom for her sentencing hearing in relation to the current offences, but pleaded guilty by video link from prison.

**Defence counsel's submissions (to be based on the following facts and viewpoints):**

Your client's "compulsive stealing behaviour" was due to a "need rather than greed" with Allira having told you, as her legal representative, that it's killing her inside, what she's done. The mother-of-five's behaviour stemmed from a desire to provide for her family and she was having issues with Centrelink around the time of the thefts. Allira goes to the shop, steals the item, particularly alcohol, and sells it for money. Explain to the judge that your client's offences targeted bottle shops numerous times because alcohol was easiest to sell. Via video link from prison, Allira apologises for her actions to the magistrate, the entire courtroom and to the community for all of the dodgy things she's done. You are also to hand up to the bend a written letter of apology by Allira to the magistrate.

Judge's sentence/s and reason/s?**CASE 4: R V WAYNE (QUEENSLAND DISTRICT COURT SENTENCING HEARING)****Prosecutor's submissions (to be based on the following facts and viewpoints):**

Wayne pleads guilty to choking in a domestic setting, which is a domestic violence offence. Wayne had choked his partner twice in quick succession during a heated argument. He first put both his hands around his victim's neck in a standing position, before pushing her onto a couch and pressing down on her throat with one hand. The victim said she felt as though she was going to pass out but maintained consciousness. During the argument, Wayne also threatened to "punch" and "kill" the victim. As the prosecutor in this sentencing hearing, you are to present photographs of the victim's neck to the court which shows red marks. Four years ago, Wayne stole a woman's handbag at a tavern and before that had appeared in court twice in relation to shoplifting offences.

**Defence counsel's submissions (to be based on the following facts and viewpoints):**

This dispute surrounded allegations of infidelity which caused the argument to escalate quickly. Despite Wayne having a criminal history, there was no violence on his record before this incident. Your client is actively working to rehabilitate himself and has completed a domestic violence course. You are to present to the court a reference letter from the victim which "pleads for leniency". Wayne and his partner are improving their relationship and, although there is still work to be done, they want to have a future together. While choking in a domestic setting is unacceptable, this incident was at the "low end" of offending. Wayne is the sole breadwinner for his family and any term of imprisonment would affect them both as a couple.

Judge's sentence/s and reason/s?

CASE 5: R V STEVEN (QUEENSLAND DISTRICT COURT SENTENCING HEARING)**Prosecutor's submissions (to be based on the following facts and viewpoints):**

Steven pleads guilty to one count each of attempted arson and wilful damage. Steven was 17-years-old old (and, therefore, considered to be an adult under Queensland's *Criminal Code*) when, as he was out walking the streets with friends, he firebombed the home of a complete stranger, hurling a lit Molotov cocktail, made out of a stubbie beer bottle filled with petrol, onto the wooden deck of family home while a man slept inside around midnight. It was pure luck that the male occupant of the house was awoken by a loud explosion and was able to quickly put out the blaze with a fire extinguisher, although he received burns to his feet. Luckily, the man's wife and daughter were not home at the time. Steven has a previous conviction for setting a fire. He told police he committed the offence because he "wanted to do something crazy".

**Defence counsel's submissions (to be based on the following facts and viewpoints):**

Steven panicked when the device was lit and just threw it in the direction of the stranger's home without appreciating how frightening the consequences might be for the occupant. He was a particularly immature man for his age of 17 years at the time of the offence.

Judge's sentence/s and reason/s?**RESEARCH**

1. Log onto, and take notes on, the page, 'Judge for Yourself', of the Queensland Sentencing Advisory Council (QSAC) website at [S] [C]:

<http://www.sentencingcouncil.qld.gov.au/education-and-resources/judge-for-yourself>

2. Read the following 'Judge for Yourself' page, and then analyse the three interactive e court cases, focussing on the factors of each case which are relevant to the purposes of sentencing in the *Penalties and Sentences Act 1992* (Qld) that you believe are most appropriate in arriving at sentence order/s for each of the three criminal offenders. For each court case, you are to write a one paragraph sentence with reasons to justify your sentencing order/s imposed on the convicted criminal. [C] [A] [R]

Judge for Yourself

Every week in Queensland, our courts sentence people who have broken the law. But have you ever wondered how judges and magistrates decide what sentences to give? It's complex.

Judge for Yourself comprises three interactive court cases based on real-life events, representing the work of the Magistrates, District and Supreme Courts in Queensland. You already know the offenders are guilty. They understand they have broken the law. It's your job to listen to the circumstances of the case and determine their sentence - *Judge for Yourself!*

You will:

- ▶ find out the type of cases each court hears
- ▶ learn about sentencing guidance judges and magistrates have to abide by
- ▶ hear about the roles of the prosecution, defence, judge and magistrate
- ▶ see the facts of the offending through the eyes of the courts, offenders and victims
- ▶ pass sentence on the offenders.

Think sentencing is easy? Hear the court case. Decide the sentence.

REVIEW

1. Describe each of the following key terms in this chapter using legal terminology [C]:
 - a. concurrent sentencing
 - b. cumulative sentencing
 - c. custodial sentences
 - d. non-custodial sentences
 - e. deterrence
 - f. retribution
 - g. rehabilitation
 - h. incarceration
 - i. denunciation
 - j. prevention

2. Explain the following principles that affect sentencing decisions in Part 2 of the *Penalties and Sentences Act 1992 (Qld)* [C]:
 - a. The purposes of punishment.
 - b. The nature and gravity of the offence.
 - c. The relevance of prior convictions.
 - d. Mitigating and aggravating circumstances.
 - e. The impact on the victim.

3. Describe each of the following range of sentencing options [C]:
 - a. Fines
 - b. Good behaviour bonds
 - c. Probation
 - d. Suspended sentences
 - e. Community service orders
 - f. Intensive correction orders
 - g. Imprisonment

4. Analyse the principles of sentencing as they apply to the following scenarios to predict an outcome [A]:
 - a. **R v Mary:**

Mary is convicted of the manslaughter of her husband. They were married for 25 years and her husband had brutally beaten her on numerous occasions. Mary is handicapped, having suffered from polio as a child. She has two children, each of whom is grown up and married. Mary bashed her husband with a hammer whilst he was asleep and he died two months later in hospital. She showed little remorse, but admitted her actions to the police.
 - b. **R v Fred:**

Fred is convicted of trafficking in heroin. He was found with 2kg of the drug. He has made significant profits from drug trafficking over a number of years. He is 33 years of age, single, with no children. He has two previous convictions of possessing a dangerous drug (cannabis) in small quantities. Each occurred six years ago.
 - c. **R v Susan**

Susan ran over a 16-year-old cyclist in her motor car. The cyclist received very serious injuries and Susan is convicted of dangerous driving causing grievous bodily harm. Susan had a blood alcohol concentration of 1.9%. She has one previous conviction for drink driving two years ago when her blood alcohol concentration was .09%. Susan is married with two young children. She has a problem with alcohol and has received treatment for alcohol addiction in the past.

TOPIC 4: PUNISHMENT AND SENTENCING

CHAPTER 13: INQUIRIES INTO SENTENCING OF CRIMINALS

FOCUS SUBJECT MATTER

13.1 INTRODUCTION

13.2 THE EFFECTIVENESS OF SENTENCING AND PUNISHMENT IN AUSTRALIA

13.3 RATES OF INCARCERATION AND REOFFENDING OF VULNERABLE PEOPLE IN AUSTRALIA

FOCUS OBJECTIVES

TO UNDERSTAND AND APPRECIATE:

- ▶ inquiry-based learning approaches to a range of sentencing issues within Australia, including the analysis and evaluation of relevant sentencing trends, in order to determine the nature and scope of each issue, examine different stakeholders' viewpoints and then evaluate each legal situation by presenting alternatives, proposing recommendations for reform of the law, discussing implications, and justifying them based on the legal criteria of just and equitable outcomes.

13.1 INTRODUCTION

Justice is conscience, not a personal conscience but the conscience of the whole of humanity. Those who clearly recognize the voice of their own conscience usually recognize also the voice of justice.

(Alexander Solzhenitsyn (b. 1918), Russian novelist. Letter, Oct. 1967, from Solzhenitsyn to three students (published in Solzhenitsyn: A Documentary Record, "The Struggle Intensifies," ed. by Leopold Labedz, 1970))

Inquiries into the sentencing of criminals must be seen against the background of the *Penalties and Sentences Act 1992 (Qld)*. As you learned in Chapter 12, in each sentencing hearing in Queensland, the judge or magistrate must, on behalf of the people of Queensland, weigh up which of the following purposes of sentencing in subsection 9(1) of the above Act are most appropriate in the unique circumstances of each case:

Section 9: Sentencing guidelines

- (1) The only purposes for which sentences may be imposed on an offender are -
- (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
 - (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
 - (c) to deter the offender or other persons from committing the same or a similar offence; or
 - (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
 - (e) to protect the Queensland community from the offender; or
 - (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

You have studied and applied these purposes, together with the various factors which judges and magistrates should apply when exercising their discretion in sentencing decisions, in **Chapter 12.2: Principles (Purposes And Factors) Affecting Sentencing Decisions**. As you would have realised when applying these purposes and factors to a variety of scenarios in Chapter 12, the sentencing process is complicated and the effectiveness of each sentence imposed on a convicted offender must be carefully considered by weighing up the perspectives of the various stakeholders, including the victim and/or his or her family and the offender, affected by each sentencing order.

Questions which arise when inquiring into the effectiveness of the criminal justice system require impartial and dispassionate examination of the sentencing decisions made in relation to a particular offence over a long period of time. A pertinent example is the way in which the media emphasises the perceived softness of sentencing of perpetrators of violent crime, which is the subject of the first INQUIRY in Chapter 13.2. Another good example of the need to make an objective examination of the effectiveness of sentencing laws is in relation to the offence of Dangerous driving causing death.



RESEARCH

Log onto austlii.edu.au/au and go to the Queensland Consolidated Acts, and then the *Criminal Code 1899* (Qld). Then scroll to s328A(4) where the offence of Dangerous driving causing death is found. Find cases starting in the decades 1950-1970 and compare them to recent cases, particularly the different penalties applied to drivers charged with causing the death of other people over that period. Describe and explain the trend you observe in the penalties given to those convicted of this offence over the last 50 years. What does this show about the changing values and viewpoints of members of our society? [C][S][A][E]

Another way to conduct an inquiry into the effectiveness of sentencing and punishment is not to look at only judges' reasons for their sentences, but also to look at the reactions of the victims, their families, and of different community groups to particular sentencing decisions. To illustrate its complexity, there is probably no better place to go than the true story told to Paul Barclay in an interview with US lawyer and Director of the Louisiana Capital Assistance Center, Richard Bourke, in July 2018 in the Supreme Court in Brisbane.

PRACTICAL APPLICATION

One of Richard Bourke's clients, Chuck, murdered three people and seriously injured a fourth person. The three murdered victims were bound and executed. One of them was a 17-year-old pregnant girl. At the time of the offences, Chuck was under the influence of a hallucinogenic drug which made him think that another person was telling him to commit the offences. Chuck was arrested and charged. Once he was no longer under the influence of the drug, Chuck was horrified at what he had done. He became a client of Richard Bourke, who represented him when he was sentenced.

Unlike Australia, where the judge decides the sentence after conviction, jurors decide sentences in the United States. In the United States state of Louisiana, when juries are selected for offences for which the death penalty may be imposed, potential jurors are asked if they are prepared to order the execution of the accused offender if they find the person guilty of the capital offence. Jurors are excluded if they are not prepared to make this decision.

Richard Bourke approached the families of all of Chuck's victims, explaining how horrified and remorseful Chuck was at what he had done, and asking them if they were prepared to meet Chuck in a form of restorative justice, and decide if they could support submissions in his sentencing hearing that he should not receive the death penalty. Initially, the mother of the 17-year-old girl refused. Chuck recorded a video to the 17-year-old girl's family which Richard was able to give to the girl's mother, asking her to look at it. Although the mother took it, she insisted that she would not change her mind. After about a month, however, she contacted Richard and requested to meet Chuck. She spent an hour in the prison talking to him. At the end of that time, as she was leaving, she said she would appear in his sentencing hearing and speak on his behalf in the defence's attempt to have Chuck's sentence commuted (reduced) from the death penalty to life imprisonment.

1. What crime did Chuck commit? [C]
2. Who is responsible for sentencing Chuck in the United States? [C]
3. How is the jury for a capital offence sentencing trial chosen? [C]
4. Describe the process which led to the pregnant victim's mother deciding she would address the jury in support of Chuck when he was sentenced. [C]
5. What part of the restorative justice process do you think led the female victim's mother to decide that Chuck did not deserve to be executed? [A]

PRACTICAL APPLICATION CONTINUED...

6. In a television interview after the sentencing of Brett Cowan for the murder of Daniel Morcombe (which is the subject of an INQUIRY issue in the following Chapter 13.2), Bruce and Denise Morcombe both stated that they would not forgive their son's murderer. Their reason was because Cowan had never shown any remorse for what he had done to Daniel. Compare the Morcombes' viewpoints about Mr Cowan with what happened in the above case involving Chuck's process of restorative justice with the family of his victim. What does this say about the potential effectiveness of restorative justice for the parties involved and the society as a whole? [E]

The focus of this chapter will be on delving into a variety of contemporary legal cases and issues causing controversy in our media-driven society which come under the following general INQUIRY questions, with each of these general questions containing a range of sub-headings which identify more specific issues to be analysed and evaluated:

- ▶ How effective is the sentencing of criminals in Australia? (Chapter 13.2 Inquiry)
- ▶ How are vulnerable people in Australia, such as Aboriginal peoples, Torres Strait Islander peoples, women, children, and people with disabilities, treated in terms of their rates of incarceration and offending? (Chapter 13.3 Inquiry)

13.2 THE EFFECTIVENESS OF SENTENCING AND PUNISHMENT IN AUSTRALIA



INQUIRY



HOW EFFECTIVE IS THE SENTENCING OF CRIMINALS IN AUSTRALIA?

Different stakeholders have varying viewpoints about the particular sentence that a judge decides is appropriate in each case. The question of the effectiveness of sentencing depends upon the perspective from which the sentencing laws and judicial decisions (sentencing orders) are viewed. As discussed in Chapter 13.1, the question of effectiveness of sentencing is relative in terms of whether the purpose for a sentence is retribution, deterrence, denunciation, prevention (protection) or rehabilitation, or, as is usually the case in most if not all cases, a combination of two or more of these purposes (Chapter 12.2). It also depends on the circumstances or factors of each case as to what is effective in terms of the purposes or reasons for the sentence handed down (also contained in Chapter 12.2).



Ch 12.2

ARE OUR JUDGES TOO SOFT ON VIOLENT CRIMINALS?

A powerful trend in recent years in Australia has been the increasingly vocal public outcry, via the media, against what is perceived to be soft sentencing of violent offenders so that these most reviled of criminals no longer 'get away with their crimes' and cause unnecessary suffering and tragedy to their victims and the victims' families and friends.





WHAT DO YOU THINK?



THUG EYES OFF PAROLE – VICTIM'S DESPAIR AT SENTENCE

SOURCE: LEA EMERY, GOLD COAST BULLETIN (GOLDCOASTBULLETIN.COM.AU), 21 APRIL 2018 (EXCERPTS)

Read the excerpts from the following report about a Gold Coast District Court sentencing hearing and answer the questions that follow it.

ROBERT Bawden, 71, was left bleeding on the footpath, blood covering the front of his white shirt after an horrific attack in Surfers Paradise. He was straddled, held down and kicked and punched in the head at least 20 times by Noal Peter John Montemayor-Mabb and another man on 23 July, 2016. "So, this is how I am going to die," he thought while laying on the ground. He has since had three rounds of skull surgery to fix his severe brain bleed ...

Two weeks after the attack, Montemayor-Mabb and another man bashed Trevor Barnes, a 79-year-old homeless man who was sleeping in a car park, leaving him with a broken eye-socket, a heavily bruised and bloody face and a fear of going out at night.

Montemayor-Mabb could be free in 14 days. The 23-year-old pleaded guilty in Southport District Court yesterday to one count each of grievous bodily harm and assault occasioning bodily harm. He was sentenced by Judge Katherine McGuinness to six years' prison, but due to time already served he will be eligible for parole in just two weeks on May 12. The maximum sentence for grievous bodily harm is 14 years.

Montemayor-Mabb has been behind bars since September 2016 and it is not his first time in jail. He was sentenced to three years' prison in 2012 for burning down the St Vincent de Paul charity shop in Monto, near Bundaberg, aged 17. Montemayor-Mabb's criminal history extends for eight pages and includes crimes such as breaking and entering, fraud and wilful damage.

Ms McGuinness [the sentencing judge] said his latest crimes were attacks of "cowardly violence" which left a "terrible impact" on the two elderly victims.

Mr Bawden was appalled by yesterday's sentence. "I don't think anyone who has ever been whacked feels the sentence is fair," he said.

Defence barrister Wayne Tolton told the court Montemayor-Mabb's parents both died in 2013. Mr Tolton said Montemayor-Mabb did not start either of the attacks. "He took a lesser physical involvement in the incidents," he said. "He has no history in the past of violence." Mr Tolton said when released, Montemayor-Mabb could stay with an aunt in Toowoomba who would take him to any job interview or trips to Centrelink.

Surfers Paradise MP John-Paul Langbroek said it was another case of light sentencing handed down by judges. "This is another example that doesn't seem right," he said. "This is not sentencing that represents community standards."





WHAT DO YOU THINK? CONTINUED



1. What is the maximum sentence for the crime of grievous bodily harm? [C]
2. What sentence did Mr Montemayor-Mabb receive for bashing Trevor Barnes? [C]
3. What is the minimum non-parole period (i.e. minimum amount of time to be spent in prison) for Mr Montemayor-Mabb? [C]
4. Based on your reading of this article, how effective is the sentence handed down in this case in achieving the purpose of retribution for the victim? [A]
5. How effective do you think the sentence is in terms of the each of the following purposes, based on your analysis of the viewpoints expressed in this article [A]:
 - a. Deterrence?
 - b. Denunciation?
 - c. Prevention (protection of the community)?
 - d. Rehabilitation?
6. Read the excerpts from the following article, 'Outrage as courts go soft on Queensland criminals', and then conduct research to locate other sources which reveal different stakeholders' perspectives in our community about the effectiveness of tough sentences involving longer terms of imprisonment of dangerous criminals. [S] [A]
7. Based on your weighing up of different stakeholders' perspectives in the article below and the sources which you have selected as a result of your research, what recommendations do you propose in order to provide more just and equitable outcomes for the parties (offenders and their victims and families) and other stakeholders (e.g. the community generally) affected by violent crimes? Write your recommendations in the form of a submission of 300-500 words to the Queensland Sentencing Advisory Council. [E] [R]

OUTRAGE AS COURTS GO SOFT ON QUEENSLAND CRIMINALS

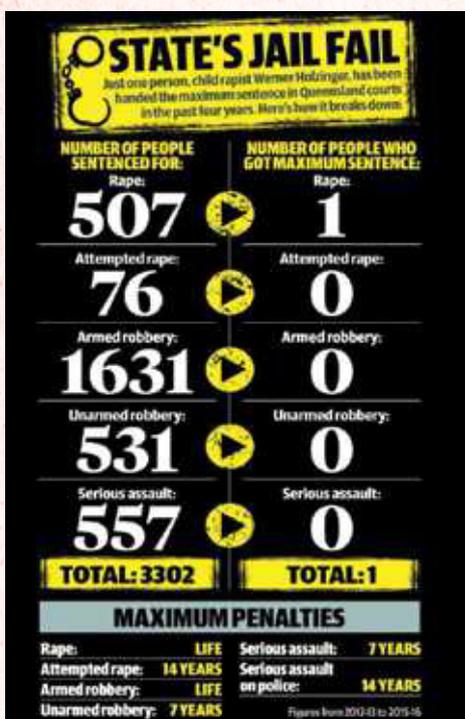
SOURCE: JESSICA MARSZALEK, THE COURIER-MAIL (COURIERMAIL.COM.AU), 9 DECEMBER 2016 (EXCERPTS)

JUST one person has received the maximum jail term for a raft of the most serious crimes committed in the state in the past four years. The Courier-Mail can reveal that out of 3302 people sentenced for rape, attempted rape, armed robbery, unarmed robbery and serious assault since 2012-13, only one person was handed the maximum sentence. And nearly 650 got no jail time at all.

The statistics have angered victim advocates, who describe them as an "outrage" and say they give credence to years of complaints from members of the public about lenient sentences handed down in Queensland courts. Victim advocate Ross Thompson, who heads the Queensland Homicide Victims' Support Group, said it was remarkable that only one person's crime was deemed serious enough for the maximum sentence. "The judiciary has always been a problem ... and I think that just proves it," he said. "I think one out of 3000 to receive the maximum sentence is ridiculous. "You can't tell me that 0.001 per cent of these individuals were serious enough to have a maximum sentence. It's an outrage."

Gold Coast Centre Against Sexual Violence director Di Macleod said she wasn't surprised at the figures. Ms Macleod said that in the majority of rape cases she had been involved with in 40 years, the offenders had received one to five years' jail - far less than the allowable life sentence for the horrific crime. "I think the community expects that someone

WHAT DO YOU THINK? CONTINUED



who has committed a heinous crime would do the time and that doesn't always happen as, clearly, these statistics show," she said. "I don't think there's enough weight given to the available maximum sentence and too much weight given to current sentencing practice."

The figures follow the Palaszczuk Government's reinstatement of its Sentencing Advisory Council, which was promoted as a bridge between community expectations and the judiciary. But chairman James Morton said it would be his job to explain how judges formulate sentences, not tell the judiciary that criminals deserve harsher terms. "A lot of community members don't understand what goes into a sentencing process and they are very delicate issues," he said. "I think people expect harsh outcomes and some people in the community seem to be not persuaded, or not buoyed, by the end result. It's more about getting the community to understand how the wheels of justice turn," he said.

HOW EFFECTIVELY ARE SERIAL SEX OFFENDERS DEALT WITH IN ORDER TO PROTECT THE COMMUNITY?

PREVENTATIVE DETENTION: DOING TIME FOR THE RISK OF A CRIME

The principle has always been that, when a person has served his or her sentence, they will be released into the community to resume their lives. Increasingly there have been concerns that a very small number of habitually violent prisoners will never be deterred or be rehabilitated and that releasing such individuals is dangerous for the community. In such cases, should a judge have the power to extend a period of detention or imprisonment, even after their term has expired when there has been no fresh crime or conviction? The answer from Queensland and other state parliaments is that there is a role for preventive detention laws. This is a relatively new development in criminal justice and has drawn both praise and condemnation. Today, in Queensland, in certain limited circumstances, a person can be kept in prison based on an assessment they may re-offend in future, if released.

The *Dangerous Prisoners (Sexual Offenders) Act* (Qld) was enacted in 2003. The Act provides:

- ▶ The Attorney-General may apply to the Supreme Court for an order for the continued detention or community supervision of a person who had been sentenced to imprisonment for a serious sexual offence. (s5)
- ▶ An order can be sought only in the last six months of the prison term. (s5)
- ▶ The Supreme Court can make an order only if satisfied that a person would constitute a 'serious danger to the community' and the danger is in the form of an unacceptable risk that the prisoner [would] commit a serious sexual offence.'(s 13(2))

- ▶ Hearings are to be conducted in public with reasons given. (s 17)
- ▶ There is a right of an appeal to the Court of Appeal. (s43)
- ▶ The Attorney-General must conduct a review at the end of 12 months of detention. (s27)

There has been considerable opposition to this law because it goes against the basic principle that punishment should be given for what a person has done, not for what they might do in the future. Assessing the risk of future violence is a very difficult task and it is unclear whether any person - judge, psychiatrist or social worker - can do this with any certainty.

CASE STUDY

Fardon v Attorney-General (Queensland) [2004] HCA 44.

Facts: In October 1980, Fardon was sentenced to imprisonment for 13 years for rape. After serving eight years of that sentence, he was released on parole. Twenty days after his release, he committed further offences of rape of a 12 year old girl, sodomy and assault occasioning actual bodily harm to her 15 year old sister. He was sentenced to 14 years imprisonment. That sentence expired on the 30 June 2003. In that same month, Queensland passed the *Dangerous Prisoners (Sexual Offenders) Act*, allowing for serious sexual offenders to be detained beyond the expiry of their sentence. It is clear that the legislation was enacted quickly to prevent Fardon returning to the community. On 17 June 2003, the Attorney-General of Queensland applied for an interim detention order. In response, an order that 'Robert John Fardon be detained in custody for an indefinite term for control, care and treatment' was granted by Justice White. She said:

What is of major concern is the failure by [Fardon] to participate in or to participate to completion in a course or courses of therapy ... For some ten years there have been efforts made to assist [Fardon] towards reintegration into the community ... He has, for the most part, chosen not to take some responsibility for his own rehabilitation and engage in appropriate treatment ...

Fardon appealed to the Queensland Court of Appeal which upheld the validity of the Act and the Order. Fardon then appealed to the High Court of Australia.

Legal Issue: Is the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) valid under the Constitution? The appellant argued that the Supreme Court of Queensland did not have power under the Constitution to make orders on continuing detention of dangerous prisoners. The High Court noted that the case also gave rise to substantial questions of civil liberty.

Decision: The majority held that the Act and Order to detain were both valid. This was because this law was a valid exercise of Queensland Parliament's power to make laws for 'the peace welfare and good government' of the State. The Court can adjudicate on a claim by the Executive (through the Attorney- General) that a prisoner is 'a serious danger to the community' 'to a high degree of probability' and it is consistent with judicial powers in the Constitution.

Per Callinan and Heydon JJ:

In our opinion, the Act, as the respondent submits, is intended to protect the community from predatory sexual offenders. It is a protective law authorizing involuntary detention in the interests of public safety. Its proper characterization is as a protective rather than a punitive enactment. It is not unique in this respect. Other categories of nonpunitive, involuntary detention include: by reason of mental infirmity; public safety concerning chemical, biological and radiological emergencies; migration; indefinite sentencing; contagious diseases and drug treatment. This is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes.

Per Gleeson CJ:

The way in which the criminal justice system should respond to the case of the prisoner who represents a serious danger to the community upon release is an almost intractable problem. No doubt, predictions of future danger may be unreliable, but, as the case of Veen shows, they may also be right. [Veen was a case where a judge warned that, if Veen was released, he was likely to kill or injure someone again. The same year of his release Veen stabbed and killed another man.]

CASE STUDY CONTINUED...

Although it was argued by Fardon that the Act was directed towards him personally, the majority found that it was not directed to a particular person but to a class of persons that the Parliament might reasonably think is a danger to the community.

In the minority, Kirby J dissented:

He noted that experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness.

As framed, the Act is invalid. It sets a very bad example, which, unless stopped in its tracks, will expand to endanger freedoms protected by the Constitution. In this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed. The appellant's continued imprisonment is unlawful. Having served his lawful sentences, he should be released forthwith.

1. Who is the respondent and who is the appellant? [C]
2. Which of the sentencing purposes does this Act meet? [C]
3. What factor was important in Justice White's decision to make a preventative detention order? [A]
4. If you were a judge in this case, would you support the majority or minority view? Why? [E]

RELEASE FROM PREVENTATIVE DETENTION

In 2007, Fardon was released under a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act*. It included a number of strict conditions, including abstinence from alcohol and drugs. In 2008 he was charged with raping an intellectually impaired woman on the Gold Coast. He was found guilty and sentenced to 10 years' imprisonment.

Fardon appealed on the grounds the judge erred in not allowing a judge-only trial and that the conviction was unreasonable based on the evidence. In 2010, the Court of Appeal quashed the conviction and did not order a re-trial. The Attorney-General applied again to have Fardon detained again under the preventative detention regime because he had breached the conditions of his existing supervision order.

In June 2011, Acting Supreme Court Justice Julie Dick made an order to allow Fardon, who had spent more than 30 years in jail for sex offences against children and women, back into the community. She ordered he again be released under a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* but specified a number of strict conditions, 42 in all, including abstinence from alcohol and drugs and only having one mobile phone.

Queensland Attorney-General Paul Lucas appealed the decision to release the 62-year-old Fardon.





YOU BE THE JUDGE



If you were a judge on the bench of the Queensland Court of Appeal, would you allow Fardon to be released back into the community? What are your main legal and social reasons? [A] [E]

Evidence is given for the Attorney-General that when Fardon was first released under a supervision order in 2007, he breached its conditions. Two conditions were that he advise authorities of any personal or intimate relationships he entered into and that he must not go to venues that sell alcohol. His latest breach involved having a relationship with an intellectually impaired woman, and visiting venues that sold alcohol. He also breached other conditions. He argues that keeping Fardon behind bars is the only way to adequately protect the community.

Evidence is given by one of Fardon's victims, raped by him when she was 12. She says she has had to live with the memories of the attack every day for the past 33 years and gives the following statement:

"I believe that repeat offenders and serial child paedophiles should be indefinitely sentenced behind bars. I believe in the 'throw away the key' on those sort of offenders and they should never be allowed back into the community. Not a day goes past that he is not far from my mind and that day he took away my innocence and stole everything about me as a child... Therefore I believe he hasn't got the right to live in the community - he should be locked up."

Evidence is given by two psychiatrists that, due to his antisocial personality and institutionalisation, there is a significant chance of him breaching conditions of a supervision order at some point. Whether it would be in a general way or a sexual offence was difficult to predict. The risk of sexual reoffending would be reduced if Fardon abstained from drugs and alcohol.

Evidence is given by a third psychiatrist that, because of Fardon's age (62 years), it is less likely that he would commit a sexual or other serious offence.

Evidence is given by a representative of the United Nations Human Rights Committee that the post-sentence detention of Robert Fardon is unjust and goes against international law. His detention is in fact imprisonment and this is incompatible with the prohibition against arbitrary detention under Article 9(1) of the *International Covenant on Civil and Political Rights*. It amounts, in substance, to a fresh term of imprisonment which is not permissible in the absence of a new conviction for which imprisonment is a sentence prescribed by law. It also goes against the prohibition against double punishment under Article 14(7) and against retroactive punishment under Article 15(1).

The appeal by the Attorney-General Paul Lucas was successful. Fardon was jailed again under a continuing detention order. Such orders are required to be reviewed annually. In February 2013, at an annual review, the continuing detention order was rescinded and Fardon was released from custody subject to a supervision order. Again, the current Attorney-General Jarrod Bleijie appealed this decision. The Court of Appeal in November 2013 rejected the appeal and reaffirmed the decision of the primary judge. At the time of writing, Fardon is in the community subject to a supervision order. While there was an extensive review of Fardon's history and relevant evidence in the annual review, the most important factor was the evidence of changed behaviour given by Fardon and the psychiatric evidence. The ultimate opinion of the psychiatrist as to risk was expressed in the following terms:

'The moderate risk for sexual re-offending which I have outlined would mean that Mr Fardon has a greater risk than the average sex offender for re-offending but that the increased risk is relatively moderate in extent. In my opinion, that risk could now be contained and reduced by a supervision order, providing Mr Fardon's positive attitudes and cooperation persist beyond the present environment.'





WHAT DO YOU THINK?



If you replace the psychiatric evidence in the activity 'You be the judge' with the new psychiatric opinion above, would you be likely to agree with the Court of Appeal, when it made its decision in November 2013 to again release Fardon under a supervision order? [A] [E]

CASE STUDY

R v COWAN (UNREPORTED SUPREME COURT SENTENCING HEARING, BRISBANE, 14 MARCH 2014)

SOURCE: BROOKE BASKIN, 'DANIEL MORCOMBE'S KILLER BRETT COWAN SENTENCED', THE COURIER-MAIL (COURIERMAIL.COM.AU) 14 MARCH 2014 (EXCERPTS)

Facts: Serial pedophile, Brett Cowan, 44 years old at the time of his trial and sentencing, was found guilty by a Supreme Court jury of, at the age of 34, indecently dealing with then 13-year-old Daniel Morcombe, murdering him and interfering with his corpse after luring him from a Sunshine Coast bus stop on December 7, 2003.

The Crown prosecutor argued that Cowan should be jailed without parole for longer than the mandatory minimum 15 years, due to Cowan's perverted sexual past, which includes horrific sex attacks, including rape, on boys in Brisbane and Darwin in 1987 and 1993, for which he served nine years in jail. But Cowan's defence lawyer, Angus Edwards, argued his client deserved a more lenient sentence because he didn't intentionally kill Daniel.

Daniel's parents Bruce and Denise tendered victim impact statements describing the anguish of losing their son at the hands of a child molester. With Cowan present in the courtroom, Denise Morcombe described him as a "perverted soul" who underestimated the Morcombe family's drive to catch Daniel's killer. "That was your mistake, you evil, evil, unhuman thing," she wrote.

Issue: What sentence was most appropriate under the Penalties and Sentences Act 1992 (Qld)?

Decision: Justice Atkinson sentenced Cowan to life in prison and set a minimum non-parole period of 20 years, but added that he should never be released as, in her opinion, he was "beyond rehabilitation". Justice Atkinson was required to sentence Cowan to a non-parole period of at least 15 years, but said she felt Cowan's crimes warranted a harsher penalty. "Everything about what you did to that child was horrific and disgraceful," she told Cowan in the Brisbane courtroom. "This is not just a murder, but a terrible murder. It has had widespread and shocking impacts."

She said it was important to also make it clear the community denounced the conduct in which he was involved and to protect the Queensland community from him. "For the reasons set out by the learned prosecutor in his address, I am able to set a parole eligibility date later than 15 years, which is the statutory minimum." She said in view of his criminal history and "enormity" of the crimes he had committed it was appropriate to set parole eligibility after 20 years served in jail. "They (the Parole Board members) should take into account that you are a plausible and opportunistic liar before they consider any view you might have about whether or not you have been rehabilitated," she said.

She said on count two, the charge of indecently dealing with a child, she sentenced Cowan to 3.5 years in jail to be served concurrently with the life sentence. Justice Atkinson said she sentenced him to misconduct with a corpse at the maximum available penalty, two years in jail to be served concurrently.

"You were, in your own words an opportunistic offender, you were waiting for an opportunity," she said. She said everything about what Cowan had done to the boy was "horrific and disgraceful". "This is not just a murder but a terrible murder. It has had widespread and shocking impacts of course and primarily, on his family, his parents and of course his two brothers, particularly his twin brothers. "But you gave no thought to them and it's not apparent to me that you've ever given any thought to that or to them. I've seen no evidence in the months you've been in this court ... that you ever felt any remorse for what you did apart from feeling sorry for yourself that you might get caught."

She said the abduction of a child in broad daylight by a stranger was very unusual and for that "we can all be extremely grateful". The fear of the stranger drives fear into the hearts of everyone in the community that vulnerable children might be taken by a predator like you and dealt with in this way," she said. These are chilling and disgraceful crimes."

CASE STUDY CONTINUED...

Justice Atkinson said he had committed terrible crimes throughout his life, escalating in offending. "When I talk about your upbringing of course it reminds me of other victims of these crimes: your family, your parents, siblings and most terribly your own children who will forever be associated with you and your name," she said.

She said Cowan's criminal history commenced when he was 17 and convicted for break and enter and unlawful use of a motor vehicle. Justice Atkinson said Cowan was convicted in the District Court in Brisbane with indecent dealing with a boy under 14 on September 8, 1989, a crime committed on December 5, 1987. She said the boy was seven-years-old and Cowan was acquitted of the offence of sodomy. "You were sentenced to two years imprisonment," she said.

She said Cowan continued to offend in minor ways, but most importantly went to the Northern Territory and committed a "horrific" series of offences against a small boy who was only six. "Again you just took advantage of an opportunity to commit acts of sexual violence against this child," she said. Justice Atkinson said Cowan was convicted of an aggravated act of gross indecency,

deprivation of liberty and another offence in relation to the offence. She said Cowan was sentenced to seven years and "pretended to be keen to be rehabilitated. You are a convincing, plausible and adaptive liar and you are prepared to lie to advance your own interests."

.....

Justice Atkinson had words to those who called for longer or harsher sentences against sex offenders. "People who call for longer or harsher sentences against sex offenders need to consider the evidence in this case that Mr Cowan killed Daniel Morcombe to avoid detection and if the sentence for a sex offence is the same as a sentence for murder, my concern is that would act as a perverse incentive to offenders to kill victims," she said. "Killing a victim is worse than sexual offending against a victim and this case is an example of that. I just want to ensure that I have said that, so that those who call for greater sentencing of sex offenders have to be aware that this is not an area where there are simple solutions. That is not to suggest the courts should or do go easy on sex offenders whose behaviour is of course, entirely abhorrent."

1. What sentence was imposed on Brett Cowan for his crimes against Daniel Morcombe? [C]
2. How did Justice Atkinson weigh up the material (significant/important) factors and purposes of sentencing under the Queensland *Penalties and Sentences Act* in her sentencing of Brett Cowan? [A]
3. Do you believe the sentence orders imposed on Brett Cowan in this hearing were effective, just and equitable forms of punishment, weighing up the competing viewpoints of the different parties and other stakeholders affected by Cowan's crimes? [E]
4. Conduct research about the decisions to release Cowan into the community on parole in relation to the two previous sexual assault cases before Cowan's crimes were committed against Daniel Morcombe. [S] In your opinion, were the two previous decisions to release Cowan on parole effective, just and equitable in their outcomes? [E]

HOW EFFECTIVE IS OUR CRIMINAL APPEALS PROCESS IN CASES WHERE SENTENCES ARE NOT CONSIDERED TO BE APPROPRIATE?

According to the Queensland Sentencing Advisory Council (sentencingcouncil.qld.gov.au), appeals may be made to a higher court, in certain circumstances, by an offender against their sentence, whilst the Queensland Attorney-General may also appeal against a sentence on behalf of the state.

The following source is an example of an appeal made by the Attorney-General against the appropriateness of the sentence imposed on a convicted rapist.





WHAT DO YOU THINK?



1. Conduct research to find out what was the outcome of the following appeal. [S] [C]
2. What was the reasoning for the appeal court's decision? [A]
3. Do you believe the appeal decision provided a more just and equitable outcome for the different stakeholders affected by it? [E]
4. Conduct further research to find out how frequently criminal trial outcomes have been appealed against in Queensland and how effective the appeals have been in bringing about just and equitable outcomes for the parties and other stakeholders. [S] [C] [A] [E]

ATTORNEY-GENERAL APPEALS AGAINST 'MANIFESTLY INADEQUATE' RAPE SENTENCE

SOURCE: LUCY STONE, BRISBANE TIMES (BRISBANETIMES.COM.AU), 23 MAY 2018 (EXCERPTS)

Attorney-General Yvette D'ath has filed an appeal against the four-and-a-half year sentence imposed on rapist James Ronald Lennox. Lennox, 58, was sentenced on April 19 at the Brisbane District Court for the rape of a 27-year-old woman in Carindale in January 2016. The sentence was suspended after 14 months. "On the advice of the Office of the Director of Public Prosecutions, the Attorney-General has lodged an appeal on the grounds that the sentence is manifestly inadequate," a statement from the Attorney-General's office said.



RESEARCH



The following appeals against the appropriateness of the sentences were heard by the Queensland Court of Appeal. For each of the following appeals and any other appeals which you can locate in your research, you are to locate the sentencing hearing report online, identify the key facts of each case which are relevant to the sentence, analyse the opposing parties' viewpoints in relevant submissions on appeal in the light of the appeal judges' decision and reasoning, and then decide whether or not you believe the appeal court's decision was just and equitable in terms of its outcome for the parties and other stakeholders involved. [C] [S] [A] [E]

1. *R v Wano; Ex parte Attorney-General (Qld)* [2018] QCA 117 (<https://archive.sclqld.org.au/qjudgment/2018/QCA18-117.pdf>)
2. *R v Brown; Ex parte Attorney-General (Qld)* [2016] QCA 156 (15/116) Fraser JA and Jackson and Bond JJ 14 June 2016 (<https://www.sclqld.org.au/caselaw/QCA/2016/156>)
3. *R v Williams; Ex parte Attorney-General (Qld)* [2014] QCA 346 ; (2014) 247 A Crim R 250 (14/0090) Holmes JA and McMeekin and Henry JJ 19 December 2014 (<https://www.sclqld.org.au/caselaw/QCA/2014/346>)

HOW EFFECTIVE IS OUR CRIMINAL JUSTICE SYSTEM IN REDUCING THE RATE OF REOFFENDING (RECIDIVISM)?

PRACTICAL APPLICATION

Read the Abstract of the authoritative 2018 source below, published by the Australian Institute of Criminology, and then complete the tasks which follow it.

TARGETING REPEAT DOMESTIC VIOLENCE: ASSESSING SHORT TERM RISK OF OFFENDING

SOURCE: ANTHONY MORGAN, HAYLEY BOXALL & RICK BROWN, AUSTRALIAN INSTITUTE OF CRIMINOLOGY (AIC.GOV.AU/PUBLICATIONS), TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE, NO. 552, JUNE 2018 (EXCERPTS)

Abstract:

Drawing on repeat victimisation studies, and analysing police data on domestic violence incidents, the current study examined the prevalence and correlates of short-term reoffending.

The results showed that a significant proportion of offenders reoffended in the weeks and months following a domestic violence incident. Individuals who reoffended more quickly were more likely to be involved in multiple incidents in a short period of time. Offenders with a history of domestic violence—particularly more frequent offending—and of breaching violence orders were more likely to reoffend. Most importantly, the risk of reoffending was cumulative, increasing with each subsequent incident.

The findings have important implications for police and other frontline agencies responding to domestic violence, demonstrating the importance of targeted, timely and graduated responses.

Complete the following tasks in order to understand, analyse and evaluate the reasons, results and recommendations of this source.

1. Locate the report at <https://aic.gov.au/publications/tandi/tandi552>. [S]
2. Based on your reading of the brief summary of the report on pages 1-4, what are the main reasons and evidence given for there being '... a need to explore the temporal (time-based) dimensions of repeat domestic violence victimisation and offending and, in particular, focus on the period immediately following a domestic violence incident'? [C]
3. What was the overall aim of this research study and report and what was the method of analysis of data? [C]
4. Based on your reading of pages 6 to 8 of the report and your analysis of the significance of data in Tables 1 and 2 as well as Figure 1 set out and explained on these pages, what proportion of offenders reoffend in the period immediately following a domestic violence incident? [C] [A]
5. To what extent is prior domestic violence offending associated with an increased likelihood of short-term offending? (see pages 9 and 10 of the report) [C] [A]
6. Are domestic violence offenders more likely to offend with each subsequent offence? (see pages 10 and 11 of the report) [C] [A]
7. What important implications, especially in terms of recommendations for reform of the law's response to domestic violence offences, do the report's findings have for police and other frontline agencies responding to domestic violence? [E]

HOW EFFECTIVE ARE NON-CUSTODIAL SENTENCES COMPARED WITH IMPRISONMENT FOR DRUG RELATED CRIMINALS?



WHAT DO YOU THINK?



1. What sentence was imposed on the Brisbane woman in the following 2018 District Court sentencing hearing for being a drug mule? [C]
2. Do you believe it was an appropriate sentence for the drug offence in this instance, based on your analysis of the different purposes of punishment under the *Penalties and Sentences Act 1992* (Qld) and taking into account the woman's history of drug offences which included five incidents of acting as a courier of cannabis? [A]
3. Based on your careful reading of the justifications for the reinstatement of Drug Courts in Queensland in the second source below, do you think a Drug and Alcohol Treatment Order would be a more effective, just and equitable sentencing order for this Redcliffe mother in order to help her break her ongoing cycle of drugs, crime, police arrests and court hearings? [A] [E]

DRUG MULE MOTHER SPARED JAIL FOR THE SAKE OF YOUNG DAUGHTER

SOURCE: VANDA CARSON, THE COURIER-MAIL (COURIERMAIL.COM.AU), 30 JULY 2018 (EXCERPTS)

A REDCLIFFE mother turned drug mule has walked free from court after she was busted with \$140,000 worth of cannabis. TG, 25, a beautician, was sentenced for cannabis possession in Brisbane District Court today.

Prosecutor Lara Soldi told the court G had been charged after police pulled over a Jeep wagon driven by her boyfriend AB on December 28, 2017, at Hendra in Brisbane's inner northeast. G was a passenger in the car. B was also charged but is yet to have his case heard. G had been paid \$1000 for the job and understood that the role would involve some sort of unlawful purpose, Ms Soldi said. Police found 12.6kg of cannabis with a street value of up to \$140,000 in the back of the car, packaged for sale in heat-sealed bags, the court was told.

Ms Soldi told the court G had a history of drug offences dating back to 2016, including five incidents of acting as a cannabis courier. "Fines have not deterred her," Ms Soldi told the court. G's lawyer Ali Rana told the court G was "simply" a delivery driver and wasn't doing it to finance a "flash lifestyle" or for "leisurely activities". Judge Bernard Porter sentenced G to 18 months' jail, to be immediately released on parole. "Don't do this again, Ms G, there are a lot of people relying on you, it seems," Judge Porter told her, referring to her seven-year-old daughter.

NEW PUNISHMENTS IN PLACE AHEAD OF DRUG COURT ROLLOUT

SOURCE: EMMA CLARKE, QUEENSLAND TIMES (QT.COM.AU), 15 AUGUST 2017 (EXCERPTS)

CHANGES to the way drug offenders are dealt with in court have been put in place ahead of the re-established Ipswich Drug Court services later this year. The legislation changes are focused at rehabilitating drug and alcohol offenders and allow courts to give low-risk criminals special treatment orders. Close to \$23 million was put aside in this year's state budget to be spent over four years to re-establish the specialist court.

It comes as drug crimes in Ipswich rose 46.4% from June to July, with 391 offences committed last month. In the last three months, 35 drug crimes were committed in the Ipswich CBD.

Attorney-General and Minister for Justice Yvette D'Ath introduced legislation that outlines how the re-established Drug Court would work in Queensland ... "(The) introduction of the Penalties and Sentences (Drug and Alcohol Treatment Orders) and Other Legislation Amendment Bill 2017 outlines the legislative framework for the Drug Court and ensures the criminal justice system is properly equipped to respond to and directly address drug and alcohol use that contributes to offending behaviour," Mrs D'Ath said.



WHAT DO YOU THINK? CONTINUED



"The Bill inserts a new sentencing option that allows a court to place a Drug and Alcohol Treatment Order on those whose offending is directly linked to their severe drug or alcohol use, which will help put them back on the right path in life, away from re-offending in the long term. "These orders will facilitate the rehabilitation of offenders by providing a treatment regime that is supervised by the court.

"A range of conditions can be imposed on an order, such as submitting to medical and psychological treatment, alcohol or drug testing, wearing a device that detects alcohol or other drug use and reporting to authorities." The legislation outlines a court can make a treatment order if it is satisfied the offender would not pose an unacceptable risk to the safety and welfare of the community.

The new Drug Court will be based in Brisbane, with referral and support services in Brisbane, Ipswich, Southport and Cairns. "The new Drug Court will provide an intensive and targeted response to adult offenders with a drug or alcohol dependency directly associated with their offending behaviour," Mrs D'Ath said. "It is hoped the Drug Court will be operational by the end of this year, with the roll-out of other referral and support services to also commence in the second half of this year."

13.3 RATES OF INCARCERATION AND REOFFENDING OF VULNERABLE PEOPLE IN AUSTRALIA



INQUIRY



HOW ARE VULNERABLE PEOPLE IN AUSTRALIA, SUCH AS ABORIGINAL PEOPLES, TORRES STRAIT ISLANDER PEOPLES, WOMEN, CHILDREN, AND PEOPLE WITH DISABILITIES, TREATED IN TERMS OF THEIR RATES OF INCARCERATION AND REOFFENDING?

In order to consider what is being done, and what needs to be done, to address the issue of the over-imprisonment of Indigenous Australians compared with non-Indigenous Australians, it is important to understand and analyse up-to-date statistics which reveal the reality of the problem.

PRACTICAL APPLICATION

1. Read the following statistics compiled by the Australian Bureau of Statistics comparing imprisonment rates of the general population of Australia with those of Aboriginal and Torres Strait Islander peoples. Identify specific statistics which prove the disproportionate rates of imprisonment in the year ending 30 June 2017 and also during the 10 years to 30 June 2017. [C]
2. Conduct your own research and select sources which provide you with an up-to-date picture of whether comparative imprisonment rates of Indigenous and non-Indigenous peoples have improved or worsened since 30 June 2017. [S] [C]

ABORIGINAL AND TORRES STRAIT ISLANDER PRISONER CHARACTERISTICS

SOURCE: AUSTRALIAN BUREAU OF STATISTICS (ABS.GOV.AU/AUSSTATS), 2017 (EXCERPTS)

Snapshot

At 30 June 2017:

- ▶ There were 11,307 prisoners who identified as Aboriginal and Torres Strait Islander, a 7% increase (711 prisoners) from 30 June 2016. The number of non-Indigenous prisoners increased by 6% (1,654 prisoners).

Prisoners, Indigenous Status, 30 June 2007 to 30 June 2017

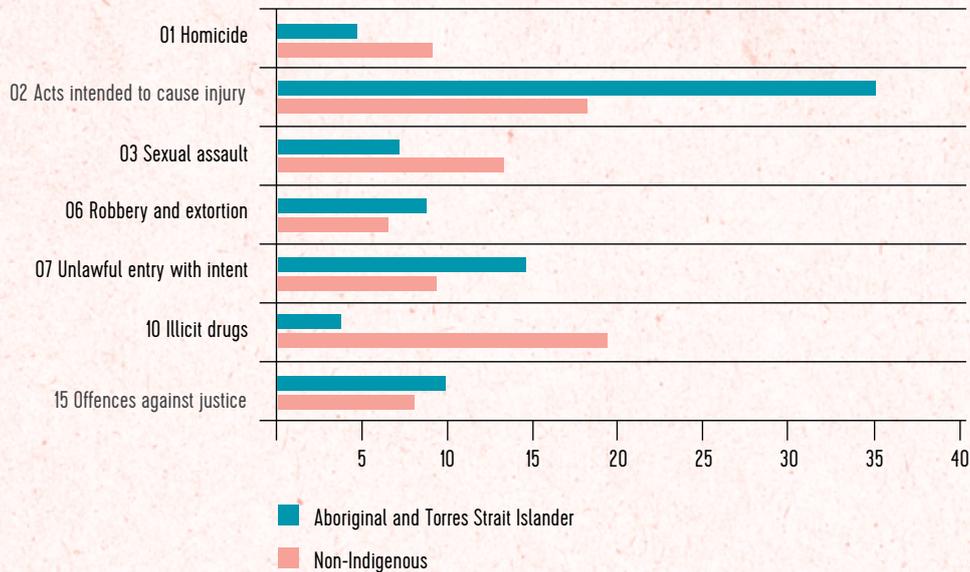


Source(s): Prisoners in Australia

- ▶ Aboriginal and Torres Strait Islander prisoners accounted for just over a quarter (27%) of the total Australian prisoner population. The total Aboriginal and Torres Strait Islander population in Australia aged 18 years and over in 2017 was approximately 2% of the Australian population aged 18 years and over (based on Australian Demographic Statistics (cat. no. 3101.0) and Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026 (cat. no. 3238.0)).
- ▶ From 30 June 2017, the Aboriginal and Torres Strait Islander imprisonment rate increased by 4%, from 2,346 to 2,434 prisoners per 100,000 Aboriginal and Torres Strait Islander population. The non-Indigenous rate also increased by 4% over the same period from 154 to 160 prisoners per 100,000 non-Indigenous population.
- ▶ The proportion of adult prisoners who identified as Aboriginal and Torres Strait Islander ranged from 9% in Victoria (610 prisoners) to 84% (1,349 prisoners) in the Northern Territory.
- ▶ The most common offence/charge for Aboriginal and Torres Strait Islander prisoners was Acts intended to cause injury (35% or 3,967 prisoners) followed by Unlawful entry with intent (14% or 1,607 prisoners). The most common offence/charge for non-Indigenous prisoners was Illicit drug offences (19% or 5,777 prisoners) and Acts intended to cause injury (18% or 5,376 prisoners).

PRACTICAL APPLICATION CONTINUED...

Proportion of Prisoners, Indigenous status by selected most serious offence or charge (a), 30 June 2017



- ▶ Just over three out of four Aboriginal and Torres Strait Islander prisoners (76% or 8,622 prisoners) had been imprisoned under sentence previously, compared to nearly one in two non-Indigenous prisoners (49% or 14,638 prisoners).

Customary law is the way Aboriginal peoples and Torres Strait Islander peoples live and their rules, including ceremonies, songs, stories; a way of life governed by a system of beliefs. The reintroduction of the Murri Court in Queensland is an example of the application of customary law to sentencing hearings of Indigenous offenders.

PRACTICAL APPLICATION

COMMUNITY HOPEFUL AS MURRI COURT REOPENS

SOURCE: ELLA ARCHIBALD-BINGE, SBS ONLINE – NITV NEWS (SBS.COM.AU/NITV), 14 APRIL 2016 (EXCERPTS)

The Murri Court has been reinstated in Queensland in a move law experts say will help reduce 'appalling' Indigenous imprisonment rates.

The first of 13 courts reopened in Rockhampton yesterday as part of an \$8.7 million dollar program unveiled by the state Labor government. A community initiative involving Aboriginal elders in the sentencing process, the Murri Court was axed by the Newman government in 2012, amid protests from local elders and legal experts. Aboriginal and Torres Strait Islander people account for 32 percent of Queensland prisoners, making them 11 times more likely to be imprisoned than the wider population.

Queensland Attorney-General Yvette D'Ath says she hopes the reinstated system will help break the incarceration cycle. "It is really important that we give our courts... the opportunity to look at diversionary programs to ensure that we are

rehabilitating those who come before the courts," she says. "It's not just about incarceration, it's about actually looking at the circumstances and where it is seen as appropriate ensuring that we can stop recidivism through rehabilitation and other programs."

The reinstatement of the Murri Court system has been welcomed by the Queensland Law Society. "Courts like the Murri Court and the Drug Court have been successful in reducing re-offending and incarceration, and it is good to see them on the way back in Queensland," says Queensland Law Society president Bill Potts.

Members of the local Indigenous community agree. Darumbal Elder Dean Edmund says the court provides community-based penalties as an alternative to prison sentences. "(It) gives us greater involvement ... in the top of the justice system rather than scrambling around as victims at the bottom," he says. "When offenders come in they see elders in the courtroom situation and have more respect for the laws. While there is no Murri Court a lot of offenders are going to court for minor crimes or petty crimes."

INDIGENOUS ELDERS JOIN MAGISTRATES IN SPECIAL COURT FOR OFFENDERS WILLING TO REHABILITATE

SOURCE: EMILIA TERZON, ABC NEWS ONLINE (ABC.NET.AU), 7 JUNE 2017 (EXCERPTS)

Magistrate Trevor Black did not hold back when he addressed a Torres Strait Islander man with a long history of tormenting his wife.

"You've been nothing but a thug and a bully," Mr Black said.

Yet it was a grey-haired woman seated near the magistrate's bench that really made the man hang his head in shame. "[Your wife] feels degraded," Aunty Leila Savage said. "It's not nice for a man to do that. You have to love her like you love yourself. We expect you'll do better now and look after your wife." It was just one example of the good cop, bad cop approach seen in the Cairns Murri Court.

The Queensland court program was set up in 2002 to tackle the state's staggeringly disproportionate rates of Indigenous incarceration. It today operates in 14 courts across the state and hears about the cases of about 800 people a year. It only admits Indigenous offenders who are pleading guilty, and it requires them to meet regularly with volunteer elders for months before they are sentenced by the courts. The pay-off is defendants overwhelmingly avoid jail time because they have proven ahead of sentencing they are willing to rehabilitate.

"I call it the carrot and stick approach," Mr Black said.

It is a vastly different approach to the churn of mainstream courts, where there is far less time for pre-sentencing intervention and prison time can be dished out in minutes. "At the court downstairs, they send you straight to Lotus Glen Prison," Mervyn Weatherall, another Cairns Murri Court elder, said. "There's nothing like Murri Court."

'I WOULD NEVER RE-OFFEND AGAIN,' OFFENDER SAYS

David Daffey is a Kuku Yalanji man who, after years of repeat offending and court appearances, went through the "totally different" Murri Court system in Cairns. "It was my mob, my people. You feel more at ease," he said.

Some may argue the Murri Court goes easy on offenders, but Mr Daffey said it was the opposite, because it forced him to contemplate his actions. "All in all, I would never reoffend again. I know that for sure," he said.

Mr Black said he had witnessed many turning points. "Some of the most emotional scenes that I've ever seen in a courtroom have been Aunty Leila talking to men about how hurtful domestic violence is [while] their partner is in the room," he said.

PRACTICAL APPLICATION CONTINUED...

"You'll see young men, who've never in their life apologised for their animalistic behaviour, finally saying they're sorry."

For the elders, it comes down to a personal touch. Their volunteer work goes far beyond advocating for the offender in the courtroom. It includes liaising with drug and alcohol services, family counsellors, welfare groups, and writing advocacy letters.

Many [offenders] have found themselves homeless or disenfranchised from their Indigenous culture, Aunty Leila said. "It can take several visits before they give you the slightest hint that they're opening up," she said. "We have them over for cups of tea. They bring their children and their wives, and I have a growl [with the offenders] and say you need to work together and do not hit her."

FEW YOUNG OFFENDERS GOING THROUGH MURRI COURT

Despite its anecdotal success, Mr Black said the Murri Court was not for everybody and there are still those who dropped out, re-offended or expected leniency for nothing. He also acknowledged the Indigenous incarceration rate remained unacceptably high in Queensland.



Rather than falling, the percentage of Queensland prisoners who are Indigenous has actually risen since the Murri Court's inception, from 27 per cent in 2006 to 31.8 per cent in 2016. At the moment, most of the state's Murri Courts are only held monthly, with less than 70 people going through the program a month.

These numbers are only the very tip of the iceberg, Mr Black said. "I would like to see a lot more interventionist courts and a lot more opportunities for custodial officers to explore other options [than jail]," he said.

"Sometimes it seems like a custodial sentence is a first resort, rather than a last resort. That shouldn't be the case."

It is a particular issue for young offenders, with an Amnesty International report last year saying the state's Indigenous children were 22 times more likely to be detained than non-Indigenous children. The Murri Court in Cairns is funded to handle juvenile matters but is currently not accepting young offenders, and it is not the only Murri Court in this situation.

Mr Black said he needed more elders before his court could handle juvenile offenders, as well as more specialist training for those volunteers. Elder Mervyn Weatherall said juvenile offenders were tough to deal with. "They swear at you in court," Mr Weatherall said.

1. Based on your reading of the above articles, how is the Queensland Murri Court an example of the role of customary law in the Queensland legal system? [C]
2. Examine the different viewpoints expressed in the above articles, and the evidence relied upon to back up those viewpoints, about the effectiveness of the Murri Court in reducing recidivism (repeat offending) and imprisonment rates of Indigenous Australians. [A]
3. Conduct research into viewpoints of other stakeholders in the community which corroborate (back up or confirm) the central viewpoints of the above articles and, in contrast, viewpoints of those people who are opposed to them. [S] [A]
4. What recommendations for reform of the law do you propose after weighing up the opposing viewpoints of the different stakeholders? Write your recommendations in the form of an online blog on the website of the Queensland Courts website. [E] [R]

HOW EFFECTIVE IS SENTENCING OF CHILDREN (JUVENILES)?

PRACTICAL APPLICATION

Read the following excerpts from the Queensland Sentencing Advisory Council's website (sentencingcouncil.qld.gov.au/about-sentencing/sentencing-child-offenders – last updated 26 October 2017), describing the sentencing of child offenders in Queensland, and summarise the key features of our laws guiding the sentencing of children under 17 years of age in this state by taking notes in response to the following focus questions. [C]

1. In what circumstances and under what Queensland Act of Parliament can a child be held legally responsible for committing an offence?
2. What is the key piece of legislation that guides the sentencing of children under 17 years of age in Queensland?
3. What special considerations and principles apply to the sentencing of children?
4. What is the general sentencing principle of 'diversion' in the *Youth Justice Act* (YJA) 1992 (Qld)?
5. What are the circumstances in which this 'diversion' principle is not to be applied to child offenders under the Act?
6. What are diversionary sentencing options which can be used by police in relation to child offenders? Briefly explain each option.

The *Criminal Code* (Qld) sets out the circumstances where a child can be held legally responsible for committing an offence:

- ▶ 'A child under 10 is not criminally responsible for any act or omission.
- ▶ 'A child under 14 can only be criminally responsible if the prosecution shows the child had the capacity to know they should not do the act or make the omission at the time of doing it.

The *Youth Justice Act 1992* (Qld) (YJA) is the key legislation that guides the sentencing of children under 17 years of age. From 12 February 2018, 17-year-olds will be treated as children for the purposes of the Act. The YJA also outlines when a young offender transitioning into adulthood should be treated as an adult.

Special considerations and principles apply to the sentencing of children, including:

- ▶ 'A child's age is a mitigating factor in deciding whether or not to impose a penalty and the nature of the penalty.
- ▶ 'A non-custodial order (a sentence served in the community) is better than detention in promoting a child's ability to reintegrate into the community.
- ▶ 'The rehabilitation of a child is greatly assisted by the child's family and opportunities to engage in educational programs and employment.
- ▶ A detention order should be imposed only as a last resort and for the shortest appropriate period.

Subject to the operation of the Act, the general sentencing principles that apply to the sentencing of adult offenders also apply to children.

Diversion

The YJA includes the principle that if a child commits an offence, they should be diverted from the court process unless the nature of offence and the child's criminal history indicate a court proceeding should be started.

Examples of diversionary options that can be used by police include administering a caution, referring the child to participate in a restorative justice process, offering the child an opportunity to attend a drug diversion assessment program or a graffiti removal program. Police also have the power to take no action.

PRACTICAL APPLICATION CONTINUED...

Caution: when a child admits to the offence and is willing, a police officer (or, where applicable, a respected Aboriginal or Torres Strait Islander community member) can explain to them what they have done wrong instead of bringing them before a court. This can involve an apology to a victim if the child is willing to apologise and the victim is willing to participate.

Graffiti removal program: police can offer this two-hour program to a child aged at least 12 who admits to a graffiti offence.

Police drug diversion assessment program: police can refer a child found in possession of a small amount of cannabis (not more than 50 grams) or a thing used for smoking cannabis, to an assessment, education and counselling session. At this session, participants are provided with information about the health impacts of illicit drug use and consequences of continued use, and assistance to stop using drugs.

Releasing at a place of safety: police must take a child arrested for being intoxicated in public to a place of safety, and release them there, if this is more appropriate than holding them at a police station or watch-house. In this case, any charge against the child is not proceeded with.

Restorative justice process: if a child admits to the offence and is willing, police can refer them to a voluntary meeting (a conference) or an alternative diversion program.

A **conference** is run by an independent convenor. Both the child and convenor must attend personally. Other participants can include the victim (or their representative) or a representative of a victim advocacy organisation, support people and other people affected by the crime. The aim is for the child and victim to agree on how the child can make up for the harm caused, in a way that benefits everyone.

When a conference is not possible, even though the child would participate, an alternative **diversion program** can be used to help the child understand the harm caused and take responsibility for the offence. This involves remedial actions, activities to strengthen relationships with family and community, and educational programs.

The restorative justice process is still relevant for children who go to court. The court:

- ▶ may dismiss a charge (and may also make a referral to the restorative justice process) when a child pleads guilty but applies for dismissal because police should have referred them
- ▶ must consider referral instead of sentencing if the child pleads guilty
- ▶ must consider referral if it finds the child guilty.

Infringement notice: where an adult could choose to pay a fine through an infringement notice instead of going to court, a child can do this too. Relevant infringement notice offences include obstructing police, unauthorised dealing with shop goods, public nuisance, trespass, and traffic offences for learner drivers, speeding and failure to comply with road rules.

Courts also have the power to make certain decisions and referrals instead of sentencing the child for the offence when charges are proceeded with.

Dismissal: a court can dismiss a charge (and may also issue a caution or direct a police officer to do so) when a child pleads guilty but applies for dismissal because the child should have been cautioned, or no action should have been taken.

Court referred drug assessment and education session before sentencing: a court can refer a child who pleads guilty, consents and meets screening criteria, to a one-on-one session involving assessment of their drug use, drug education and identification of treatment options. Eligible charges are possessing small amounts of certain dangerous drugs for personal use (including amphetamines, cannabis and ecstasy) and possessing things like a bong or needle. Successful completion means the court proceedings come to an end and the child is not liable to be further prosecuted for the offence.



WHAT DO YOU THINK?



What is the central viewpoint (thesis) of the author in the following source in relation to the best way to help young criminal offenders? Do you agree with this central viewpoint in terms of the arguments and evidence relied upon in order to substantiate it and in relation to the recommendations ensuing from them? Why or why not? [A] [E] Conduct research into a range of relevant sources and select sources which corroborate the author's thesis as well as sources which oppose or challenge it. [S]

OPINION: LABELS AND PUNISHMENT NOT THE WAY TO HELP YOUNG OFFENDERS

SOURCE: MEG PERKINS, THE COURIER-MAIL (COURIERMAIL.COM.AU), 30 DECEMBER 2016 (EXCERPTS)

ON Boxing Day The Courier-Mail published an article on the Children's Court in which Judge Michael Shanahan expressed his concern that a small group of young offenders (10 per cent of 3742) require focused attention in order to decrease their offending behaviour

Unfortunately, the use of emotionally loaded expressions such as "child crims" and "child criminals" in media coverage labels children as young as 10 years old as bad, anti-social and dangerous. Young children who are persistent offenders usually have good reasons for their failure to avoid the criminal justice system. Poverty is a major factor in crime worldwide and children whose parents are absent or unwell (mentally ill or substance abusing) may be stealing due to hunger.



Most Australians find this difficult to believe, but talking to children who have spent time on the streets at age 10 or 11 soon changes one's perspective. One boy survived for years on the Gold Coast, stealing food from Woolworths and clothes from Big W, before he was finally given a job ... by a drug dealer.

Then there are the children who have been physically and/or sexually abused by their parents, family members or family friends. These children may be highly anxious and angry. Many have a particularly severe type of developmental post-traumatic stress disorder, an anxiety disorder which affects both the structure and the function of their brains. They are not offered any medical or psychological therapy as their families are not willing or able to expose the child abuse to anyone in authority. They soon learn alcohol and marijuana ease their emotional distress and may try drugs such as heroin and ice. Chronic illicit drug users frequently have a history of beginning to use alcohol around age 11 or 12 and marijuana soon afterwards. These substance abusing children break and enter and steal to support their self-medication program. They know no other way to cope with their traumatic lives.

There are also children who cannot manage the demands of the school environment. Their brains may have been damaged by toxins such as prenatal alcohol or marijuana, or they may have been deprived of oxygen during birth, or perhaps fallen on their heads from an upstairs veranda onto concrete. They may have a neurobehavioural disorder that has not been diagnosed. The result is that their brains are immature and/or dysfunctional. They cannot sit still, cannot follow instructions, cannot control their behavioural impulses or their emotional outbursts, cannot remember what they have been taught, and cannot achieve the academic goals set for them at school. They may be diagnosed with ADHD (attention deficit hyperactivity disorder), a description of symptoms which does not attract disability services at home or at school.

Children of poverty may find a way out if they are talented at school or at sport. They may be able to work their way into a different life if they are supported by prosocial family members or teachers. Abused children, who have



WHAT DO YOU THINK? CONTINUED



otherwise healthy brains, may also find a way to turn their lives around. They may be able to use their strengths, such as friendliness and empathy, to connect to others, to overcome the anxiety and depression that they have suffered due to the abuse.

It is the group who have significant brain damage who will not learn to behave in a socially acceptable fashion. They will not learn because they cannot learn, not because they won't. They are confused by the demands made upon them and frustrated by the negative feedback that they receive from others, adults and their peers alike. Punishment will not heal their brains, nor improve their behaviour. In fact, if we have 374 children in Queensland who are persistent offenders, it is more than likely that they are those who are suffering from all three conditions; poverty, child abuse and brain damage or dysfunction. It is impossible to "rehabilitate" those who have never been functional. We need to focus our attention on assessment and intensive therapy, as well as social supports, "rehabilitation" not "justice", if we are to break their cycle of offending.

Dr Meg Perkins is a psychologist, researcher and writer

HOW EFFECTIVE, JUST AND EQUITABLE IS SENTENCING OF PEOPLE WITH DISABILITIES?

PRACTICAL APPLICATION

AUSTRALIAN PRISONERS WITH DISABILITIES NEGLECTED, ABUSED

SOURCE: HUMAN RIGHTS WATCH (HRW.ORG), 6 FEBRUARY 2018 (EXCERPTS)

[HTTPS://WWW.HRW.ORG/NEWS/2018/02/06/AUSTRALIA-PRISONERS-DISABILITIES-NEGLECTED-ABUSED](https://www.hrw.org/news/2018/02/06/australia-prisoners-disabilities-neglected-abused)

(Sydney) People with disabilities in prisons across Australia are at serious risk of sexual and physical violence, and are disproportionately held in solitary confinement for 22 hours a day, Human Rights Watch said in a report released today. The 93-page report, "I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia," examines how prisoners with disabilities, including Aboriginal and Torres Strait Islander prisoners, are at serious risk of bullying, harassment, violence, and abuse from fellow prisoners and staff. Prisoners with psychosocial disabilities – mental health conditions – or cognitive disabilities in particular can spend days, weeks, months, and sometimes even years locked up alone in detention or safety units.

State and federal governments should end the use of solitary confinement for prisoners with disabilities, ensure that appropriate services are available to meet their needs, and more effectively screen prisoners for disabilities as they enter prison. "Being locked up in prison in Australia can be extraordinarily stressful for anyone, but is particularly traumatic for prisoners with disabilities," said Kriti Sharma, disability rights researcher at Human Rights Watch and author of the report. "The services to support a prisoner with a disability just aren't there. And worse, having a disability puts you at high risk of violence and abuse."

Human Rights Watch investigated 14 adult prisons across Western Australia and Queensland and interviewed 275 people, including 136 current or recently released prisoners with disabilities, as well as prison staff, health and mental health professionals, lawyers, academics, activists, family members or guardians, and government officials. People with disabilities, particularly psychosocial or cognitive disabilities, are dramatically overrepresented in the criminal justice system in Australia – 18 percent of the country's population, but almost 50 percent of people entering prison. Aboriginal and Torres Strait Islander people comprise 28 percent of Australia's full-time adult prison population, but just 2 percent of the national population. Within this group, Aboriginal and Torres Strait Islander people with disabilities are even more likely to end up behind bars.

PRACTICAL APPLICATION CONTINUED...

However, prisons fail to adequately identify people with disabilities and are ill-equipped to meet their needs, often lacking the most basic services. In 9 out of 14 prisons, prisoners with physical disabilities had to either wait for access to a bathroom, or else shower, urinate, or defecate in humiliating conditions because bathrooms were not accessible. "Toilets are not accessible," one prisoner said. "I can't get my chair in. I have to pee in a bottle." Another said: "I have to wear a nappy every day. I don't feel like a man; I feel like my dignity is taken away." The vast majority of Western Australian and Queensland prisons are overcrowded. In nine prisons, people were often forced to "double-up," with two and sometimes three people in a cell built for one. Sharing cells can also place prisoners with disabilities at heightened danger of verbal, physical, or sexual violence.

Among those interviewed, 41 people said they had suffered physical violence, and another 32 sexual violence by fellow prisoners or staff. Due to stigma and fear of reprisals, sexual violence is hidden and hard to document, but ever-present in both male and female prisons. Some prisoners with disabilities with high support needs have "prison-carers" – other prisoners whom prison authorities pay to look after them. In one prison, staff told Human Rights Watch that six out of eight carers were convicted sex offenders and one of them regularly raped the prisoner with a disability in his charge. In 11 out of 14 prisons, Human Rights Watch found evidence of racism toward Aboriginal and Torres Strait Islander prisoners. One such prisoner with a psychosocial disability said: "Officers call me 'black c___' heaps of times, it's normal."

Prisoners in solitary confinement typically spend 22 hours or more a day locked in small cells, sealed with solid doors, and even contact with staff may be wordless. Nearly all solitary confinement units Human Rights Watch visited were full and most prisoners with disabilities interviewed had spent time in one. While solitary confinement can be psychologically damaging to any prisoner, its effects can be particularly detrimental for someone with a psychosocial or cognitive disability.

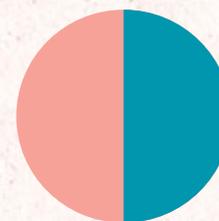
Human Rights Watch found that some prisoners can spend years in prolonged solitary confinement. One man with a psychosocial disability has spent more than 19 years in solitary confinement in a maximum security unit. Under international standards, the "confinement of prisoners for 22 hours or more a day without meaningful human contact" amounts to solitary confinement. According to the United Nations special rapporteur on torture, the imposition of solitary confinement "on persons with mental disabilities is cruel, inhuman or degrading treatment. Hauling people into the detention unit or safety unit has become common practice for prisoners with mental health conditions," Sharma said. "Without proper training and alternatives, staff often feel they have no option but to lock them up in solitary confinement."

State and Territory governments should conduct regular and independent monitoring of prisons to investigate conditions of confinement for prisoners with disabilities, including Aboriginal and Torres Strait Islander prisoners, and ensure they do not face abuse, Human Rights Watch said. Queensland, South Australia, Victoria, and the Northern Territory should create an office of the inspector of custodial services that is independent, has adequate resources, and reports directly to parliament.

In Australia, people with disabilities are overrepresented in prisons, comprising:



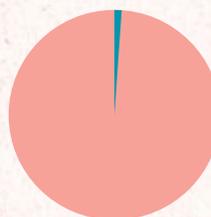
18% of the general population



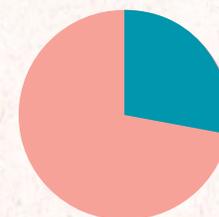
50% of the prison population

SOURCE: AUSTRALIAN BUREAU OF STATISTICS, 2017

Aboriginal and Torres Strait Islander people in Australia are overrepresented in prisons, comprising:



2% of the general population



28% of the adult prison population

SOURCE: AUSTRALIAN BUREAU OF STATISTICS, 2015

PRACTICAL APPLICATION CONTINUED...

Prisons should immediately put in place effective systems to screen prisoners with disabilities when they enter prison and provide adequate access to support and mental health services. They should ensure that all prison staff receive regular, gender and culturally sensitive training on interacting with people with disabilities. Most importantly, State and Territory government should end solitary confinement for prisoners with disabilities. Due to overcrowding, prisoners in Brisbane Women's Correctional Centre often have to "double-up," with two and sometimes three people confined in a cell originally built for one. Difficult conditions of confinement can be particularly problematic for people with disabilities.

1. What is the central (overall) viewpoint (thesis) of this Human Rights Watch online source in relation to the treatment of prisoners with disabilities in Australia? [C]
2. How effectively is the central viewpoint substantiated (proven) in terms of the main arguments and evidence provided in the online source? [A]
3. Do you agree with the recommendations for reform made in this source? Why or why not? Conduct research and select sources which corroborate and/or question the recommendations made in this paper. [E] [S]

REVIEW

1. Describe each of the following key terms in this chapter using legal terminology [C]:
 customary law | restorative justice | recidivism
2. Analyse one or more of the following legal issues by (a) determining the nature and scope of the issue and (b) examining viewpoints and consequences of different stakeholders in relation to the issue/s [A]:
 - a. Are our judges too soft on violent criminals?
 - b. How effectively are serial sex offenders dealt with in order to protect the community?
 - c. How effective is our criminal appeals process in cases where sentences are not considered to be appropriate?
 - d. How effective is our criminal justice system in reducing the rate of reoffending (recidivism)?
 - e. How effective are non-custodial sentences compared with imprisonment for drug-related criminals?
 - f. What needs to be done to address the disproportionate rates of crime and imprisonment of Indigenous Australians compared with non-Indigenous Australians?
 - g. How effective, just and equitable is sentencing of women?
 - h. How effective, just and equitable is sentencing of children (juveniles)?
 - i. How effective, just and equitable is sentencing of people with disabilities?
3. Using your analysis of your selected legal issue/s, evaluate the legal situation by [E]:
 - a. presenting alternatives and proposing recommendation/s for reform of our criminal justice system; and
 - b. discussing implications of your recommendations, and justifying them using the legal criteria of just and equitable outcomes for the parties and other stakeholders in our society.

UNIT 2

BALANCE OF PROBABILITIES

TOPIC 1:

CIVIL LAW FOUNDATIONS

In Topic 1, students gain insight into the foundations of the Australian and Queensland legal systems in the context of civil law. They consider the importance of civil law in their lives and distinguish between civil and criminal law matters. Students will appreciate the role civil law plays in resolving disputes between parties through various processes, including the court system, tribunals and other dispute resolution methods.

TOPIC 2:

CONTRACTUAL OBLIGATIONS

In Topic 2, students develop an understanding of the key concepts, principles and processes of contract law. They have opportunities to apply their understandings of these concepts, principles and processes to a variety of real-life situations and evaluate the effect of them on citizens.

TOPIC 3:

NEGLIGENCE AND THE DUTY OF CARE

In Topic 3, students develop an understanding of the key concepts, principles and processes of negligence and duty of care. They are provided with opportunities to apply their understandings of these concepts, principles and processes to a variety of real-life situations and evaluate the effect of them on citizens.

TOPIC 1: CIVIL LAW FOUNDATIONS

CHAPTER 14: THE NATURE AND GROWTH OF CIVIL LAW

FOCUS SUBJECT MATTER

14.1 A BRIEF HISTORICAL BACKGROUND

14.2 SOURCES OF CIVIL LAW

14.3 DISTINGUISHING CIVIL LAW FROM CRIMINAL LAW

14.4 THE BRANCHES OF THE CIVIL LAW: CONTRACT AND TORTS

14.5 THE DOCTRINE OF PRECEDENT

14.6 HOW DOES INTERNATIONAL LAW INFLUENCE AUSTRALIA'S CIVIL LAW?

TO UNDERSTAND AND APPRECIATE:

- ▶ the civil law of Australia, its subject matter and processes started in the common law of 12th century England;
- ▶ the common law is called judge-made law because it is made in the decisions of judges who followed each other's decisions;
- ▶ to make the common law more certain, Acts of Parliament (statutes) were passed which applied to, and changed, the common law;
- ▶ in Queensland, unlike Victoria and New South Wales, in 1899, the criminal law became mainly statute law;
- ▶ there are fundamental differences between the civil law and criminal law;
- ▶ there are two predominant branches of the civil law, contract and torts (including negligence), which became very different before Australia was settled;
- ▶ all Australian law is subject to the doctrine of precedent, and it is with the Australian High Court, that final authority rests; and
- ▶ Some Australian civil law is determined by International obligations.

14.1 A BRIEF HISTORICAL BACKGROUND

In **Topic 1: Legal Foundations**, Chapter 2, the two sources of common-law are identified and explained. The first and most important of these sources to our civil law today are the decisions made by judges in court cases. However, it is useful to have an understanding of how the different branches of the law developed historically in our **common-law system**. This system had its origins in 12th century England, in a time which was very different.



Ch 2.6

THE MEDIEVAL LAW

The medieval common law was largely concerned with **serious crime and land tenure** (ownership and other rights). It was not concerned with breach of informal agreements reached by word-of-mouth or damage to persons or to property caused unintentionally by accident. The central courts administering justice on behalf of the King were concerned with **breaches of the King's peace**. Such cases were decided by the Royal law of the central courts, but otherwise:



Ch 2.1

... *It is not the custom of the court of the Lord King to protect private agreements*

SOURCE: GLANVILLE, TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE, 1180

At the time, the common law was therefore not concerned with remedies for breach of informal agreements (oral agreements), although there were remedies available for what are now described as **intentional torts** (e.g. trespass to the person). It was possible, however, to seek justice elsewhere, in county courts, borough courts, and courts of markets and affairs, for example.

In the 13th century, the common-law system recognised formal contracts (agreements in writing) first. The practice was to authenticate these agreements by sealing them. Sealing a document involved placing a wax seal on it thereby identifying the documents owner and establishing its importance as an agreement. Sealed agreements became actionable in central law courts.

Increasingly, from the 13th to the 17th centuries, the common law courts allowed actions to be brought on informal (oral) contracts. In reaction to these developments, a view took hold that the unregulated character of the 17th century jury trial had made it too easy for plaintiffs to bring actions on verbal promises inadequately proved. The *Statute of Frauds* (1617) required that there be formal agreements in writing under signature to transfer land and to sell goods worth more than £10. This was the first statutory intervention in the common law of contract.

You will find in **Topic 2: Contractual Obligations**, which follows, that the 19th century was a period during which many decisions were made in the common law of contract, when it was necessary to decide the many disputes in the commercial world of the Industrial Revolution. During this period the idea reached its peak that men of full age and competent understanding should have the **utmost liberty in contracting**, and that their contracts should be enforced by the courts. You will also find that as the world became more complicated, it became more necessary for governments to intervene and pass laws to make the common law of contract more equitable.

Until the case of *Donoghue v Stevenson* (1932), the law of torts had not been able to formulate a **general test** for whether or not a person who was negligent owed a duty of care. Therefore, unless the courts had previously decided that a particular duty of care to a particular class of persons was enforceable by the law, actions in negligence would fail unless the court created a new duty of care category. This case marked the beginning of the modern law of tort, and this is where **Topic 3: Negligence and the Duty of Care** essentially begins later in this book.

PRACTICAL APPLICATION

Revise Chapters 2.1, 2.2, and 2.3, and then answer the following questions:

1. Describe how the common law of contract and torts developed from medieval times up to the 19th century. [C]
2. Do you think it fair and appropriate that the common law of England should apply to and be observed by Indigenous Australians from the moment Captain Cook hoisted the Union Jack in Botany Bay and declared the continent to be British? [E]
3. Assume that the following examples occurred in the colony of New South Wales before 1828. What remedy could the plaintiff in each case seek from a New South Wales court? [C] A]
 - (a) Indigenous (Aboriginal) Australians living on the Hawkesbury River are dispossessed of their land by free British settlers, who drive them away by force of arms. Aboriginal elders seek redress in Sydney.
 - (b) Free settlers living on the Hawkesbury River agree with the owner of a shop in Sydney to sell him all their produce. The agreement is informal (oral). The owner refuses to pay when he is not able to sell some of the produce. The settlers want to sue for their unpaid debt.
 - (c) The owner/driver of a horse and cart in Sydney loses control and knocks over a pedestrian carrying a large basket of eggs. She breaks her arm and loses all the eggs. She wants to sue for her injury and the loss of the eggs.
 - (d) A free settler in Sydney agrees to sell his house to another free settler, but changes his mind after signing a written agreement. Neither of the settlers possesses a seal but each of them applies an ink thumbprint to the document. Can the agreement be enforced?

A number of matters should be clear to you after following this brief simplified history of our common law from the 12th century and from revising the earlier chapters referred to in

Topic 1: Legal Foundations:

- ▶ The 12th century mediaeval law divided into well-defined branches of the civil law (contract and torts) and criminal law by the 19th century.
- ▶ Acts of Parliament (statutes) could create law which would override the Civil law and create criminal offences.
- ▶ British law did not recognise Indigenous (Aboriginal) Australian law until the *Mabo Case* in 1992.
- ▶ British settlers brought their law to Australia, and it became Australian law.

14.2 SOURCES OF CIVIL LAW

We will now leave the brief historical context behind and look at the meaning of the common law as it is applied in the Australian courts, and in Queensland courts in particular. The topic has already been covered in **Chapter 2.6: Courts: Sources Of Common Law**. Go back of this chapter and read it. As you read it make notes under the following headings to help you revise what it said. You will find the Review questions at the end of Chapter 2 a useful focus when making your notes.

1. Judge-made law.
2. Judicial precedent.
3. The Queensland hierarchy of courts.
4. *Ratio decidendi* and *obiter dicta*.
5. *R v Kaporonovski* [1972] Qd R 465; *Kaporonovski v R* (1973) 133 CLR 209.

STATUTE LAW

We have seen in **Chapter 2.4: The Australian Constitution** and in **Chapter 2.5: Parliaments: Sources Of Statute Law** that the Parliaments of the Commonwealth of Australia and of Queensland have the authority to make laws which apply to our lives, and that these laws override the common law to the extent that they are applicable. Again, it would be very useful for you to read these earlier chapters about statute law, and summarise the main aspects of them for future revision. This time, make up your own headings under which you make notes to describe and explain statute law, what it means, where it comes from, and how it is applied.



Ch 2.4
Ch 2.5



WHAT DO YOU THINK?



The process by which the relationship between common law and statute law is maintained, involves interaction between parliaments as law-makers, courts as guardians and sources of the common law, and courts as interpreters of statutes. This is illustrated for you in Chapter 2.5, namely **Separation of Powers in the Australian Legal System**.

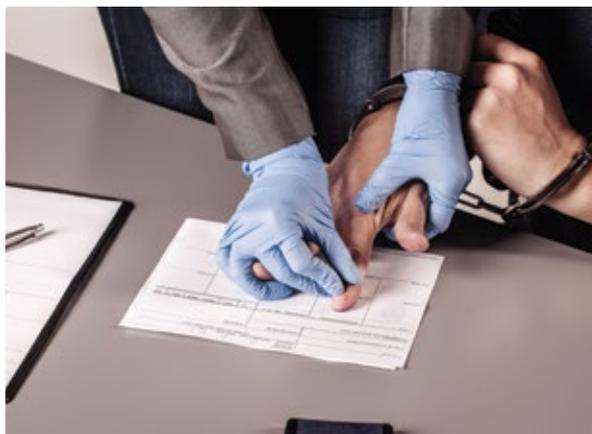
What do you think are the advantages and disadvantages of the separation of powers doctrine? Try to give actual examples in your answer of legal situations in which the doctrine is important. [C] [S] [A] [E]

14.3 DISTINGUISHING CIVIL LAW FROM CRIMINAL LAW

The development of the civil law involved separation of the criminal law from the civil law. The first modern paid police force was started in metropolitan London by Sir Robert Peel in 1829, when the *Municipal Corporations Act (1829)* was passed. Whatever crimes established by the common law and statute law in Britain, applied in Australia in accordance with the legal position set out above, until 1899.

A great Queensland lawyer, **Sir Samuel Griffith**, wrote the Criminal Code (1899)Qld, which codified into statute all of the common law relating to criminal offences. This was and still is a remarkable achievement, and the Code continues to be the **basis of the criminal law today** in Queensland, and also in Tasmania and Western Australia, where it was adopted.

Importantly, the civil law is very different from the criminal law, not only in Queensland, but everywhere in Australia. You can see this in the comparative table which follows.



CIVIL LAW

- ▶ Under the civil law, the person who has suffered damage (the plaintiff) must bring a private claim (set) against the alleged wrongdoer (the defendant). Private legal disputes may arise between individuals, organisations and governments.

- ▶ Under the civil law, the chief remedy usually sought is compensation (damages). Other remedies such as specific performance, injunctive relief, and declaratory relief, may be sought if appropriate, in both contract and in tort.

- ▶ Civil law is based mostly on common law (case law) although an increasing number of statutes have been passed that have altered both contract law and the law of torts.

- ▶ The standard of proof according to which the plaintiff must prove his or her case in a civil action is on the **balance of probabilities**.

- ▶ In civil trials, judges decide both questions of **fact** and questions of **law**. It is very unusual to have a jury trial in a civil matter, although it is not unheard of in defamation cases, particularly those involving high profile plaintiffs.

- ▶ The cost of bringing a civil court action is usually paid by the loser in the case. This will include the cost of court fees, lawyer's fees, and other expenses relating to the claim. Quite often, these amount to thousands of dollars and make it difficult to bring a claim which is uncertain. There are ways of dealing with this issue which will be looked at in the context of the next two topics, but there is no substitute for good legal advice for a plaintiff. Legal aid is rarely granted in civil cases, the exception being family law cases involving children.

CRIMINAL LAW

- ▶ Criminal charges are made by the police. Court cases are commenced and argued by a prosecutor on behalf of the victim and the general public (the State) against the accused. Although rare, it is possible for a citizen to bring a private prosecution.

- ▶ One of the main aims of criminal law is usually to punish the offender, and thus preserve the peace and good order of the society in which we live. Increasingly, victims seek the opportunity to have a voice in criminal proceedings and to seek restitution (compensation) from the offender or from the state under the *Criminal Offence Victims Act 1995* (Qld) and the *Victims of Crime Assistance Act 2009* (Qld).

- ▶ The criminal law in Queensland, Tasmania, South Australia and Western Australia is all contained in Acts of Parliament, which owe their existence to Sir Samuel Griffiths codification of the criminal law in *Criminal Code 1899* (Qld). The basis of the criminal law in New South Wales and Victoria is the common law, but this has been significantly the subject of statute law in both states.

- ▶ A much higher standard of proof of **beyond reasonable doubt** is required for the prosecution to prove its case against an accused person in a criminal trial.

- ▶ In criminal trials, it is nearly always the case, where a person is charged with a serious offence, that it will be heard before a judge and jury. The jury decides questions of fact, and a judge decides questions of law.

- ▶ In criminal prosecutions, the State usually pays the cost of bringing the matter to court, and even where the accused is found not guilty, the accused pays his or her own costs, unless entitled to legal aid.



HYPOTHETICAL

Facts: Tessa celebrates with her team mates after winning the netball grand final. She has too much to drink, and despite being told not to drive by friends, decides to drive home because it is a short distance. On the way she must pass through a Give Way sign, drives over the speed limit, and fails to give way to another vehicle travelling through the intersection from her right. There is a collision, with the other vehicle hitting the rear of her four-wheel-drive. The other driver's car is a write-off and he is badly injured, suffering a broken leg, cuts to his face, and concussion. The police attend the scene almost immediately. Tessa is breathalysed and records a reading of .09, over the legal limit. The police take statements and investigate the accident.

1. What criminal charges are the police likely to bring against Tessa? [C]
2. Could the driver of the other vehicle argue that Tessa was negligent and caused his injuries? [C]
3. Could the driver of the other vehicle recover damages for the loss of his vehicle against Tessa? [C]
4. How does this illustrate that the same fact situation can give rise to both a **criminal court action** and a **civil court action**? Explain your answer. [C] [A]

In some cases, a person's negligent action or omission is so extreme that he or she is charged with a criminal offence. This is known as **criminal negligence**, which means that the person has been so reckless to the point of almost knowingly causing harm to the victim of the accident in the eyes of the law. In other words, the jury is asked to consider whether the actions of the charged person was so grossly negligent that he or she must have known that someone else was likely to be injured.

PRACTICAL APPLICATION

DRINKING DAD CLEAR OF CHILD NEGLECT

SOURCE: AMANDA WATT, COURIER MAIL

An intoxicated Sunshine Coast man alleged to have dropped his baby daughter on a concrete path while carrying a schooner of beer was acquitted by a jury yesterday. The man, 52, who cannot be named under Queensland law, appeared in the Maroochydore District Court charged with committing a negligent act causing harm to his 18 month old child on May 14 last year. The baby suffered a fractured skull, bruising and swelling to her right eye and abrasions.

The court was told the man had been drinking at the Yandina Hotel with his de facto wife and three children, and was carrying his baby with one arm while holding a glass of beer in his other hand when he appeared to stumble on a ramp as he walked from the hotel.

Witnesses told the court the baby fell from his grasp and hit the path head-first while the schooner of beer remained in his hand. Kellie Davidson said she saw the

man slowly place the beer down beside him before he went to pick up the child.

The court was told the man then put his daughter in his car, drove home and was later found by police drinking a stubby of beer while the injured girl lay on a bed in another part of the house. His blood alcohol reading was recorded at .096 per cent.

Investigating police arranged for the child to be taken to Nambour Hospital where her injuries were treated.

Crown Prosecutor Tricia Velthuisen told the jury that, while she was "not suggesting it was a deliberate dropping", the man's actions represent a "grave breach in his duty as a parent". She said there was an abundance of evidence that showed he was affected by alcohol at the time.

PRACTICAL APPLICATION CONTINUED...

But defence counsel David Murray said the case against his client was “flawed and uncertain” and the evidence of the two witnesses contained inconsistencies. Mr Murray told the jury they had to find his client had failed to take the proper care of his daughter he was required to, “not that he was carrying a child while intoxicated”.

He said there was no evidence from any witness that he [his client] deliberately dropped the child.

The jury took less than two hours to find the man not guilty. The man broke down during yesterday’s proceedings when a picture of the child’s injuries was shown to the court.

1. What were the father’s actions which led to his dropping the child? [C]
2. What do you think the father could/should have done differently to avoid the accident? [A]
3. What decision did the jury make in this case? [C]
4. Would you have made the same decision, if you were a member of the jury? In answering this question, consider whether the father’s actions were so recklessly negligent that he should have known his daughter could be hurt by his actions. Also consider the significance to the decision of the prosecution having to satisfy the jury of the father’s criminal negligence beyond reasonable doubt. [A]
5. If the injuries to the baby were to have long-term effects, such as learning difficulties or a personality disorder, what other type of court action may be brought against the father? [A]
6. In your opinion, should the father have been charged with a criminal offence? [E]

HYPOTHETICAL

1. Use your imagination to create and act out a roleplay situation, complete with conversation parts for each character, that may or may not, in your opinion, lead to a parent being charged with a criminal offence for negligently causing the death or serious injury of a son or daughter. [A] [C]
2. After the situation has been roleplayed in your class, justify to the class your reasons for believing that the negligence is, or conversely is not, so reckless as to amount to a criminal offence. [A]

14.4 THE BRANCHES OF THE CIVIL LAW: CONTRACT AND TORTS

We have seen above the different characteristics of the civil law and criminal law. Within the civil law, we have seen that historically there were two important and separate branches, namely contract law and the law of torts.

A tort is a civil wrong, other than a breach of contract, which causes personal injury, property damage or financial loss and for which the innocent party usually claims damages. The law of civil wrong has developed to compensate a person who suffers injury, damage or loss due to another person’s (the tortfeasors) act or omission. Such act or omission, depending on the particular tort, can be done intentionally, negligently, and even can be unintended or accidental (in cases involving strict liability). It is found mainly in the common law. The **purpose** of the law of civil wrong is for justice to be achieved

by transferring the loss from the victim to the wrongdoer. It is based on the principle that each citizen should take responsibility for the consequences of his/her actions.

Like torts, the law of contract is contained largely in the common law and does not deal with criminal behaviour. When a contract comes into existence, however, it creates a **legal binding relationship** between two or more people in which **each person usually makes a promise which he or she intends to keep**. An example would be a promise by a customer to pay for a new car when it was delivered in exchange for a promise by a car dealer to order a new car for delivery to the customer.

14.5 THE DOCTRINE OF PRECEDENT

You have already studied this topic earlier in this chapter when revising **Chapter 2.6: Courts: Sources Of Common Law**. You will understand then, that when courts make decisions, they are obliged to follow the decisions (the *ratio decidendi*) of the higher courts in the hierarchy, unless they can be distinguished. When they are distinguished it means the judge has decided the earlier decision does not apply to the facts of the case before him or her. Judicial precedent is a process whereby **new law** is made in the court system. This and other features of the doctrine of precedent are illustrated in the cases that follow to the end of this chapter.



Ch 2.6

KEEPING DANGEROUS ANIMALS

To see the development of judicial precedent, we could look at almost any area of the law. The following is one example of many important principles for the operation of a civilised society:

To what extent should a person who keeps an animal be responsible for damage caused by that animal?

Formal recognition of the need for a law dealing with this problem is not new. The Code of Hammurabi, which was previously referred to in Chapter 1, dealt with it as follows:



If a mad (and wild) bull meet a man in the highway and gore him and kill him, that case has no remedy. If a man's ox is known to be addicted to goring, and he has not blunted his horns, or fastened up his ox, then if his ox has gored a free man and killed him he shall give half a mina of silver. If it be a man's slave, he shall give a third of a mina of silver

Code of Hammurabi, Sections 250–252 (circa 1700 BC)

This Code recognised that it was not fair to deal with people who kept different types of animals in the same way. From about the 17th Century onwards, the English common law developed a legal principle along the same lines as Hammurabi's Code. The first statement of this legal principle in England was made in the decision of Lord Holt in 1699 in the case of *Mason v Keeling* 1699 12.322. The rule was next applied (followed by a later judge) in 1858 in the following case.

CASE STUDY

Besozzi v Harris I F & F 92, 1858

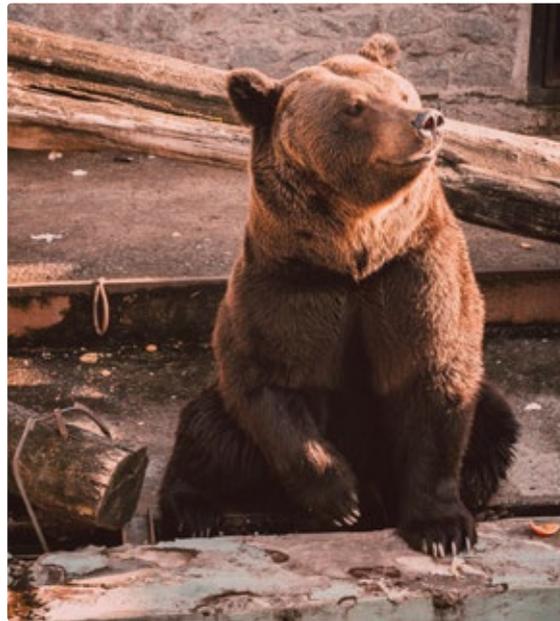
Facts: The plaintiff, Besozzi, was visiting the home of the defendant, Harris, with his permission. Harris was the owner of a bear which he kept fastened on a chain. The plaintiff walked past the bear's house and was grabbed and injured by the bear.

Legal Issue: Was Harris responsible for the personal injuries suffered by the plaintiff?

Decision: He was responsible. Justice Crowder said, 'The statement that the defendant knew the bear to be of a fierce nature must be taken to be proved, as everyone must know that such animals as lions and bears are of a savage nature. A person who keeps such an animal is bound so to keep it that it shall do no damage.' without having them disputed in law courts in the future.

1. How did the judge describe bears? [C]
2. What did the judge say about the state of knowledge of people who keep bears? [C]
3. What did the judge say people who keep bears must do? [C]

4. What is the principle of law developed by the judge in this case? You will need to combine all of your answers to the previous three questions in stating the legal principle. [A]



CASE STUDY

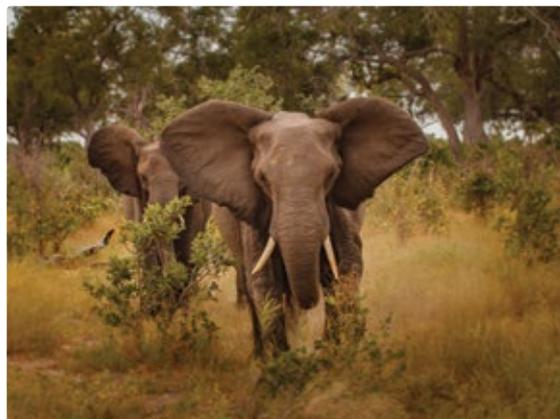
Filburn v People's Palace and Aquarium Co Ltd (1890) 25 QBD 258

Facts: The plaintiff was injured by an elephant kept by the defendant in its amusement park.

Legal Issue: Was the respondent liable for the damage to the plaintiff?

Decision: Yes. The elephant fell into the category of a dangerous animal. Lord Esher MR (Master of the Rolls – a senior judge in England) said at page 261, 'The law of England recognises two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature and anyone who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous.' The three judges in this case, Lord Esher, Lord Justice Bowen and Lord Justice Lindley, gave judgments that agreed (that is, the court's decision was unanimous).

1. What are the two classes of animals that the law of England recognised in this case? [C]
2. Into what class did the elephant fit? [C]
3. When does a person's state of knowledge of whether an animal is dangerous or not become important? [A]



From the above cases, you can see that judges in England developed a legal principle, or rule, which was in fact the law about damage caused by animals kept by people. The judges, in deciding later cases, were required to divide animals into two classes. These were:

1. dangerous animals (*ferae naturae*); and
2. tame animals (*mansuetae naturae*).

If an animal fell into the **category of a dangerous animal**, it was presumed by the judge as a matter of law that the keeper of the animal knew that the animal was dangerous and was responsible for any damage that it did. If the animal fell into the **category of a tame animal (non-dangerous)** then, as a matter of law, the keeper of the animal was not liable for the damage that it caused unless the keeper knew that the animal was dangerous. His state of knowledge needed to be proved in cases involving the second category of animals.

Once the **legal principle** was established, it became a **precedent which judges in subsequent cases followed**. An interesting question also is whether, after one judge had decided that a particular animal belongs or does not belong to the category of a dangerous animal, were judges in subsequent cases required to follow that decision as a precedent?

CASE STUDY

Behrens v Bertram Mills Circus Ltd [1957] 2 QB 1

Facts: Mr Behrens and Mrs Behrens occupied a booth in a fun fair under the control of the defendant. One day Mr Whitehead, the manager of Mrs Behrens, was in the booth with his small daughter and her pomeranian dog, Simba. The elephants of the defendant passed the booth on their way to the circus ring. Simba ran out and snapped and barked at the elephants. The third elephant in the procession, Bullu, ran after her along with another elephant. Bullu knocked down the front of the booth and seriously injured Mrs Behrens. She suffered personal injuries as well as a loss of earnings.

Legal Issue: Was the fun fair owner (defendant) responsible for the damages suffered by the plaintiff?

Decision: The plaintiff was successful. The defendant had to pay for all the injuries suffered by the plaintiff. This was so, even though the circus elephant was docile and, as the judge put it, 'no more dangerous than a cow'. The judge said that he was bound to ignore 'the world of difference between the wild elephant in the jungle and the trained elephant in the circus'. The judge, Justice Devlin, said as follows: '*Filburn's* case held that as a matter of law an elephant is an animal *ferae naturae* ... (it) must be regarded as an authority for the legal proposition that all elephants are dangerous.' It was argued before the judge that the elephants in this case were Burmese elephants and that therefore he could hold that, while elephants generally are *ferae naturae*, Burmese elephants were not. The argument was rejected. Justice Devlin said as follows:

'It is not open to me to consider this submission. It is not stated in *Filburn v People's Palace* what the nationality of the elephant was with which the court was there dealing, and the case must be regarded as an authority for the legal proposition that all elephants are dangerous.'

1. Why was it essential that the judge had to decide whether the elephant was *ferae naturae*? [A]
2. What evidence is there in the judgment that suggests the judge was not entirely happy with having to classify the elephant as a dangerous animal? [A]
3. In what way did the defendant attempt to distinguish this case from *Filburn's* case? [A]
4. How would the division of animals into sub-species such as Burmese, Indian, African elephants have weakened the effect of the precedent already established? [A]



These cases were all decided by **English courts**. They are **not binding on the courts in Australia**. You will recall from earlier in this chapter that only courts in their jurisdictional hierarchy are bound by decisions handed down by superior courts in the hierarchy. Nevertheless, such English decision are considered to be **persuasive in Australia** and, after carefully taking them into account, Australian courts adopted these principles also. In two Australian cases our native animals have featured. The judge had to decide whether they were *ferae naturae*.

CASE STUDY

Lake v Taggart [1978]1 SR (WA) 89

Facts: The plaintiff lived in a residential area in the hills with bushland nearby. She had seen her children off to school and was pedalling her bicycle home at about 8.30am. The defendant lived nearby on a two acre block of land. From time to time he kept kangaroos as pets on his property. On the day before the incident, he obtained from another person three kangaroos, a male, a female and a joey. He placed the female and the joey into an enclosure on his property but the male kicked its way out of the bag in which it had been transported and escaped.

The plaintiff was attacked by the kangaroo. She described the terrifying attack. This is part of her description. 'I pedalled faster and I looked behind but it was still coming after me. I couldn't believe it. I stood on my bike and tried to pedal as fast as I could and I started to panic as I knew that I was going to nothing – it was a brick quarry and just bush. I got off my bike and I automatically just held the bike up in front of me to protect myself. The kangaroo was on the other side of my bike. I could see its front teeth and it was making a hissing sound. Then all of a sudden it stood on its tail and knocked the bike away from me. I put my head down to protect my face and next I knew I was doing a complete somersault and my neck gave a great crack and I remember thinking I had had it. It is going to break my neck. As I went over I remember seeing grey fur over me. I somersaulted and think he must have thumped me because I had two scratches on my thigh in almost identical places.'

'I got up and I realised I must get some help so I opened my mouth to call 'help' and squeaks came out and the kangaroo started coming at me with his claws out. My voice came. I was screaming 'help' – I grabbed the kangaroo's paws in instinct I suppose. I just held on. I found I couldn't scream loud enough to call for help. I just opened my mouth and screamed as loud as I could. I could see his back legs thrashing at me. We stumbled backwards but I didn't go down ... All this time I was screaming. We both regained our balance when he started to come at me again. I knew what he was going to do this time. All the time I was screaming.'



Legal Issue: Was the defendant, Taggart, liable for the damages suffered by the plaintiff, Lake?

Decision: The kangaroo was not a dangerous animal. Judge Pidgeon referred to both Lord Esher's and Lord Justice Bowen's words in *Filburn's* case. He said, 'Filburn's case had been followed consistently in England and elsewhere'. He said that if he applied the test of Lord Justice Bowen, the question would be whether, '... according to the experience of mankind, the particular class of animal is dangerous or not dangerous'. He then went on to say:

'I would find it difficult to come to the view that the experience of mankind would find kangaroos in the wild as dangerous ... My view is that the kangaroo as a class is harmless by its very nature and that this is the view held generally. It is known ... that there have been some attacks by reason of the animal being cornered or surprised or worried by dogs and probably there have been spontaneous attacks without any obvious reason, but I do not consider these incidents, which appear isolated, would be sufficient to alter the general view of the species.'

There was no evidence that the defendant had any knowledge of any vicious propensity (tendency) in the kangaroo and, consequently, the plaintiff was unsuccessful.

1. From the facts in this case, why would the defendant have had no knowledge of any vicious propensity (tendency) in the kangaroo? [C]
2. In light of the description of the attack by the plaintiff, do you agree that the kangaroo should not be categorised as a dangerous animal? [A] [E]

14.6 HOW DOES INTERNATIONAL LAW INFLUENCE AUSTRALIA'S CIVIL LAW?

The Australian Government has formally committed itself to passing laws that uphold the international laws to which it is a signatory as a member of the United Nations, including, but not limited to, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* and the *Convention Relating to the Status of Refugees*.

In order to see explanations and practical applications of the way international law affects Australia's law, refer to the following sections of our Volume 1 and Volume 2 textbook series:



Ch 2

REVIEW

1. Describe the following: [C]

agreements under seal | informal agreements | misfeasance | nonfeasance | assumpsit
actions for trespass | writs 'on the case' | disputes about land tenure | ratio decidendi
obiter dicta | judicial precedent

2. Describe and explain the following: [C] [A]

(a) Justice dispensed by the Royal Courts in 12th century England.

(b) The Statute of Frauds.

(c) Australian law when it was first settled.

(d) *The Australian Courts Act 1828* (Imperial).

(e) *The Australian Act 1986* (Commonwealth and British).

(f) The doctrine of the separation of powers.

(g) Doctrine of precedent.

3. Analyse the differences between civil law and criminal law. [A]

4. How does the separation of powers doctrine contribute to a fair and democratic Australia? [A]

5. Analyse the differences between the meaning, importance and application of ratio decidendi and obiter dicta in a court's judgement. [A]

TOPIC 1: CIVIL LAW FOUNDATIONS

CHAPTER 15: DISPUTE RESOLUTION IN CIVIL LAW

FOCUS SUBJECT MATTER

15.1 WHAT IS A DISPUTE?

15.2 DIFFERENT METHODS OF RESOLVING CIVIL DISPUTES

15.3 WHY GO TO COURT?

15.4 DIFFERENCES BETWEEN CIVIL AND CRIMINAL COURT ACTIONS

15.5 WHICH COURT?

15.6 DIFFERENCES BETWEEN COURTS AND TRIBUNALS

15.7 TRIBUNALS INVOLVED IN DISPUTE RESOLUTION

15.8 COMPLAINTS AND APPEALS AGAINST GOVERNMENT DECISIONS

15.9 COMMISSIONS OF INQUIRY

TO UNDERSTAND AND APPRECIATE:

- ▶ the nature of a civil dispute in Australia;
- ▶ there are many options for resolving civil disputes in Australia;
- ▶ care should be exercised when choosing to go to court as opposed to some other form of dispute resolution;
- ▶ civil and criminal courts follow different procedures, including rules of evidence;
- ▶ tribunals offer an alternative to the court system;
- ▶ the avenues for complaints and appeals against, and the judicial review of, government decisions; and
- ▶ governments set up Commissions of Inquiry to resolve matters of public interest.

15.1 WHAT IS A DISPUTE?

The potential for a dispute begins with a person (**the aggrieved party**) believing that he or she has been wronged in some way by another person (**the wrongdoer**). This perception of being wronged could be one-sided (where a drunk driver mounted the footpath and hit an innocent pedestrian) or each party could have a conflicting claim against the other (where one driver was over the legal blood alcohol limit and the other was driving over the speed limit when they collided). The feeling of being wronged grows into a dispute once there is **communication of the perceived wrong/s** to the other party, either personally or through a third party (usually a mediator or a solicitor) and **disagreement or conflict results**.

Disputes can be resolved by unlawful as well as lawful means. Blood feuds, duels and taking violent revenge to settle differences were well-established means for settling disputes centuries ago. In modern Australian society, violent disputes can still occur when criminal organisations clash, such as outlawed bkie gangs. There are laws which limit the activities of such organisations and prohibit their illegal activities. The police in all states in Australia are actively involved in preventing violent criminal conduct. The focus in this chapter is on the lawful means of dispute resolution.

15.2 DIFFERENT METHODS OF RESOLVING CIVIL DISPUTES

The following range of options for people in dispute exists in Australia to bring about a resolution to the dispute, beginning with doing nothing about the problem through to going to court for a binding decision to be imposed upon the disputing parties.

1. *'LUMPING' THE GRIEVANCE*
2. *EXIT AND AVOIDANCE*
3. *REDIRECTING*
4. *NAMING, BLAMING AND CLAIMING*
5. *NEGOTIATION*
6. *MEDIATION*
7. *EXPERT DETERMINATION/CASE APPRAISAL*
8. *ARBITRATION*
9. *ADJUDICATION BY A COURT OR TRIBUNAL*



To explain how these options arise, we will consider two incidents at the local hairdresser's salon.

- ▶ **Incident One:** You arrive at the appointment time and are kept waiting for an hour, causing you to be late back to work and have your pay 'docked' (reduced by the hour that you were late to work).

1. *'LUMPING' THE GRIEVANCE*

Most people will simply be annoyed and not even mention it to their hairdresser. The wait was irritating but you accept that this frequently happens so you 'lump the grievance'.

2. EXIT AND AVOIDANCE

However, you might decide that you will never go to that hairdresser again, which is a means of avoiding future conflict by exiting from it.

3. REDIRECTING

Alternatively, you may redirect the cause of the problem by deciding that it was not the fault of the hairdresser, but that of the person before you who was late for his or her appointment. By deciding to adopt any one of these responses, you have stopped the conflict escalating into a dispute.

- ▶ **Incident Two:** The hairdresser leaves the colour dye in your hair for too long on your wedding day and, instead of having subtle red foils running through it, your hair has turned bright purple. You complain and refuse to pay. He says you didn't explain clearly what you wanted and demands that you pay \$150 for the service. You have to rush to another hairdresser, who charges a further \$250 to take out the colour and give you the foils you wanted.



4. NAMING, BLAMING AND CLAIMING

Here, you have decided against lumping the grievance and avoidance options. Instead, by speaking about it, you have **named the grievance**. You have **blamed** the hairdresser as the one responsible for the state of your hair and, by refusing to pay for the service, you have **claimed** a remedy or compensation of some sort. If the hairdresser denies she is to blame and insists on being paid, the two of you are clearly **in dispute**.

There is a range of options to deal with this dispute.

5. NEGOTIATION

To settle it, you may both decide to negotiate, which means you will discuss alternatives to come up with some **compromise solution**. The hairdresser may offer to recolour your hair at no extra cost. By accepting that compromise, the dispute has been resolved by negotiation.

6. MEDIATION

If you and the hairdresser are unable to agree on a compromise, then the assistance of a third person may be needed. **Mediation** is when **the third party tries to assist both of you to resolve the dispute without imposing a legally binding solution**. This means the mediator helps both parties to think of ways to settle the dispute and provides a neutral and helpful environment for discussion. The mediator helps to generate a range of possible solutions for you both – various combinations of recolouring, paying lesser amounts, paying it off over a period of time, or sums of money as compensation – but what you decide to do is totally up to you. The mediator cannot force a decision on either of you.

There can be an **informal mediation** where the parties just ask a person in the community whom both respect to assist them. Alternatively, you can decide to use a **professionally trained mediator**. Many community centres, professional bodies and associations, and also law firms, have trained mediators, for example, the Resolution Institute, formerly the Institute of Arbitrators and Mediators Australia (www.iama.org.au)

Conciliation is a form of mediation that takes place under an Act of Parliament. An example of

conciliation is found in the *Health Quality and Complaints Commission Act 2006* (Qld). Another example is the requirement to go to a conciliation conference under the *Family Law Act 1975* (Cth) before the matter can go to trial. If conciliation settles the dispute, both parties appear before the Family Court, and the judge makes orders to give effect to the parties' agreement.'

7. EXPERT DETERMINATION /CASE APPRAISAL

Another alternative, often used to assist mediation, is to seek the opinion of an expert and have him or her advise you of the best possible outcome. If the reason why you did not accept the hairdresser's option of re-colouring your hair was because you were concerned it would make the matter worse, then an **expert determination** by a member of the Hairdressers' Association may be appropriate.

Case appraisal is a form of expert determination where the decision or solution is advisory or provisional, and is not binding on the parties. It is hoped that, when the parties hear what a neutral, independent expert has to say, it will assist in the resolution of the dispute. In Queensland the court can order that parties have case appraisal, as well as mediation. It differs from mediation because the case appraiser can provide a solution.

- ▶ If you and the hairdresser cannot reach a compromise, even with the assistance of a mediator or an expert, then you can choose to **have a third party impose a decision** on you. There are two avenues, described as follows.

8. ARBITRATION

The first is for you to agree who that person should be and agree to accept his or her decision and abide by it. For example, you may decide to go back to the person who was the mediator and ask to make a fair decision for you. This becomes an arbitration, which means that the third party has the **consent of the parties** to impose a **decision which will be binding** upon them. It is a more **formal process than mediation or conciliation** and is governed by relevant Arbitration Acts. Commercial contracts, often contain a clause that requires the parties to submit to arbitration.

9. ADJUDICATION BY A COURT OR TRIBUNAL

The second way to have a third person impose a decision is to take the matter to a **court or tribunal** for a formal **hearing and testing of the evidence**. An adjudication is then made, which means that **the judge will impose a decision on both parties who will usually be legally required to abide by that decision**.

It is unlikely that a dispute such as Incident Two, involving only \$400 in damages, would ever go to court for resolution. Most disputes are resolved by the first four options ('lumping' through to a negotiated settlement).



WHAT DO YOU THINK?



It is not possible to shake hands properly with a clenched fist.

Think of three conflicts or disputes that you or a friend or a member of your family may have had. Look at the list in section 4.2 and write down which processes, if any, were, or could have been, used to resolve those disputes. [C] [A]



15.3 WHY GO TO COURT?

At the very heart of an effective legal system are the courts, whose **judges are charged with the responsibility of resolving disputes according to the law by giving all disputing parties a fair hearing**. A large measure of the success of a legal system is the extent to which laws are consistently and sensibly applied to resolve legal disputes. In our democratic society, the law is assumed to be fair to all. This ideal of fairness is intended to apply equally to both the victim of a wrongdoing and the alleged wrongdoer. A legal system should not play favourites or provide benefits to one person or group in society at the expense of another. Everybody should receive a satisfactory ‘deal’ before the courts.

If a dispute is not resolved by the processes of ADR (alternative dispute resolution), **a formal hearing in a court or tribunal is often the last resort to resolve the dispute. In many instances, court is the best or the only option**. The best option for a victim of repeated domestic violence is to go to court to obtain a protection order. The best option for a worker who is unfairly dismissed, where the employer refuses to negotiate, is to go to the Industrial Relations Tribunal. Often it is necessary to go to court because the other party rejects an ADR option. Of course, where a serious criminal offence has been committed, the police have no option other than to charge the offender and take the matter to court.

In disputes of a commercial kind, there is usually a ‘paper trail’ (a series of documents such as invoices, receipts, emails/faxes/letters) between the parties. These can indicate if the matters in dispute are likely to lead to a court action. **A common dispute occurs when a person does not pay his or her debts**. This can be because of cash flow problems or simply because a person is slow to pay. When this happens, the threat of going to court is often enough to make such a person pay. In the Hypothetical that follows, you are asked to think about this issue.

HYPOTHETICAL

Facts: Virtue Pty Ltd delivers stationery in perfect condition to Dodgy Marketing Pty Ltd. The stationery has been ordered on the letterhead of Dodgy Marketing. Virtue quotes for the stationery. The quote sets out price, quantity and the quality of the stationery to be provided. Virtue delivers a tax invoice to Dodgy Marketing, which says payment is to be made within 30 days. Dodgy Marketing does not pay its bill. It does not raise any issue about the quality of the stationery. The amount of the account is \$8,500 including GST. Virtue telephones

repeatedly and writes requesting the bill to be paid. No response is received for three months. Virtue’s director speaks to her lawyer and is advised that the company could sue Dodgy Marketing to recover the amount owing, interest from the date of issuing proceedings, and legal costs for issuing proceedings.

Issue: Is immediate court action the best option for Virtue? Why or why not? [A] [E]

15.4 DIFFERENCES BETWEEN CIVIL AND CRIMINAL COURT ACTIONS

PRACTICAL APPLICATION

Look carefully at the illustration following and read the descriptions of the court personnel before answering the following questions:

1. What type of court case – criminal or civil – is being heard in the courtroom diagram? Which of the court personnel in the diagram assist you to answer this question? [C]
2. Which party has the onus of proof in this type of court hearing? [C]
3. What is the onus of proof in this type of court case? [C]
4. What is the standard of proof? [C]

PRACTICAL APPLICATION CONTINUED...

- Why do you think our court rooms are generally arranged in this way? Do you think this layout and the personnel who are involved in court proceedings best serve the interests of justice for the parties and the general community, or should there be a different layout and different personnel? [C] [A] [S]
- If this was a civil court case, which court personnel in the diagram would you remove. Which new court personnel would you install instead. Describe the role of any new court personnel you have identified. [C] [A]
- If this was a civil court case, what answers would you give to questions 2, 3 and 4. [C][A]

JUDGE'S ASSOCIATE:
Assists judge with paperwork (e.g. marking and storing of exhibits) and research of relevant legal cases and principles.

DEFENDANT'S SOLICITOR AND BARRISTER:
In Queensland, the term, 'legal practitioner', is used generally to describe all practising solicitors and barristers. The barrister speaks on behalf of the accused (defendant) while the solicitor handles other aspects of the defence case, such as preparing witness statements and ensuring all evidence is available for presentation to the court.

LEGAL CLERK (for crown prosecutor): A solicitor employed by the DPP to assist more senior legal practitioner with the running of the prosecution case.

ACCUSED:
A person against whom a court action has been brought (tends to be used interchangeably with 'defendant' in criminal trials).

PUBLIC GALLERY: Members of the public may observe court proceedings unless the court is closed (e.g. where children act as witnesses or in sexual offence or domestic violence cases) or the judge rules that behaviour is inappropriate.

JUDGE: Controls the running of the court hearing to ensure a fair trial. Decides on matters of law, decides guilt of accused if no jury and passes sentence on persons found to be guilty. In civil matters, hears evidence and decides the matter, usually without a jury.

COURT REPORTERS: Record what happens in court hearing on audiotape and with shorthand/digital recording.

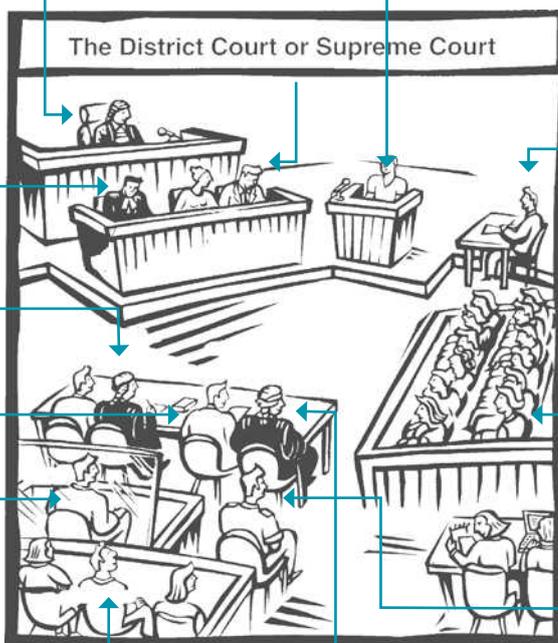
WITNESS: Gives evidence (oral testimony or opinion) by answering questions put to him or her by legal practitioners.

BAILIFF: 'All rise! Hear ye, hear ye! This honourable court is now in session!' A court officer who assists judge in managing behaviour of parties and other people in courtroom, brings witnesses into court, administers oaths, and looks after jury.

JURORS: A group of ordinary citizens who collectively decide on the facts of the case. Crucial in trial of indictable (serious) offences. Rarely a part of a civil trial.

MEDIA: Journalists often attend to report on court hearings. Photos and recording equipment are prohibited. Sometimes, a judge suppresses publication of sensitive information or the identity of certain parties (e.g. children or victims of sexual offences).

CORRECTIVE SERVICES OFFICER: Brings the accused into court dock from court house cells and closely supervises the accused's behaviour during proceedings.



(Source: Queensland Courts, 2011)

CROWN PROSECUTOR: Legal practitioner (usually a barrister) who presents the case for the Crown (works for Director of Public Prosecutions (DPP) in Queensland Department of Justice and Attorney-General. If this were a civil court hearing, the person at the right end of the bar table as viewed from the back of the courtroom would be the plaintiff and/or his legal representatives.

In Chapter 14.3: Distinguishing The Civil Law From Criminal Law we have already summarised the main differences between the civil law and the criminal law. The focus of this part of Chapter 15 is similar, but directed towards a narrower focus, namely understanding the differences between civil and criminal court actions.

In the administration of the Australian system of legal justice, a basic distinction is made between legal disputes that are criminal and civil. The question of whether a wrongful act should be classified as civil or criminal, or both, depends upon the legal consequences that usually follow it. The usual consequence of a serious criminal offence is that the wrongdoer (the accused) is arrested, charged by a police officer and, once sufficient time has been allowed for the Crown and the accused to prepare their cases, tried by a judge and jury in a criminal hearing (trial).

A civil case, on the other hand, involves one person or company taking another person, company or the government to court, usually to try to obtain compensation for loss or damage that has been suffered because of an alleged wrongdoing, such as a negligence or breach of contract. Other consequences of a successful civil court action can be a declaration by the court of a legal entitlement (for example, that one of the parties is the legal owner of property in dispute) or an injunction order, which requires a party either to stop doing a particular act (for example, playing loud music until 2am three times a week) or to carry out a particular act (for example, cutting down a large tree because its branches are hanging dangerously over a neighbour's house).

SUMMARY OF DIFFERENCES BETWEEN CIVIL AND CRIMINAL COURT ACTIONS:

Distinguishing features	Civil court hearing	Criminal court hearing
Person who brings legal action	Plaintiff	Prosecutor/complainant
Person who defends the action	Defendant	Accused/defendant
Name of court action	Suit/trial	Trial
Party with the onus of proof	Plaintiff	Prosecutor/Crown
Standard of proof	On the balance of probabilities	Beyond a reasonable doubt
Consequences of a successful court action	Defendant ordered to pay plaintiff damages (compensation for the loss or injury); and defendant also likely to be ordered to pay the plaintiff's legal costs (i.e. the amount of money spent in bringing the matter to court)	Accused is found guilty of offence and is sentenced to prison or is fined or receives a community service order or a suspended sentence or a warning
Consequences of an unsuccessful court action	Plaintiff's case is dismissed and plaintiff is also likely to be ordered to pay the defendant's legal costs	Accused is found not guilty (i.e. acquitted) of the offence and is free to leave the court

The approach to a civil dispute is different. At the heart of resolving a legal dispute to the satisfaction of one or both of the parties is seeking to have their claims verified, either informally in negotiations, or formally in a tribunal or court of law. When it comes down to it, the successful resolution of a legal dispute, whether winning in court or having strong bargaining power in negotiations for the settlement of a dispute with the opposing party, evidence is the key.

THE ONUS (BURDEN) OF PROOF

The onus of proof is the responsibility carried by a party to a court hearing to convince the judge or jury that what is being said is true. The onus of proof rests on the person bringing the case against another to court.

Criminal cases

Prosecution (for the crown) carries the onus of proving accused is guilty

**Civil cases**

Plaintiff carries onus of proving the case against the defendant

In criminal cases the prosecution must establish the guilt of the accused by providing sufficient evidence. The few exceptions to this were discussed in Chapters 7 - 11, Topic 3 Criminal trial process.

In civil cases the onus of proof falls on the plaintiff but, in many cases, the defendant will admit many facts which means they do not have to be proved. Unlike criminal cases, civil defendants must prove any claims made in their own defence other than a simple denial of the plaintiff's claims.

THE STANDARD OF PROOF

The standard of proof is the degree to which a party must convince or satisfy the judge or jury that an alleged fact, or series of facts necessary to prove a claim did actually occur.

Criminal cases

Prosecution must prove beyond reasonable doubt

**Civil cases**

Plaintiff must prove on the balance of probabilities

In criminal cases, it is the prosecutor who must present evidence with such weight or certainty that the accused's guilt is **beyond a reasonable doubt** in the mind of the judge or the members of the jury.

In civil cases, the plaintiff must establish the case by proving it on the **balance of probabilities**. This means that the judge or (in defamation cases, for example) the jury must be satisfied that the majority of evidence favours the conclusion that the plaintiff's claim is more likely than not to be the true position than the defendant's claim.

Despite the significant differences between civil and criminal trials, the nature and types of evidence and the questions about its admissibility, are essentially the same. It is not necessary to repeat here an explanation of the types of evidence and when they are admissible as it can be revised by reading **Chapter 9.5: Court Rules Of Evidence**. However, the private nature of civil disputes means that there are quite distinct and separate court processes which apply when matters are not resolved and end up in a court or tribunal for resolution. Where an intending plaintiff goes to seek resolution, and hopefully justice, depends upon where the particular claim/dispute can be heard.



Ch 7 -
Ch 11



Ch 9.5

HYPOTHETICAL

State whether each of the following legal disputes is criminal or civil. Briefly explain why. [C] [A]

1. A bitter dispute between the son and ex-wife of a recently deceased man as to who should receive his possessions under his will.
2. A Government employee has been sacked from her job without any warnings or reasons.
3. A person at a night club is arrested for selling cocaine in a police raid.
4. Having signed a contract to play for an AFL club in Perth for three years, a player decides, after one year of playing for the club, that he would prefer to play for the Brisbane Lions.
5. The owner-driver of a truck, in defiance of repeated directions from a police officer, refuses to move her truck from a major road in a blockade protesting against a government decision to increase petrol taxes.

15.5 WHICH COURT?

Each court or tribunal has been set up by an Act of Parliament. Some courts, such as the Family Court and Federal Court, are set up by the Commonwealth Parliament. The State courts and tribunals are set up by the Queensland Parliament. The power of each court to hear matters brought before it is set out in the Act of Parliament (whether state or federal) which has established it.

The Commonwealth Constitution enables the Federal Government to pass laws about divorce and disputes between married couples about their property and their children. It does not allow the Federal Government to pass laws about de facto partners. This is only one example of many. The Australian state governments, however, have agreed to cede (pass over) their powers to the Commonwealth to pass laws and resolve disputes in relation to de facto relationships. This means, for example, that the Family Court now has the power to deal with children who are not children of the marriage because that power has been given to the Family Court by the Queensland Government.

The first question a lawyer would consider, if you take a particular problem to him or her, is which court has the authority to make a decision in relation to the legal issues raised. This is known as jurisdiction.

There are two types of court jurisdiction:

- ▶ **original jurisdiction**, meaning those types of cases which commonly are heard for the first time at that level in the court structure; and
- ▶ **appellate jurisdiction**, being the authority to hear cases brought on appeal from a lower court in the hierarchy. As you learned in Chapter 4, our courts are in a hierarchy. This means that the decisions of most courts may be re-examined by a higher court.

A guide to the original and appellate jurisdictions exercised by the main Queensland and Federal Courts is set out in the diagram in **Chapter 2.6: Courts: Sources Of Common Law**. Most courts have original jurisdiction over both civil and criminal cases. Simple offences are heard by a magistrate alone, while indictable (more serious) offences are usually heard by a judge with, or without, a jury in the District Court or Supreme Court. The courts have limits set as to the amounts they can order to be paid to successful parties in civil suits. You should appreciate, however, that the choice of a court can be very complicated. It can be legally challenged and the consequences of choosing the wrong court can be extremely expensive for an unsuccessful litigant. Legal advice should, therefore, be obtained before commencing a court action.



Ch 2.6

PRACTICAL APPLICATION

Refer to the diagram on page 50, JURISDICTIONAL HIERARCHY OF QUEENSLAND AND FEDERAL COURTS, and decide in which court a dispute should be heard in each of the following examples. Give your reasons. [C] [A]

1. Kim built three patrol vessels for an Asian country in Brisbane. The vessels did not go as fast as they should, to meet the requirements of the agreement between Kim and the Asian country. Peters were the naval architects responsible for the design of the vessels and ensuring they would reach the speed required. Modifications to the vessels cost \$1,200,000. Kim brings a claim against Peters in negligence.
2. Kate is in a car accident for which Daniel is responsible. Kate suffers injuries and has been advised that similar cases had resulted in damages being awarded to the plaintiff between \$575,000 and \$650,000. Kate brings a claim against Daniel in negligence.
3. Jessica loses her claim for damage to her car in the Magistrates Court. She decides to appeal.
4. The Brisbane City Council grants a development approval to Dodgy High Rises Pty Ltd to develop a suburban high-rise nursing home by changing it to residential units for private sale. Local residents decide to object in court.
5. James and Maria are in dispute about which of them should care for their children. Maria decides to issue court proceedings.
6. Thomas makes a pest spray to control the pests in orchards. On the spray container, and in literature for advertising, Thomas makes claims about the performance of the spray and its contents. These are strikingly similar to those of a large company, Pest Spray Inc which also makes a pest spray for the same purpose. Pest Spray Inc decides to ask the court to make an order to stop Thomas from using the words in his advertising and to sue Thomas for damages.
7. On the boundary of Mari's yard Jack grows a very large mango tree, which is colonised by flying foxes when mangoes are ripe. The mangoes fall on Mari's veranda together with a lot of flying fox droppings. Mari asks Jack to cut the tree back. Jack refuses. Mari makes an application for an order for the mango tree to be severely pruned regularly.

15.6 DIFFERENCES BETWEEN COURTS AND TRIBUNALS

Tribunals are set up to deal with legal disputes that arise in special areas. They are not courts, and for this reason, they are not bound by many of the formalities of the court system. **Tribunals differ from courts in the following ways:**

- ▶ Court cases are usually conducted by lawyers; tribunal hearings may not be.
- ▶ Courts allow and encourage legal representation; tribunals are less insistent, sometimes refusing the use of legal counsel.
- ▶ Formal procedures and protocols, such as referring to judges as 'Your Honour' and wearing wigs and gowns, are followed in courts; tribunals are often more relaxed and informal.
- ▶ Courts apply strict rules of evidence but these may be relaxed or not followed in tribunals.
- ▶ Courts have a permanent place in the legal structure but tribunals may be established for the completion of a specific task. You should note, however, that some tribunals, such as the Australian Human Rights Commission and Queensland's Crime and Misconduct Commission, have a continuing role in our legal system.
- ▶ Courts follow the doctrine of precedent, but tribunals are free to disregard previous decisions. There are some exceptions, however, especially when tribunals are acting to decide appeals from lower tribunals. In the giving of the decision, the appellate tribunal may lay down principles to be followed by the lower tribunal in future hearings. This does not mean that they do not act within the law as their decisions can usually be challenged in the courts by way of review or on appeal.

15.7 TRIBUNALS INVOLVED IN DISPUTE RESOLUTION

Tribunals may be established by Commonwealth and State governments or by non-government organisations and associations.

COMMONWEALTH TRIBUNALS - EXAMPLES:



- ▶ National Native Title Tribunal

STATE TRIBUNALS - QUEENSLAND EXAMPLES:

- ▶ Crime and Misconduct Commission (CMC - <http://www.cmc.qld.gov.au>) - oversees Queensland Government departments and agencies, including the police service and corrective services agencies, as well as fighting organised crime and paedophilia in the state.

STATE TRIBUNALS - QUEENSLAND EXAMPLES CONTINUED:

- ▶ Queensland Civil and Administrative Tribunal (QCAT - <http://www.qcat.qld.gov.au>): commenced operation on 1 December 2009, replacing tribunals such as the Anti Discrimination Tribunal, Small Claims Tribunal and Guardianship Tribunal. It now makes decisions about matters such as:
 - ▶ Residential tenancy disputes
 - ▶ Small debt disputes (up to \$25,000)
 - ▶ Consumer and trader disputes and minor civil disputes (such as a car accident damages or personal injuries claims up to \$25,000)
 - ▶ Building disputes
 - ▶ Anti-discrimination matters
 - ▶ Appointment of attorneys to manage a person's affairs.



WHAT DO YOU THINK?



Australian Human Rights Commission

Most tribunals have an Internet site that provides facts sheets and other information about their purposes, functions and personnel. For example, the website of the Human Rights Commission can be found at: <http://www.hreoc.gov.au/>.

Log on to the website at <http://www.hreoc.gov.au>, click on the 'About' icon at the top of the home page and then answer the following questions on this page. [C]

1. What was the former name of the commission?
2. In what year was the commission established?
3. How was it established?
4. Fill in the blank: We are an _____ and report to the _____.
5. What is the vision of the Australian Human Rights Commission?
6. What are the five ways in which the commission seeks to fulfil its mission of 'leading the promotion and protection of human rights in Australia'?
7. Under the heading, 'Our structure', what areas of human rights/discrimination are represented in the five commissioner positions?

15.8 COMPLAINTS AND APPEALS AGAINST GOVERNMENT DECISIONS

STATE COMPLAINTS AND APPEALS

Any citizen wishing to appeal against an administrative decision or action of the Queensland Government or its agencies must consult the relevant Act of Parliament or regulations. In some instances the Act will provide for appeals and a tribunal may exist.

If no provisions exist under the Act, the following options are available:

- a. Lodging a complaint with the Queensland Ombudsman.
- b. Seeking judicial review in the Supreme Court.
- c. The government commissioning an independent review.

A. COMPLAINT TO THE QUEENSLAND OMBUDSMAN

The role of Ombudsman (Swedish for ‘agent or representative of the people’) is to **investigate and report on any complaints by members of the public about government administration** where a citizen has complained to the relevant government officials and had no success. The Commonwealth and all States have Ombudsmen established under Acts of Parliament. The Ombudsman **cannot impose penalties but can have a report tabled in Parliament**. This type of action draws unfavourable publicity to the government minister or authority referred to in the report.

An **action by the Ombudsman** begins with a written complaint from a member of the public, although the Ombudsman is not required to investigate every complaint. Before commencing the inquiry, the Ombudsman must notify the Minister concerned that an inquiry is to occur. He may enter any place of government activity, inspect any document, issue written questions for answer, and require any person to appear and answer questions under oath.

The powers and responsibilities of the Queensland Ombudsman are contained in the *Ombudsman Act 2001* (Qld). Examples of areas of complaints that the Queensland Ombudsman investigates are:

- ▶ unfair treatment by a government department or official;
- ▶ a prior complaint being ignored; and
- ▶ delays in carrying out administrative action or responding to concerns (for example, police officers failing to respond to a complaint).

The Queensland Ombudsman holds **very wide powers of investigation**. When the findings are complete, the Ombudsman **can request information** from the body concerned about the steps it intends to take in order to satisfy the recommendations in the report. If no steps are taken within a reasonable time, the Ombudsman may advise the Premier and the Parliament.

B. JUDICIAL REVIEW BY THE SUPREME COURT

Review of a State Government decision or action can be sought by a dissatisfied citizen under the *Judicial Review Act 1991* (Qld) by taking the matter to a hearing in the Supreme Court. The court will only interfere with an administrative decision if it can be established that the government body acted in a manner that was **beyond the powers given to it or if the body carried out its powers in an improper manner**. If the court finds in favour of the complainant, it may overturn the decision or compel the government body to take a certain action or refrain from doing an act.

C. GOVERNMENT-COMMISSIONED INDEPENDENT REVIEW

In cases where there is a public outcry over a decision made by a government official, **the government may be pressured into conducting its own independent review**. This means that the aggrieved parties do not need to bring their own private case to court. This occurred with respect to the death in police custody on Palm Island of Mulrunji Doomadgee, with the Queensland Government seeking a review of the Queensland Director of Public Prosecutions' decision not to press charges against the policeman.

PRACTICAL APPLICATION

In January 2007, the Queensland Government's Attorney-General appointed the highly respected retired NSW Chief Justice, Sir Laurence Street, to conduct an independent review of the decision of the Queensland Director of Public Prosecutions, Leanne Clare, not to charge Senior-Sergeant Chris Hurley over the death of Aboriginal man, Mulrunji Doomadgee, while in police custody on Palm Island. After the Deputy Coroner, Christine Clements, had found that Doomadgee, who had suffered broken ribs and a ruptured liver in the scuffle, died at the hands of Sen-Sgt Hurley, Ms Clare dismissed the 2004 death as a 'terrible accident'. Sir Laurence Street, however, disagreed with Ms Clare's decision made on behalf of the Queensland Government and recommended that Sen-Sgt Hurley face trial for manslaughter. At the Supreme Court trial in June 2007, Hurley was found not guilty of manslaughter by the jury on the basis of his successful pleading of the defence of Accident.

1. What decisions were made by Christine Clements, Leanne Clare, Sir Laurence Street and the Supreme Court jury? [C]
2. Why do you think it was considered necessary to appoint a retired judge from outside Queensland to conduct the independent review? [E]
3. It has been estimated that the total costs of the independent review, which took 11 days, were \$150,000. Was this money well spent in the interests of achieving justice for the individual parties involved in the legal process and for the community as a whole? [E]

COMMONWEALTH COMPLAINTS AND APPEALS

Complaints or appeals against the actions or decisions of Commonwealth Government administration may be made in one or more of the following ways:

- a. Complaint to the Commonwealth Ombudsman.
- b. Appeal to the Administrative Appeals Tribunal.
- c. Judicial review by the Federal Court.

A. COMPLAINT TO THE COMMONWEALTH OMBUDSMAN

The **Commonwealth Ombudsman** position was created by the *Ombudsman Act 1976* (Cth) and is located in Canberra. The Ombudsman can investigate problems arising from government administration or policy but not legislative (parliamentary) or judicial (court) decisions. Some examples of Ombudsman inquiries include:

- ▶ delays in obtaining taxation refunds from the Taxation Office;
- ▶ complaints involving aged care facilities and refugee centres; and
- ▶ Austudy and other matters involving universities.

To complement the general powers of the Commonwealth Ombudsman, the Federal Government has also established **specialised Ombudsmen** to investigate complaints from consumers and businesses in

specific industries, such as telecommunications and banking. The **Telecommunications Industry Ombudsman** is a free alternative dispute resolution scheme, which is independent of industry, government and consumer organisations, for small businesses and residential consumers in Australia who have a complaint about their telephone or Internet service. Similarly, the **Australian Banking Industry Ombudsman** operates throughout Australia to help resolve complaints between banks and their customers, whether they are individuals or small businesses.



B. APPEAL TO THE ADMINISTRATIVE APPEALS TRIBUNAL

The Commonwealth Administrative Appeals Tribunal (AAT) was established to provide **one central body, which persons could use to appeal against an administrative action or decision**. As we have seen, appeals against Queensland decisions must proceed through the terms of each Act, but at the Commonwealth level the AAT covers a wide range of Acts.

The Tribunal is not bound by legal procedures and aims to investigate the reasons for actions rather than engage in legal debate. The hearings are usually in public and lawyers frequently appear on behalf of their clients. Each party is required to pay their own costs although legal aid is available if the person meets the qualifying criteria.

C. JUDICIAL REVIEW BY THE FEDERAL COURT

In applying remedies under an 'order of review', the Federal Court can use the same types of orders as the High Court. It can direct that particular actions be taken or not taken, overturn decisions originally taken, or refer the matter back to the original decision-maker for reconsideration subject to whatever directions the court may apply.

CASE STUDY

Green v Daniels (1977) 13 ALR 1

Facts: Miss Green, aged 16 years, left school in December and, unable to gain employment, applied for unemployment benefit. The Department of Social Security refused the benefit immediately because departmental policy was that school leavers were not eligible for benefit until the end of the school vacation, in February.

Legal Issue: Could Miss Green successfully require the Department to review its decision?

Decision: The High Court agreed with Miss Green's argument that the policy being followed was not specified in the Social Security Act and that the Department of Social Security had misused its powers.

It recommended that she should receive benefits from the date of leaving school. However, only the Director-General of Social Security has the authority to grant benefits. He

was required to reconsider the case again following the High Court recommendation. The Director-General came to the same decision, but this time based it on a clause of the Act requiring that a person receiving a benefit be willing to undertake work. He decided that Miss Green had not established her willingness to work. So, she did not receive the benefits for the holiday period.



A DIFFICULT CHOICE: JUDICIAL REVIEW VS. ADMINISTRATIVE APPEAL

The case of *Green v Daniels* illustrates how judicial review may not always achieve the desired result. It is necessary to understand that judicial review and administrative appeal serve different purposes. **Judicial review** is concerned with jurisdiction to make a decision or take an action. It is concerned with legality, deciding questions such as whether the government body had power to make that decision or whether the power was exercised in a legal manner. **Administrative appeal** is concerned with the 'rightness' of the decision considering the facts. It is not concerned with legality but with the validity of the case being presented.

Because *Green's* case was a judicial review before the High Court, **all the court could find was that the decision reached was illegal**. The Department of Social Security accepted that decision and commenced the administrative procedures once again – this time finding against Green on a legal basis. Had Green taken the matter to administrative appeal, it would have been the task of the Administrative Appeals Tribunal to determine the merit of her case on the basis of the facts presented. If the tribunal had found in her favour, it is very likely that the department would have had to pay the benefit.

15.9 COMMISSIONS OF INQUIRY

Usually in response to a public outcry about the allegedly improper or illegal actions of a particular government official or department, governments at both the federal and state levels have the power to set up **independent commissions of inquiry** to investigate the truth of the allegations and to make recommendations to the government as to whether further legal action should be taken against the officials in question. The Commissioner (often a senior or retired judge or barrister) usually has **wide investigatory powers**, which are broader than the powers of judges in courts of law, including the power to summons witnesses, offer indemnities, seize documents and obtain other forms of evidence that may not have been admissible in a court of law. After the findings and recommendations have been issued by the Commissioner, the government decides if and how it will respond to them.

Federal commissions of inquiry are called Royal Commissions and are created and operated under the *Royal Commissions Act 1902* (Cth). Examples of matters of public interest which have been the subject of Royal Commissions set up by the Federal Government include old-age pensions (1905-06), the tobacco monopoly (1905-06), the basic wage (1920), the coal industry (1929), television (1953-54), drug trafficking (1983), British nuclear tests in Australia (1984-85), Aboriginal deaths in custody (1987-1991), the Australian Secret Intelligence Service (ASIO) (1994-95) and certain companies in relation to a UN Oil-for-Food Programme (2005-06). The Royal Commission into Institutional Responses to Child Sexual Abuse 2012-2017, and the Banking Royal Commission 2018 which continues at the time of writing.

States also have their own Acts of Parliament that give them the authority to set up Royal Commissions or commissions of inquiry to resolve disputes that have become matters of public interest and importance. A recent example was the 2005 Queensland Public Hospitals Commission of Inquiry, including the highly publicised complaints against Dr Patel at Bundaberg Base Hospital. (See the Inquiry's final report at <http://www.qphci.qld.gov.au>).



PRACTICAL APPLICATION

NOVEMBER 2012*ROYAL COMMISSION
ANNOUNCED*

Julia Gillard, ex-Prime Minister, announces the Royal Commission into Institutional Responses to Child Sexual Abuse.

MARCH 2013*ROYAL COMMISSIONS
ACT 1902 (CTH) AMENDED*

The Act was amended to allow for private sessions, the first private session was held on 7 May 2013 in Sydney.

SEPTEMBER 2015*REDRESS AND CIVIL
LITIGATION REPORT RELEASED*

This report contains the Royal Commission's final recommendations on redress and civil litigation.

AUGUST 2017*CRIMINAL JUSTICE
REPORT RELEASED*

This report contains the Royal Commission's final recommendations on the response of the criminal justice system to victims of institutional CSA.

DECEMBER 2017*MESSAGE TO AUSTRALIA*

A book that gave people an opportunity to share a message about the experience and hopes for creating a safer future for children.

DECEMBER 2017*THE FINAL REPORT*

This report was presented to the Governor-General detailing the culmination of a five-year inquiry into institutional responses.

Thank you for the opportunity to tell my story. You cannot know what it meant to be listened to with such respect and made to feel that what happened to me really mattered. I hope my experience will help to promote the change needed to prevent this ever happening to another child.

SOURCE: [HTTP://WWW.CHILDABUSEROYALCOMMISSION.GOV.AU](http://www.childabuseroyalcommission.gov.au)

The interim and final reports of the **Federal Commission of Inquiry into Institutional Responses to Child Sexual Abuse** can be found on the above website.

- 1 Conduct research to find out what findings were made as a result of this inquiry into an aspect of the inquiry which has led to legal consequences. Two areas, for example, are criminal prosecutions against persons responsible for child sexual abuse and compensation for victims of child sexual abuse. Describe and explain the outcomes achieved as a result of the commission's work in your chosen area. [C] [A]
2. Go to **Message to Australia**, and choose from the public messages three examples which illustrate the diversity and extent of the problem addressed in this commission. One example should be that of an Indigenous Australian. Describe the experiences of the victims in your own words. Explain why it is important for there to have been a process for these victims to tell their stories, and for there to be consequences (including legal consequences) to which the community must respond. [C] [A] [E]
3. Prepare a short speech to your classmates explaining why this Royal Commission was worthwhile (or not). [R]

REVIEW

1. Describe the following: [C]
 - (a) The dispute resolution processes which involve the assistance of a third party and those which do not.
 - (b) The nature of the judge's responsibility.
 - (c) The differences between civil and criminal court actions.
 - (d) A hierarchy of courts
2. Describe and explain the following : [C] [A]
 - (a) The difference between 'lumping' a grievance and 'naming, blaming and claiming'.
 - (b) How mediation differs from conciliation.
 - (c) The differences between courts and tribunals.
3. Describe the judicial review process and explain how it is different from an administrative appeal. [C] [A]
4. Describe the nature of commissions of inquiry set up by governments, and explain the circumstances in which this might occur. What is the value of such inquiries, and explain how they might be misused for political purposes. [C] [A] [E]

TOPIC 1: CIVIL LAW FOUNDATIONS

CHAPTER 16: ALTERNATIVE DISPUTE RESOLUTION

FOCUS SUBJECT MATTER

16.1 BACKGROUND

16.2 THE MEDIATION PROCESS

TO UNDERSTAND AND APPRECIATE:

- ▶ the support for alternative dispute resolution in Commonwealth and State legislation; and
- ▶ the nature of mediation, its benefits and disadvantages, and how it is conducted.

16.1 BACKGROUND

In Chapter 15, we looked at dispute resolution in the civil law in a general way. We shall now look at one of the forms of dispute resolution, **Alternative Dispute Resolution**, which has grown in importance since it first became a realistic option for people involved in disputes to use as a way of resolving them.

In Australia, the courts of law are generally considered to be our main dispute resolution forum. Yet, it is well established that **only a very small percentage of disputes are resolved in court**. As has been shown, there are many options in our country for settling disputes. These can be used singly or in combination with each other.

It is always difficult to know how many disputes are resolved by means other than through the use of third parties, such as judges, mediators and arbitrators. Social scientists, who have conducted research into conflict and dispute resolution, estimate that only 3% of disputes would go to third parties for resolution. Of those disputes actually brought to the courts for resolution, only 6-8% will ultimately have an adjudication given by a judge. **The great majority of disputes settle with the parties compromising by negotiation or mediation at a stage prior to trial.**

The term alternative dispute resolution (ADR) was coined in the late 1970s as a way of promoting means of **settling disputes other than by taking the case to court**.

At that time, many members of the legal profession, including judges, had become concerned that:

- ▶ taking cases to court had become **too expensive**;
- ▶ the process was **too lengthy** often with parties waiting for years to have their dispute resolved; and
- ▶ it was an **alienating process** for many people, especially for women, and people of different ethnic backgrounds and experiences.

The above concerns have not disappeared with time. If anything, they have grown and become drivers of reform, particularly with regard to legislative changes, building alternative dispute resolution processes into the court process

ADR was used as a catch-all phrase or an umbrella term to quickly identify those **dispute resolution processes that did not require adjudication by a judge**. Although labelled alternative, these ADR processes, such as mediation, are well recognised and accepted by the courts of law as useful and important means to settle disputes. Mediation, for example, can also be integrated with going to court. The courts, in many cases, encourage parties to go to mediation and can make it compulsory for them to do so when this is permitted or required by legislation. A recent example of compulsory mediation is that parents must go to a mediation before being allowed to start a court case about with whom a child should live after parents separate.

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL (QCAT)

QCAT was established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

Section 3 sets out the objects of the Act, among which are:

- (b) *to have the tribunals deal with matters in a way that is accessible, fair, just, economical, informal and quick; and...*
- (c) *to enhance the openness and accountability of public administration.*



The homepage on the Internet website of QCAT at <https://www.qld.gov.au/law/court/queensland-civil-and-administrative-tribunal> reinforces and interprets the objects of the Act in its opening statement by describing itself as **independent, accessible, quick, inexpensive and efficient**. It also advises that persons who attend QCAT are expected to represent themselves, and need to apply for permission from the tribunal, if they wish to have a lawyer represent them. QCAT has wide-ranging jurisdiction, including adult guardianship matters, reviewing administrator decisions, building disputes, consumer disputes, residential tenancy disputes, retail shop leases and tree disputes. There is a monetary limit of \$25,000. An example of a civil dispute in this jurisdiction is part of an activity in Chapter 18 that follows. When it was first established, this tribunal represented a real attempt to make justice fairer and more accessible.

CIVIL DISPUTE RESOLUTION ACT 2011 (CTH)

On 1 August 2011 the *Civil Dispute Resolution Act 2011* (Cth) passed into law. The object of the Act is set out in s3 as follows:

3 Object of Act

The object of this Act is to ensure, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.

The Act requires parties:

- ▶ to take ‘genuine steps to resolve the dispute’ before commencing proceedings in the Federal Court and Federal Magistrates Court; and
- ▶ to file a ‘genuine steps statement’ with their application to demonstrate such steps have been taken.

The steps taken must constitute a sincere and genuine attempt to resolve the dispute, having regard to the person’s circumstances and the nature and the circumstances of the dispute, for example, offering to discuss the issues in dispute with a view to resolving the dispute, giving the other party information they need to understand the issues involved, or suggesting a method of alternative dispute resolution.

There are consequences for failing to comply with the Act, including adverse cost orders, but proceedings are not invalidated by non-compliance.

CIVIL PROCEEDINGS ACT 2011 (QLD)

Part 6 of the *Civil Proceedings Act 2011* (Qld) deals with alternative dispute resolution. It is compulsory under the court rules in Queensland that a court action founded on a personal injuries claim must undergo mediation before the court allows it to proceed to trial. Otherwise, mediation can occur voluntarily if the parties decide to do so, or the court can require it. The court can also require a case appraisal, an alternative form of mediation to which we have earlier referred which involves an independent assessment by a case appraiser. These methods can lead to settlement in part or in full of a claim.

The objects of Part 6 of the *Civil Proceedings Act 2011* (Qld) are set out as follows:

37 Objects of Pt 6

The objects of this part are-

- (a) to provide an opportunity for litigants to participate in ADR processes in order to achieve negotiated settlements and satisfactory resolution of disputes; and*
- (b) to improve access to justice of litigants and to reduce cost and delay; and*





- (c) to provide a legislative framework allowing ADR processes to be conducted as quickly, and with as little formality and technicality, as possible; and
- (d) to safeguard ADR processes-
- (i) by extending the same protection to participants in an ADR process as they would have if the dispute were before a court; and
 - (ii) by ensuring that they remain confidential.

PRACTICAL APPLICATION

1. Describe and explain the differences between the objectives and processes of the Civil Dispute Resolution Act 2011 (Cth) and Part 6 of the *Civil Proceedings Act 2011* (Qld). [C] [A]
2. Describe the approach taken by QCAT when it deals with civil disputes. How is it different from the processes of the other courts, federal and state? [C] [A]



WHAT DO YOU THINK?



The public pays for the court system, the judge's salaries, the court buildings, and all the administrative staff.

Is it fair to require people to make a genuine attempt to resolve their disputes before they use this expensive court process at public expense? [E]

16.2 THE MEDIATION PROCESS

When a third person assists in resolving a dispute, but lacks the authority to impose a binding decision, it is called mediation. There are many forms of mediation found around the world and also many variations within Australia. The ADR movement has put forward certain characteristics that generally apply to mediations in this country.

Usual characteristics of the mediation process are:

- ▶ Participation in mediation is voluntary in many cases.
- ▶ Limited number of procedural rules.
- ▶ No rules of evidence.
- ▶ Informal discussion of the parties' concerns which allows for the venting of emotional issues.
- ▶ Mediator's power is restricted to control of the process.
- ▶ Parties decide the content of what is discussed.
- ▶ Parties decide on the outcome.



- ▶ The process is private and confidential.
- ▶ Flexibility of possible solutions.

BENEFITS OF MEDIATION

- ▶ Mediation is considered **empowering** as it **gives control over the outcome of a dispute back to the parties** rather than having it controlled by the State, as occurs with an adjudication in the courts of law.

In law, nothing is certain but the expense.

SAMUEL BUTLER

- ▶ Mediation is considered **cheaper** than going to court. This is because there is less formality and paperwork involved, legal costs are lower, and settlement is likely to occur at an earlier time. The mediation process is thought to be **less stressful** for parties than going to court, partly because mediation is less formal and less adversarial.
- ▶ Mediation is **private and confidential** so no one else needs to know the details of the dispute or what was the agreement. Because mediation often involves a compromise by both parties, the emphasis is on finding common ground between the parties rather than finding a winner of the dispute. This differs from court cases where the process is adversarial, and generally results in a winner and a loser. This is why mediation is often referred to as providing a **'win/win' solution**. For this reason, you are more likely to stay friends or keep a workable relationship with the other party than occurs when people go to court.

DISADVANTAGES OF MEDIATION

- ▶ As the mediator does not impose a solution both parties should be equally able to speak for themselves and promote their interests. However, if there is a significant **power imbalance** between the parties, mediation may not be recommended.
For example, a wife who has been physically and emotionally abused by her husband should not go to mediation to decide issues in dispute about children unless protected by independent representation.
- ▶ If a party has a **clear legal right**, it may be argued that a compromise in a mediation may cause him or her to receive less than if the matter went to court. Because mediations are private and confidential, no one knows how other similar disputes have been resolved. This means that there can be significant variations in settlements. As you saw in Chapters 2.6, 14.7, consistency or 'treating like cases alike' has traditionally been considered fair and just. It also enables precedent to occur. Privately settled mediations **do not allow a clear and consistent history of decisions (precedent) to develop**.
- ▶ Lastly any decision given by a judge in a court of law will be **enforced by the State**.
If the court orders a sum of money to be paid to one of the parties there are mechanisms to ensure this occurs, such as using a court-sanctioned bailiff to collect the money owed. As mediations are voluntary agreements, enforcement may be more difficult. If a party agrees to do something and then does not adhere to it, the matter may have to be taken to court.

WHO CAN MEDIATE?

Mediations can occur informally without using professional mediators. However, there are many professional mediation services available where persons trained in mediation provide dispute resolution services. These range from highly expensive professional services to free mediation services provided through professional and government organisations.

Some examples are the Queensland Law Society, which refers people to its current list of legal practitioners who are accredited (trained) mediators the Caxton Street Legal Centre (focusing on community-based mediations) and the Australian Commercial Disputes Centre (business-related disputes). Relationships Australia and the Family Court provide mediation services for family members in dispute. In addition, mediation has been integrated into the dispute resolution process in the courts. Both federal and state courts at each level provide court-annexed mediation, which means that magistrates and judges have the power to make mediation compulsory for parties before they are allowed to have a court hearing.

PRACTICAL APPLICATION

ALTERNATIVE DISPUTE RESOLUTION

SOURCE: [HTTP://WWW.QLS.COM.AU/FOR_THE_COMMUNITY/ALTERNATIVE_DISPUTE_RESOLUTION](http://www.qls.com.au/for_the_community/alternative_dispute_resolution)

Alternative Dispute Resolution (ADR) includes a variety of methods outside of court proceedings which can result in a binding or non-binding agreement to resolve a legal problem. Methods include:

- ▶ Mediation
- ▶ Arbitration
- ▶ Building and Construction Industry Adjudication (BCIPA)
- ▶ Conciliation
- ▶ Collaborative law

You may have a choice of more than one avenue, depending on the issue. Queensland Law Society has developed a decision tree to show the flow of action for five different forms of ADR.

Once you have obtained general legal advice from your solicitor, they will be able to approach an appropriate ADR expert concerning your legal issue to discuss costs, venue, who will attend, documentation to be provided, pre-ADR meetings and availability.

See below frequently asked questions for more information about ADR.

Mediation

Mediation is a popular way of settling disputes without going to court. A mediator is an impartial third party who will guide you through a structured process to assist in the resolution of your dispute. It is up to the parties to reach an agreement and decide what is included in that agreement. Parties in a mediation may choose not to accept the agreement if they are unhappy with the terms reached or the suggested outcome. Agreements reached in mediation are not legally binding, unless the parties

sign a statement agreeing to be bound to the agreement in law.

The mediator will not make a decision for the parties, but can draw up an agreement with terms each party agrees to. The mediation process allows for personal considerations to be taken into account including maintaining a working relationship between the parties.

Mediation can save considerable time, legal fees and court costs for parties and for the community.

Often, outcomes reached in mediation cannot occur in court, where a judge is bound to interpret what a contract means, rather than taking into account the wishes of the parties.

Unless directed to mediation by a court or tribunal, mediation is a voluntary process. If an agreement cannot be reached through mediation, the parties may then choose to take the matter to court.

When is mediation compulsory?

Some courts and tribunals have compulsory dispute resolution procedures. For example, the Family Court requires compulsory mediation in custody/parenting matters. Court actions in the Federal Court of Australia or the Federal Circuit Court can only commence if parties have taken genuine steps to resolve their disputes (Civil Dispute Resolution Act 2011) though there are some proceedings which are excluded such as criminal, civil penalty or appeals.

If you have been referred to mediation by QCAT you may need to take part in an abbreviated mediation in which a trained mediator helps the parties discuss their issues and agree on a solution in a short period of time (usually no more than 1 hour).

PRACTICAL APPLICATION CONTINUED...

The QLS Find a Mediator service allows you to find a nationally accredited mediator.

Arbitration

Arbitration is a form of alternative dispute resolution outside of the courts to obtain a decision that will legally bind the parties. The parties present their arguments and evidence to an arbitrator who acts as a judge and creates a binding determination, called an award.

Arbitration offers a flexible and efficient means of solving disputes.

Arbitration can be ordered by consent in matters in which there are current proceedings before the court or parties can agree to arbitration.

Issues suitable for arbitration are:

- ▶ financial matters
- ▶ property settlement
- ▶ spousal maintenance

You can find a QLS Approved Arbitrator quickly by using the Find an Arbitrator service.

BCIPA

The Building and Construction Industry Payments Act 2004 (BCIPA) allows a process of swift adjudication to resolve payment disputes within the building and construction industry across the State. Enquiries regarding lodgement of adjudication applications should be directed to the Queensland Building and Construction Commission at qbcc.qld.gov.au or alternatively by telephone on 139 333.

Below is a list of Queensland solicitors who specialise in matters related to the Building and Construction Industry Payments Act 2004. These solicitors can help you with your application or response documents to ensure compliance with the requirements under BCIPA.

Conciliation

If your legal issues revolve around discrimination in the workplace or relate to services, the best way to resolve the dispute may be conciliation. This process assists parties in identifying the disputed issues and discussing possible terms of settlement while receiving expert advice from the conciliator who does not act as a judge for the parties.

As with mediation, some courts and tribunals may require you to try conciliation before going to trial.

Collaborative law - negotiations without court involvement

Collaborative law involves both parties and their legal representatives specifically agreeing in writing to reach a settlement without resorting to litigation (a participation agreement is signed at the start of the process). The focus of all participants is to actively participate, negotiate and minimise conflict in order to avoid going to court. Although collaborative law can be used for commercial areas, the primary purpose in Australia is to resolve family law matters. The legal representatives are required to remove themselves from the matter if the parties are unable to reach an agreement.

The Queensland Department of Justice and Attorney-General (www.justice.qld.gov.au) has a website explaining mediation in its Dispute Resolution Centres. Answer the following questions based on your reading of the website.

1. How much does it cost to use the mediation service provided by the Queensland Government's Dispute Resolution Branch (DRB)? [C]
2. Why is it important for this mediation service to be confidential and impartial? [C]
3. In providing an alternative to court for settling disputes for all Queenslanders, what are three types of savings to be made, not just for individuals but for the whole community? [C]
4. How do dispute resolution centres help the court system? [C]
5. What is the main aim of the service provided by the trained mediators? [C]
6. Are there any restrictions on who can use the service? [C]
7. What are three (3) types of disputes that are handled by the DRB [C]
8. How successful are these mediations? [C]

HYPOTHETICALS

HYPOTHETICAL 1

You are a lawyer. A client, Mrs Day, comes to you with a problem she is having with her neighbour, Mr Night. Mrs Day and her young children are disturbed by the loud music and by the frequent parties that Mr Night has in his backyard. She has called in the police on many occasions – every time he plays music or has a party. Now she wants you to put a stop to his nocturnal partying and polluting the air with loud music. Mr Night has told her that she ‘ought to get a life’ and that he is entitled to do what he likes in his own backyard up until midnight.

Write a letter of advice to Mrs Day, based on your reading of the Dispute Resolution Centres website and the earlier discussion of mediation, that responds to the following questions [C] [S] [A] [E] [R]:

1. Should she take the matter to court or try mediation?
2. What would be involved in a mediation and how long would it take?
3. Would you, as her lawyer, attend with her?
4. What are the potential benefits and concerns associated with mediating this dispute?

HYPOTHETICAL 2

Facts: Ryan is a handyman who regularly repairs stairs and outdoor decks (verandahs). He quotes to repair Sam’s and Molly’s back deck for \$7000 including GST. He discusses with them the materials he intends to use, and it is agreed that the decking will consist of Australian hardwood. When Ryan sources the decking, all of the timber merchants and hardware stores are unable to supply the quantity of Australian hardwood he needs for the job. The shortage, according to the suppliers is likely to last for three months. Ryan telephones Sam who agrees that Ryan can use imported Merbau(Kwila) hardwood which comes from Indonesia. There is no discussion about the price, but usually the imported Indonesian hardwood is cheaper by approximately 30%. Ryan does the job, and when he finishes, Molly asks him why he did not use Australian hardwood and says she had heard that importers sometimes obtained their product from overseas suppliers who did not comply with environmental standards. Ryan’s supplier was unable to give him this assurance. Molly complains to Sam, and they decide that they want Ryan to remove the imported hardwood and replace it with Australian hardwood when it becomes available. Ryan refuses. He is not paid and takes his dispute to QCAT. A mediation is ordered.

1. Prepare a written statement of complaint (opening statement) for Ryan, indicating that he seeks payment in full. [C] [A]
2. Prepare the mediator’s summary of the essential points that Ryan made in his opening statement. [C] [A]
3. Prepare a response (opening statement) from Sam and Molly setting out their version of what happened, indicating that they want the decking replaced with Australian hardwood. [C] [A]
4. Prepare the mediator’s summary of the whole dispute. Identify the facts and issues where the parties have common ground (are in agreement) and those where they are in dispute. [C] [A]
5. With a group of three or five fellow classmates, suggest options which might be possible to resolve the dispute. Initially, list these as they are suggested, and then make separate lists, one for Ryan, and the other for Sam and Molly, in the order of preference for each of the parties. Take a vote on what you think is the best option to resolve the dispute. [C] [S] [A]
6. Prepare an agreement in writing to reflect what is agreed. [R]

WHAT HAPPENS IN MEDIATION?

Unlike court hearings where the procedural rules are fixed, mediations are marked by a great deal of flexibility. However, **most professional mediations follow a similar pattern**. Usually the parties can decide whether or not they wish to have a lawyer present with them at the mediation. If the hairdresser and the dissatisfied client from the hairdressing salon (from our earlier example) went to mediation, it is likely to be in the following format.

PAST FOCUS 1.

Defining the problem and the issues in dispute

MEDIATOR'S OPENING

The mediator makes an opening statement in which he or she introduces all the parties and explains the mediator's role, the ground rules and procedure for the mediation, and the goal of the mediation. The goal is usually to find a mutually satisfactory solution to the problem that both parties can live with. The mediator explains that the meeting is confidential until agreement is reached.

2. **A. FIRST PARTY – OPENING STATEMENT**

One of the disputants/parties (in the hair salon case, it would be the dissatisfied client) gives their view on the nature of the conflict and the dispute.

Mediator summarises

The summary here is to be the essence or essential points in the first party's opening so that both parties clearly understand what has caused the complainant to pursue the matter to this point.

**B. SECOND PARTY – OPENING STATEMENT
(BY THE HAIRDRESSER)****Mediator summarises**

The summary is the second party's main points of contention.

3. **MEDIATOR SUMMARISES WHOLE DISPUTE**

The mediator stresses areas of common agreement. These may be written up in a list on a board in order to identify the main issues to be discussed and negotiated. Parties are asked if they agree with these, and if they do, the next stage commences. If not, the list may be changed until both parties feel satisfied with the accuracy of the dispute summary.

4. **DISCUSSIONS AND EXPLORATION OF OPTIONS**

This occurs jointly with both parties and the mediator.

Private meetings

At times, the mediator may ask for a private meeting with each of the parties.

The process of joint discussion and further private meetings will continue until an agreement is reached, or it is clear that there is no compromise solution to which both parties will agree.

5. **SETTLEMENT OR NO SETTLEMENT**

If the parties agree, this will be written down as an agreement and signed by the parties and the mediator (usually in the form of a binding agreement).

If there is no agreement reached, the parties may adjourn with an option to try mediation a second time. Otherwise they will go on to resolve it by some other means, whether it is 'lumping' it or going to court.

**FUTURE FOCUS**

Addressing each issue, exploring options for solving problem

RESOLUTION

PRACTICAL APPLICATION

Conduct a role-play of either the hairdresser situation or the Hypothetical involving Mrs Day and Mr Night. One person can be the mediator or you may like to try having two mediators who work together to assist the parties to reach an agreement. The other two are either Mrs Day and Mr Night, or the hairdresser and her dissatisfied client/s. Follow each stage of the procedure outlined above in conducting the mediation.

If an agreement is reached, write it out as a contract that both parties could sign. [C] [A] [R]

REVIEW

1. Define the meaning of the following: [C]

mediation | conciliation | case appraisal

2. Describe and explain the following: [C] [A]

(a) The role played by alternative dispute resolution in the Queensland Civil and Administrative Tribunal.

(b) The objectives of the *Civil Proceedings Act 2011* (Qld).

(c) The objectives of the *Civil Proceedings Resolution Act 2011* (Cth).

3. Describe and explain the advantages and disadvantages of mediation compared to the court system. [C] [A] [E]

4. In what ways does QCAT provide a jurisdiction which is of assistance to persons trying to resolve disputes which, while factually and legally complicated, involve issues valued at less than \$25,000, which do not justify the expense of significant funds to resolve them? Would it be possible for such disputes to cost large amounts of money in any event? [C] [A] [E]

TOPIC 1: CIVIL LAW FOUNDATIONS

CHAPTER 17: RESOLVING CIVIL ISSUES

FOCUS SUBJECT MATTER

17.1 INTRODUCTION

17.2 MAKING A COMPLAINT TO THE QUEENSLAND OMBUDSMAN

17.3 RESOLVING A FAMILY ISSUE IN THE QUEENSLAND CIVIL
AND ADMINISTRATIVE TRIBUNAL (QCAT)

17.4 RESOLVING A CONTRACT DISPUTE IN THE MAGISTRATES COURT

17.5 COURT-ORDERED ALTERNATIVE DISPUTE RESOLUTION

TO UNDERSTAND AND APPRECIATE:

- ▶ there is a large number of different jurisdictions to which civil issues/disputes can be taken for resolution;
- ▶ these different jurisdictions are all governed by their own rules, and can only exercise authority in accordance with the laws which establish them;
- ▶ where a person goes to seek an outcome resolving an issue/dispute depends on the nature and factual circumstances surrounding it; and
- ▶ the cost of resolving an issue/dispute varies enormously, depending on the choices made about jurisdiction, legal representation, and procedures chosen during the litigation.

17.1 INTRODUCTION

In **Chapter 15: Dispute Resolution in Civil Law**, we outlined for you the different methods available to a person or persons needing to resolve civil disputes. Each of these methods is governed by different rules, but the facts of each dispute, as well as the persons involved, are analysed to decide the best method to be used.

In this chapter, a number of civil disputes will be considered, giving you the opportunity to participate in the processes required to take these to satisfactory resolution.

17.2 MAKING A COMPLAINT TO THE QUEENSLAND OMBUDSMAN



INQUIRY



*WHEN IS IT APPROPRIATE TO COMPLAIN TO THE QUEENSLAND OMBUDSMAN
AND WHAT IS THE PROCESS INVOLVED?*



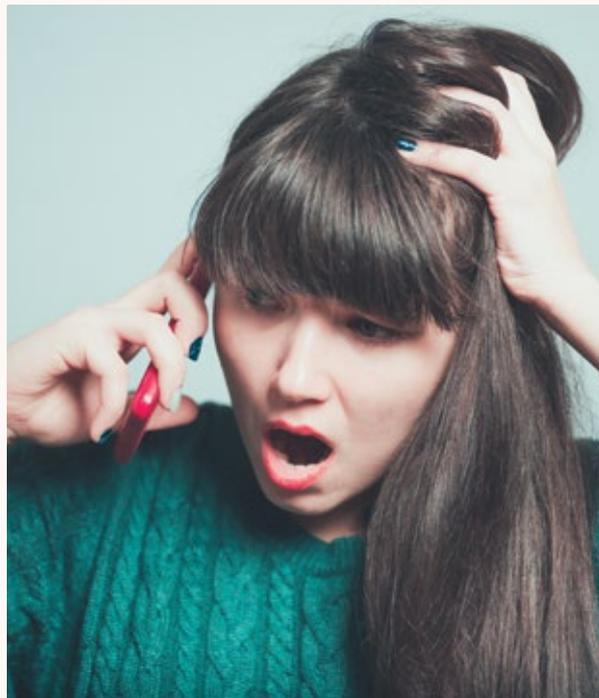
RESEARCH



Go online to ombudsman.qld.gov.au where you will find useful information about the Office of the Queensland Ombudsman, the source and scope of its authority, the nature and extent of its obligations, and its processes. Some of what you will find is:

- ▶ the Queensland Ombudsman is an officer of Parliament and reports to Parliament through the Legal Affairs and Community Safety Committee;
- ▶ its vision is to achieve a fair and accountable public administration in Queensland;
- ▶ it regards itself as independent and impartial, ensuring a fair outcome is achieved;
- ▶ it was originally tasked in 1974 with investigating the administrative actions of government departments and authorities;
- ▶ it now has the dual role of investigating complaints against government agencies and helping agencies improve their decision-making and complaint handling; and
- ▶ it has a section on its website giving advice to a person who wishes to make a complaint to an organisation such as a state school.

While online, go to the pages under the heading 'Complaining to the organisation involved'. Download the template complaint letter on the website and make notes from the useful approach set out in the letter.



HYPOTHETICAL

Facts: Toby attends a large state high school in Queensland. He is in Year 12, and is hoping to proceed to tertiary studies. His results are important to determine what he will be able to study. Toby goes to a year-end social event on Saturday night run by another school to mark the approaching end of the academic year with some of his friends from school in his grade. Toby does not drink alcohol, but his friends do, and they smuggle alcoholic beverages into the venue. At the venue, Toby is sitting with his friends in a specified area set aside for them. A security person discovers alcoholic beverages in the area and confronts them. He ejects them from the function and promises to advise their school administration of their behaviour. One of their teachers who accompanied the students from their school as a condition of them being allowed to attend, is immediately notified of the incident.

Toby is aware of a rule that the consumption of alcohol on school premises (including premises at other schools) attracts possible suspension and fears the worst. His fears are realised when he is suspended the next Monday for the remainder of the school year, and to return only to attend final assessment in the last three weeks. All the other students (his friends) receive the same punishment. Toby tells his parents, who ring the school to speak to the administration (the headmaster) but are informed that the decision has been made and will not be changed. Toby will miss approximately 10% of his assessment over the final six weeks, as well as valuable class time when the

teachers conduct revision and assist students to prepare for exams. Toby is told by his Form master it will affect his grades and his potential score which determines tertiary entrance.

Toby's parents read the school rules and policy document given to them when Toby first enrolled at school. It informs them that the school has a policy of receiving complaints in writing, arranging an interview with a panel that includes the headmaster and a parent nominated by the Parents and Citizens Association of the school, which will review any serious punishment. It is now the Tuesday after the weekend on which the incident took place.

Legal issue: Does Toby have grounds for a complaint about his punishment? If the school administration does not react urgently to a written complaint, would Toby also have grounds to seek urgent intervention by the Queensland Ombudsman in the school review process on the grounds of procedural unfairness?

Decision: Toby's parents decide that they have no alternative but to prepare for the worst. They use the template complaint letter to write immediately to the school administration, and lodge a copy of that letter with the Queensland Ombudsman, making a complaint about the refusal of the school to adopt its own written procedures to resolve the issue.

1. Who are the stakeholders in this dispute? [C]
2. Describe the issue in dispute between Toby, his parents and the school administration (headmaster). [C]
3. What are the options each stakeholder could take to resolve the dispute? [C] [A]
4. Complete a letter on behalf of Toby to the school administration using the template complaint letter provided on the Queensland Ombudsman website. [C] [A] [R]
5. Complete a letter of complaint on behalf of Toby to the Queensland Ombudsman, asking for the school review process to be bypassed, and for an urgent decision to be made for an alternative punishment which allows Toby to return to the school and complete his assessment without disadvantage. [C] [A] [R]

17.3 RESOLVING A FAMILY ISSUE IN THE QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL (QCAT)

You have studied in a general way in **Chapter 15.8: Tribunals Involved In Dispute Resolution**, the different areas of the law which QCAT can hear. When a family member needs to be appointed as attorney to manage the financial affairs of an elderly person in the family who is no longer able to look after himself or herself, any dispute is usually taken to QCAT. The following action taken in the tribunal, is a straightforward illustration of how such an dispute could arise and be resolved.



Ch 15.8



INQUIRY



DOES QCAT HAVE THE JURISDICTION TO HEAR A FAMILY ISSUE?

HYPOTHETICAL

Facts: Gwen is an elderly widow. She receives a visit from a Legacy volunteer, Sam, every week, to help her with chores. Gwen has two adult children, Cynthia and Jack. Gwen is a client of Cameron, who has been her solicitor for many years. Cameron has been Gwen's attorney pursuant to the *Powers of Attorney Act 1998* (Qld) since 2001.

Gwen instructs Cameron in 2003 that she will need him to manage her affairs pursuant to his role as her attorney because Cynthia and Jack frequently argue with each other about what should happen to her and her property. Cameron suggests Gwen should change her existing power of attorney to an enduring Power of attorney, but Gwen says it is too late to do this, because her general practitioner has already told her that she has the early indications of Alzheimer's disease. Sam, who has brought Gwen to Cameron's office for her appointment with him, confirms that he has observed the early symptoms which Gwen claims to have.

Cameron advises Gwen that it will be necessary to bring an application before a tribunal member at QCAT so that an order can be made to activate the existing power of attorney and confirm that he can continue as Gwen's attorney after she is no longer able to give him instructions (that is, change it to an enduring power of attorney). Cameron tells Gwen that he will need a letter of opinion from her medical practitioner, and an affidavit from Sam confirming his observations, and for her to attend at the tribunal with him when the application is heard. Cameron adds that both Cynthia and Jack will need to be served with the application to give them an opportunity to appear and object, or to seek alternative orders, such as for either of them to replace him as Gwen's attorney.

Cameron seeks instructions to:

- ▶ obtain an affidavit from Sam confirming his observations of her symptoms; and
 - ▶ write to Cynthia and Jack informing them of Gwen's instructions, and inviting them to contact him to discuss the matter before they receive formal notice from QCAT serving them with the application.
 - ▶ Carry out the necessary research to confirm that the advice given by Cameron to Gwen in the affirmative to each of the above legal issues is correct. Go online to qcat.qld.gov.au and also search '*Powers of Attorney Act 1998* (Qld) to find the answers. [C]
1. Carry out the necessary research to answer the following questions. Go online to qcat.qld.gov.au and also search the *Powers of Attorney Act 1998* (Qld) to find the answers. Select the correct references and sections of the legislation to support your answer. [C] [S]
 - (a). Does QCAT have the authority to hear an application under the *Powers of Attorney Act 1998* (Qld)?
 - (b). Is Cameron a person recognised under the *Powers of Attorney Act 1998* as having the status to file this application?
 - (c). Does QCAT have the power to make an order activating Gwen's power of attorney for Cameron to manage her financial affairs and to confirm it will continue even after she loses capacity?
 - (d). Will QCAT serve Cameron's application on Cynthia and Jack once it is filed?
 2. List the information required to be included in Cameron's application, and the draft order that he seeks. [C] [S] [A]

THE TRIBUNAL PROCESS

(a) The application

Cameron prepares the application and files it at QCAT. The application contains full names and addresses of

HYPOTHETICAL CONTINUED...

Gwen, Sam, Gwen's general practitioner, Cynthia, Jack and Cameron. It contains details of Gwen's financial circumstances, her health history, and family history. It sets out the reasons for the application, including her relationship with Cynthia and Jack, and their relationship with each other. It sets out the order which Cameron is seeking on Gwen's behalf.

Each of the persons named in the application receives a letter from QCAT, informing each of them that a preliminary conference with a Registrar will occur on a given date, and each of them is expected to attend, unless permission is granted to be excused. Prior to the due date of the preliminary conference, Cameron contacts the Registrar, who gives permission for Sam, Gwen, and the general practitioner to be excused.

(b) The preliminary conference

Cameron, Cynthia and Jack attend before a Registrar. Cameron is given permission by the Registrar to represent Gwen at the preliminary hearing. The Registrar invites Cameron, as the applicant, to summarise the relevant facts and explain the order that is being sought. He goes through the application that Cameron filed on Gwen's behalf and notes that Cameron has not attached a certified copy of the original power of attorney document. Cameron has that with him and shows the Registrar, who informs Cameron that it will be necessary for him to prove that he is Gwen's attorney by filing a certified copy before any hearing can take place.

Cynthia, and then Jack, are invited by the Registrar to respond. Each of them tells their story, and both of them acknowledge that there have been frequent disagreements with their mother and each other, and that each of them has told Gwen that they do not trust the other to act as her attorney. When asked if this is still their position, both say it is. When asked if they know of any reason to oppose Cameron as the person to manage their mother's financial affairs, each of them says no.

The Registrar confirms that it is not possible for Cameron to act as Gwen's attorney without an order of the Tribunal, because her capacity to manage her financial affairs is impaired. Cameron asks the Registrar if it is possible for the order to be made by consent (that is, by filing documents signed by all parties by agreement). The Registrar indicates that this is not possible as the medical evidence suggests that Gwen is already not fully capable of managing her financial affairs, and that a Tribunal Member needs to conduct a hearing and be satisfied that the order will be in Gwen's interest.

The Registrar checks the Tribunal's diary and allocates a hearing date for three hours from 10am on a date suitable to Cameron, Cynthia and Jack. Cameron submits that it is not necessary for Gwen's general practitioner to be present. The Registrar disagrees. The Registrar makes the following orders:

IT IS DIRECTED THAT:

1. The matter of Gwen's power of attorney be heard at 10am on 6 May 2018.
2. Cynthia and/or Jack to file any cross-application and serve it on Cameron by 22 April 2018.
3. Gwen's general practitioner to file an affidavit attaching his medical opinion by 22 April 2018.
4. Cameron to file a certified copy of Gwen's original power of attorney by 22 April 2018.

The hearing

Prior to the hearing Cameron files a certified copy of Gwen's original power of attorney and an affidavit from her general practitioner stating that Gwen is experiencing symptoms of early Alzheimer's disease. In his opinion she is unable to manage her financial affairs. Cameron also files an affidavit by Sam giving evidence that he has observed Gwen confused about her banking arrangements.

Neither Cynthia nor Jack filed any documents.

All of the required parties attend the QCAT hearing on 6 May 2004. Cameron initially seeks permission to represent Gwen, explaining their long relationship, that she wants him to represent her, and that he is prepared to continue as her attorney if the Tribunal so orders. The Tribunal Member gives permission, saying it is justified in the circumstances.

Cameron asks the Tribunal Member if she could consider the evidence of the general practitioner first, so he can be excused, if possible. She agrees. Cameron summarises the evidence of Gwen's general practitioner, and refers to Sam's affidavit supporting his opinion. The Tribunal Member asks Gwen if she is comfortable with her doctor's opinion and Sam's evidence. Gwen said she trusts both Sam and her doctor and agrees with their views. She gives Cynthia and Jack the opportunity to comment, but both of them decline. The Tribunal Member excuses the general practitioner and thanks him for his attendance and contribution.

HYPOTHETICAL CONTINUED...

The Tribunal Member asks Gwen to describe the relationship with her solicitor, Cameron. Gwen does so, expressing her total confidence in Cameron, that he will honestly act in her interests if his powers are activated and if he continues to be her attorney until her death. The Tribunal Member asks Cynthia, and then Jack, to confirm that neither of them opposes Cameron's appointment, and that neither of them wishes to be their mother's attorney. They both answer in the affirmative, and indicate that they have discussed Cameron's fees with him, and will be happy if the Tribunal permits him to charge for his services from the date of his appointment. The Tribunal Member asks Gwen if she agrees with this, and Gwen responds that she does.

At this point in the proceedings the Tribunal Member indicates that she is in favour of granting the orders, then proceeds to give reasons for doing so. Initially, she

summarises the facts, then says that she is satisfied that the future arrangements for Gwen are satisfactory. She then makes the following orders:

IT IS ORDERED THAT:

1. Pursuant to the power of attorney dated 1 October 2001, Cameron shall be Gwen's duly appointed attorney from 6 May 2018 until further order.
2. Cynthia and Jack shall be entitled to give Cameron 30 days notice to file in this tribunal a statement of the financial circumstances of Gwen at the conclusion of each financial year.
3. Cameron shall be paid for any services rendered by him pursuant to his role as the attorney of Gwen.

1. Who are the stakeholders? [C]
2. Describe and explain the issue in dispute. [C] [S]
3. What are the options available to resolve the dispute? [C] [S]
4. Write your version of the Tribunal Member's summary of the facts prior to making the orders. [C] [S] [A]
5. List the findings of law that the Tribunal Member would need to make in order to make her orders. [C] [A]
6. Set out the reasons the Tribunal Member might give to explain order 1. [C] [S] [A]
7. Set out the reasons the Tribunal Member might give to explain order 2. [C] [S] [A]
8. Describe the processes in this matter from start to finish in QCAT. Describe and explain the steps in the process. Do you consider the processes in this matter meet the objectives of QCAT? [C] [S] [A] [E]



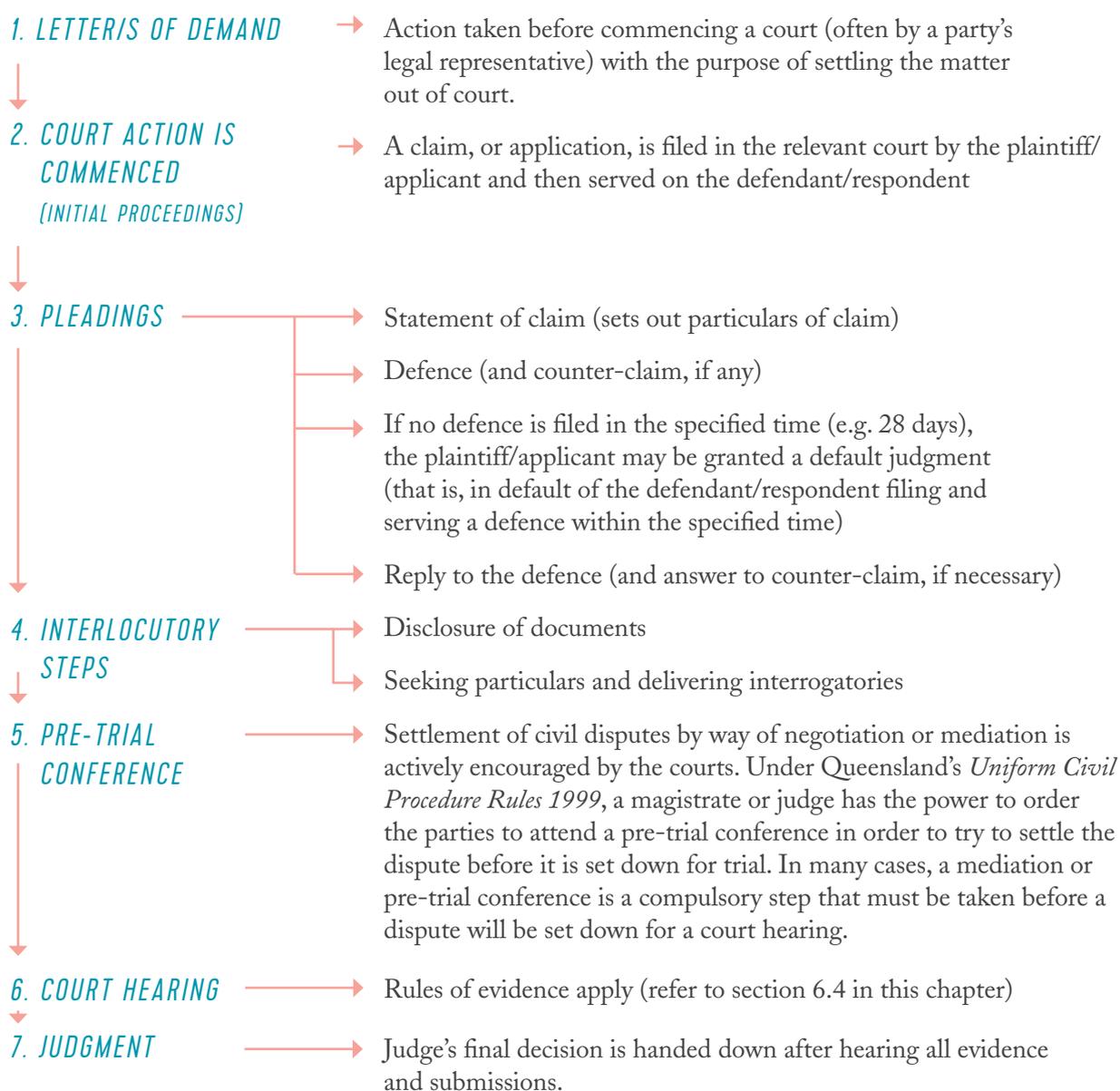
17.4 RESOLVING A CONTRACT DISPUTE IN THE MAGISTRATES COURT

Civil court matters, commonly called actions, civil suits or civil litigation, are usually between private citizens, or between private citizens and organisations. A complaint is brought against another person, usually seeking payment of money or the ceasing of an unlawful act. A clear set of procedures must be followed correctly before a court will deal with the matter. Failure by a party to fully comply with each

step in the litigation process may cause the matter to be thrown out of court by the judge. This can prove to be very time-consuming and expensive, particularly if a party decides to begin the whole court action again. Because of the number of issues of legal procedure that must be properly addressed by each party in a civil court case, it is a wise policy to consult a lawyer (legal practitioner) for assistance and guidance in conducting a civil action.

It should be remembered that by far the majority of disputes are settled by agreement without going to court. Alternative Dispute Resolution procedures, such as mediation, are being utilised more frequently as a means of settling a dispute, either before the matter makes it to court or before the judge has made a final decision in a court hearing. It is only when the system of private negotiation fails to provide a satisfactory solution to all parties that a court hearing becomes necessary.

USUAL FLOW OF DOCUMENTS AND STEPS TAKEN IN A CIVIL COURT ACTION



COURT HEARING

At the court hearing (usually referred to as the trial), evidence is led by each party or by witnesses on their behalf. Each person who gives evidence may be cross-examined. In order to bring a witness to court who refuses to attend voluntarily, either party to the court action may *subpoena* the witness. This is a document sent to a person that compels him or her to attend the court on a given date to give evidence or produce documents in the matter.

JUDGMENT

At the end of the trial, the magistrate or judge makes a decision (called a judgment) in favour of the party who has succeeded in convincing him/her that that party's case is stronger (on the balance of probabilities) than the case of the other party.

In a court action, a set of procedures must be followed to make sure that each party to the action has as much information as possible before the court hearing goes ahead. The general procedure is the same in each court. *The Uniform Civil Procedure Rules 1999 (Qld)* replaced the different rules which apply to each civil court before 1 July 1999.



INQUIRY



DO COURT ACTIONS (LITIGATION PROCESSES) ENSURE PROCEDURAL FAIRNESS?

HYPOTHETICAL

Facts: Jodie Sherman and Nicole Sprintall have created a successful interior design business called Sherman and Sprintall Interior Designs Ltd (SSID). They are concerned that a customer, Stephen Lister, has not paid more than the 10% deposit of \$3000 on a total bill of \$30,000 for the renovation of the lounge room in his home overlooking Mermaid Beach on the Gold Coast. When telephoned and e-mailed on many occasions, Stephen has promised to pay "as soon as possible". It is now three months since Stephen agreed to pay the balance amount of \$27,000. He has a reputation in the local business community for failing to pay debts as they fall due. A credit rating check (information that shows how well a person or business has paid its debts in the past) confirms that Stephen has a poor credit rating.

Stephen has claimed on a number of occasions that SSID has done a shoddy job. He claims that the wallpaper is of an inferior style and quality to that selected and that much of the wallpaper is peeling off the walls in his lounge room. He also objects to the non-delivery of items of furniture: a Bohemian oil painting, a genuine Huon Pine coffee table and Thai silk curtains. Stephen estimates the value of the unfinished work, the undelivered items and the cost of fixing up shoddy workmanship is \$25,000 and, therefore, wishes to strenuously defend any court action.



HYPOTHETICAL CONTINUED...

He relies on a written report by an expert in the interior design industry which estimates the cost of fixing the wallpaper will be \$14,500, and the cost of acquiring and installing the missing furniture items \$10,500. Later, in preparation for the court hearing, SSID pays for a different interior design expert to assess the cost of replacing the wallpaper, which is estimated to be \$8000.

The written quotation did not refer specifically to what furniture and materials would be included in the renovation. Stephen, however, claims that he had spoken to Nicole Sprintall a week before accepting the quotation and had come to a verbal agreement about the inclusion of the Bohemian oil painting, genuine Huon Pine coffee table and Thai silk curtains. Nicole Sprintall recalls the conversation but denies agreeing to the specific inclusions, claiming that it is the company's business policy for all quoting to be in writing and that, in order to reduce overall costs of the makeover, low-cost furniture and curtains had been agreed upon verbally.

Letter of demand

SSID instructs their solicitors, Strongarms Solicitors, of 39 Cavill Avenue, Surfers Paradise, Q 4217, to send a letter of demand to Stephen Lister requiring payment within seven days of the date of the letter. Their further instructions are for Strongarms to issue proceedings for recovery of the debt in the Southport Magistrates Court if no payment is made.

Write the letter of demand on behalf of Strongarms. [C] [A]

Court action is commenced (initial proceedings)

SSID issue proceedings by filing a claim using Uniform Civil Proceedings Rules 1999 (Qld) Form 2 which can be found on the Queensland Courts website under UCCPR forms. The same form is used for the Supreme Court, the District Court and the Magistrates Court. There are formal parts which must be completed on the form, such as the name of each of the plaintiff and defendant (in this case, SSID and Stephen Lister). Part of the form contains the words seeking the relief (remedy) sought by the plaintiff.

CLAIM

The plaintiff claims: *(state concisely the relief claimed by the plaintiff)*

The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.

1. Obtain a copy of Form 2 from courts@qld.gov.au by going to the UCCPR, and complete the formal parts. [S] [C]

2. Some words which must be included on the form where the plaintiff is asked to state concisely the relief claimed include '**balance of \$27,000**', '**damages**', and '**breach of contract**'. Attempt to state in a sentence the relief claimed by the plaintiff SSID. [C] [A]
3. What is the purpose of the notice to the defendant on the form?]A]

Pleadings

Strongarms complete the Statement of Claim (Form 16, UCPR) on behalf of SSID. A statement of claim contains the facts that SSID relies on in order to make its claim. These are called pleadings. Part of the form which contains the pleading is set out in the exercise below.

STATEMENT OF CLAIM

This claim in this proceeding is made in reliance on the following facts: (in consecutively numbered paragraphs, each containing, as far as is practicable, a separate allegation)

1. *(set out as briefly as the nature of the case permits all material facts relied on as required in the Uniform Civil Procedure rules, Chapter 6, Parts 1, 2 and 3)*

2.

3.

The plaintiff claims the following relief:

(set out in full the relief claimed including full particulars of the nature and amount of each type of damages claimed and full particulars of interest required by Rule 159)

The plaintiff does not require a jury.

In paragraph form, set out the material facts on which SSID needs to rely to establish there is a binding agreement, the terms of the agreement, and the term which Stephen Lister has breached in order to give rise to SSID's claim. Note that the relief claimed will repeat your answer to question 2 in the previous section of the Hypothetical. [C] [S] [A]

As you read on the claim form, the defendant, Stephen Lister, is given 28 days to file a defence. His defence is also a pleading, and there is a form under the UCPR which he must use. Again, this process is quite technical. Each fact alleged in the statement of claim must be addressed. Lawyers say that if the defendant agrees with a fact it should be ‘**admitted**’, if it is a fact that is not within the knowledge of the defendant, then it is ‘**not admitted**’, and if the defendant does not agree with an alleged fact, it should be ‘**denied**’.

If the defendant has a **different version**, then the defendant sets these out as **material facts** in its defence, which the defendant will need to prove on the balance of probabilities. If the defendant’s version has had the result that it suffers damage, it can claim that damage as a **counterclaim** against plaintiff’s claim.

Stephen Lister instructs Fightback Solicitors to act for him, and arranges for them to file his defence within the time limit.

HYPOTHETICAL CONTINUED...

NOTICE OF INTENTION TO DEFEND

TAKE NOTICE that the Defendant intends to defend this proceeding.

The facts relied on by the Defendant are set out in the attached defence (*and counterclaim*).

Filed in the Southport Registry on (*date*):

Registrar: (*Registrar to sign and seal*)

1. Obtain a copy of the Notice of Intention to Defend, Form 6, UCPR. Complete the formal parts to the best of your ability. [C] [S]
2. Address each paragraph of the SSID statement of claim, using the terminology explained above, admitting, not admitting and denying the facts alleged in the Statement of Claim in accordance with Stephen Lister’s version of events. Then plead the material facts of Stephen Lister’s version of events, concluding that he has a counterclaim. This is essentially the same as claim which can be set off against the plaintiff’s claim. The final paragraph of Stephen Lister’s **defence and counterclaim** would read

and the defendant claims damages for breach of contract in the sum of \$25,000. [C] [S] [A]



INTERLOCUTORY STEPS:

It is the usual procedure for litigants to require **Disclosure of Documents** in order to ensure that the other party does not have a document which corroborates his or her version of the facts. Remember, the court decides who is successful on the balance of probabilities. Sometimes, litigants use **Interrogatories**, which are questions that can be asked in order to understand some allegation of fact which is not clear in the pleading.

HYPOTHETICAL CONTINUED...

1. Nicole Sprintall keeps a business diary, and it contains a diary note of a conversation with Stephen Lister which records that the three items, the Bohemian oil painting, genuine Huon Pine coffee table and Thai silk curtains, were not to be supplied as alleged. Should SSID disclose Nicole Sprintall's diary? Does it corroborate her likely evidence at trial? [C][A]
2. Stephen Lister's defence pleads the value of his damages as \$25,000, without giving particulars of the detail of what it comprises. Strongarms write to Fightback, asking for the particulars, and for details of any evidence that will be used at trial to support the counterclaim for damages. They threaten to ask the court for an order to obtain this information if it is not provided by return correspondence. Should Fightback respond to Strongarms request? Do you think the court would be sympathetic if Fightback refuses to give to Strongarms the information requested? Give your reasons. [C][A]

Pre-trial conference

SSID and Stephen Lister agree to attend a pre-trial conference, a voluntary conference at which they are

required to attempt to resolve the dispute. The conference is held at the court and is chaired by a Deputy Registrar. SSID and Stephen Lister are unable to compromise on the cost of re-wallpapering the walls and the quality of furniture that was to be supplied. The Deputy Registrar checks the court diary and allocates the matter for a hearing date of one day, the estimated time the parties consider it will take to finish the trial.

Court hearing

SSID arranges through Strongarms to be represented by Denise, a barrister. Stephen Lister does the same. The plaintiff, SSID, presents its case first. Jodie Sherman, Nicole Sprintall and the independent interior design expert give evidence on behalf of SSID. Each of them is cross-examined by Rob, the barrister representing Stephen Lister. Stephen Lister and his interior design expert then give evidence and are cross-examined by Denise. Rob is the first to sum up his client's case. This is the usual order in which submissions are made. Denise goes last. At the conclusion of the court hearing the magistrate reserves her decision. She announces that she will deliver judgment at 9 am on the following day.

JUDGMENT:

At the end of the trial, the magistrate makes a decision (called a judgment) in favour of the party who has succeeded in convincing her that it's case is stronger (**on the balance of probabilities**) than the case of the other party.

HYPOTHETICAL CONTINUED...

You be the magistrate. Assume that you, as the magistrate, make the following findings of fact:

- ▶ There is a binding contract.
- ▶ The terms of the contract include a price of \$30,000 to do work and deliver materials.
- ▶ The defendant Stephen Lister has not paid the \$27,000 debt.
- ▶ The Bohemian oil painting, Huon Pine coffee table and Thai silk curtains were not included in the original quote for work and materials of \$30,000. There was no concluded agreement requiring SSID to deliver those specific items.
- ▶ Nicole Sprintall's version of the details of what was verbally agreed between her and Mr Lister is accepted, except that the quality of furniture and curtains to be included in the makeover, is held to be inferior (to a total value of \$1500) to what would reasonably have been expected for such a quotation. This is the evidence of SSID's expert under cross-examination.
- ▶ The evidence of Stephen Lister's expert is accepted that the wallpaper is peeling off the walls in places and needs repair. However the evidence of the SSID expert is accepted that the cost of repair and replacement is \$8000.

HYPOTHETICAL CONTINUED...

Weigh up the evidence that you, as the magistrate, have accepted on the balance of probabilities and deliver judgment in favour of one of the parties. Write out your reasoning, including relevant calculations, clearly and concisely in the form of a judgment. [C] [S] [A] [E] [R]

1. Who are the stakeholders? [C]
2. Describe and explain the issue/dispute. [C] [S] [A]
3. What options are available to the stakeholders to resolve their dispute? [C] [A]
4. Describe each step taken in the litigation process and explain why each of them was necessary. [C] [S] [A]
5. Do you think it would be possible to make the litigation process simpler/less complex? Give your reasons. [A] [E]
6. Was there a fair balance in the litigation process between the interests of the plaintiff and the interests of the defendant? Did each of them receive procedural fairness? [A] [E]

17.5 COURT - ORDERED ALTERNATIVE DISPUTE RESOLUTION

You saw in the previous example that SSID and Stephen Lister had an opportunity in a pre-trial conference to resolve their dispute. Almost always, in disputes of that kind, there is an opportunity for dispute resolution, ranging from a simple discussion between the parties, or their lawyers, or to formally arranged mediation of which the court would be aware. In some jurisdictions, for example under the *Family Law Act 1975* (Cth), it is compulsory for a conciliation conference before a court Registrar to occur, or for a private mediation ordered by the court to be held where the parties can afford it, before the court is prepared to set the matter down for trial. Conciliation conferences and mediations held between parties and their legal advisors in the Family Court jurisdiction, are very successful, and resolve many disputes about children and property.

HYPOTHETICAL

Facts: Whitney and Coby were married for 15 years. They own their own home at Jimboomba which is now worth \$550,000. They paid \$300,000 for the home and still owe a mortgage debt of \$50,000. Whitney does casual work at the local supermarket. Coby is a self-employed electrician. They have two children aged 10 and 8. They have been separated for three years. During that time Coby has lived with his parents at Jimboomba and Whitney has lived with the children in the home. They are not divorced.

Coby has been paying the mortgage repayments monthly, and helps Whitney financially with the children's expenses. Coby's electrician business earns him approximately \$70,000 profit per year. Whitney earns approximately \$28,000 per year from her part-time work. She also receives social security payments. Coby has not been able to put money into superannuation, and his superannuation balance is \$30,000. Whitney has a

superannuation balance of \$19,000. Neither of them has any other significant assets and some time ago agreed to keep the furniture and contents which were in their possession respectively as their own.

After trying to negotiate an outcome for six months, Coby applies to the Federal Circuit Court (division of Family Court), seeking orders that the house be sold, and the net proceeds divided 50-50. He also sought an order that each of he and Whitney keep their respective superannuation entitlements and any other property in their possession. Whitney files a response to Coby's application, and seeks an order that she be entitled to retain the house until the youngest of the children is 18 or leaves school, whichever is the earlier. Alternatively, she seeks a greater share of the net proceeds of sale of the house (75-25 in her favour), and otherwise she agrees to the orders sought by Coby.

HYPOTHETICAL CONTINUED...

**First hearing date/Directions hearing**

On the first hearing date, Coby and Whitney and their lawyers attend court before a judge of the Federal Circuit Court. Coby's lawyer is invited by the judge to explain the matter and the issues in dispute. She outlines the pool of assets, and identifies the areas of dispute. She submits that the parties are not far apart and a conciliation conference should be ordered by the court before any trial. Whitney's lawyer agrees. The judge notes that Whitney wants to keep the house until the children leave school, but she says that she would not normally make such an order. She makes a direction that the parties attend mediation at their own expense. Whitney's lawyer objects because Whitney is unable to afford her share of the \$4000 needed to pay the mediator. The judge points out that neither of them is unemployed or on Legal Aid, and the anticipated costs for trial for one day would be around \$12,000 each. The court has scarce resources and children's matters have priority in the conciliation conference list. Coby instructs his lawyer that he will pay for the mediator. The judge makes the directions, including a direction that Coby's lawyer is to seek a further hearing date in due course if the matter does not settle.

Mediation

Coby's lawyer organises a mediator and the date for the mediation. The parties attend at free rooms offered by the Queensland Law Society. The mediation proceeds. They agree to the following orders:

1. Who are the stakeholders? [C]
2. Describe and explain the issue in dispute? [C] [A]
3. Describe and explain the options available to the stakeholders to resolve this dispute? [C] [A]
4. Divide the class into groups of at least five students per group. There are five roles, and each student must be responsible for a role. Revise from Chapter 17.2 The Mediation Process, and then each of you prepare your respective roles, and conduct the mediation, attempting to reach the same outcome as Coby and Whitney. [C] [S] [A] [R]

- (a). The joint ownership of the home is to be severed and changed to tenants in common, 60% to Whitney, 40% to Coby.
- (b). Coby is to be entitled to use the home to secure a loan to buy himself a new property, supported by up to 40% of the agreed value of \$550,000. Whitney is to sign any documents needed for Coby to do this.
- (c). Coby is to be responsible for payment of the balance of the mortgage of \$50,000.
- (d). Whitney is to keep the home in good condition until it is sold.
- (e). Whitney and Coby are to sell the home at auction within 60 days of the date that the youngest child leaves school or turns 18, whichever is the later.
- (f). Whitney and Coby are to be paid 60% and 40% respectively of the net proceeds of the sale of the home.
- (g). Each of Whitney and Coby are otherwise be solely entitled to any asset they own or use in their possession respectively at the date of the orders.

Coby's lawyer organises a new hearing date, the parties attend with their lawyers, and the orders are made by consent. The judge congratulates them on reaching a compromise which saved them the considerable costs of a trial.



WHAT DO YOU THINK?



1. Could any of the stakeholders in the four activities presented to you in this chapter, have resolved their dispute before commencing any litigation process? Describe what each of them could have done, and explain the process by which a resolution could have been achieved without court process. [C][S][A][E]
2. Could any of the stakeholders in the four activities presented to you in this chapter, have used a different litigation process other than that presented as chosen in the activity, to resolve the dispute? Explain your answer. [C][S][A][E]

REVIEW

1. Describe the following: [C]

Office of the Queensland Ombudsman | Queensland Civil and Administrative Tribunal
Queensland Magistrates Court | Federal Circuit Court

2. Describe and explain the jurisdiction of each of the entities listed in question 1 above. [C] [A]
3. Make up a dispute scenario which needs to be resolved because it must go to formal dispute resolution (that is, to a court, tribunal, or ombudsman). Describe and explain to which entity it should go to be resolved. [C] [S] [A]
4. Compare and contrast the different jurisdictions used to present civil actions in this chapter. Ensure, among other things, you evaluate their characteristics using the criteria of procedural fairness. [C] [A] [E]

TOPIC 2: CONTRACTUAL OBLIGATIONS

CHAPTER 18: CONTRACT LAW IN MODERN AUSTRALIA

FOCUS SUBJECT MATTER

18.1 MEETING THE CHALLENGES OF THE MODERN AUSTRALIAN ECONOMY

18.2 CONSUMERS NEED STATUTORY PROTECTION

18.3 THE ROLE OF AUSTRALIAN CONSUMER LAW IN PROVIDING
CONSUMER PROTECTION

TO UNDERSTAND AND APPRECIATE:

- ▶ the Australian economy needs contract law to provide a workable and fair system for commercial activity to thrive;
- ▶ many members of the Australian economy, including consumers, need statutory intervention in the interests of all stakeholders; and
- ▶ the Australian consumer law as applied throughout Australia since 1 January 2011.

18.1 MEETING THE CHALLENGES OF THE MODERN AUSTRALIAN ECONOMY

Our economy relies on the law of agreements to function effectively. Australians plan their business and personal affairs around the agreements that they make to pursue their interests and their lives. The legal issues faced when the Australian Government enters into international agreements are different from those which individuals enter into from day to day. For example, the Australian and East Timorese Governments have an agreement about the exploitation of oil of resources in the seabed which is part of its territory. Recently, there was a dispute and the East Timorese Government took Australia to the International Court in The Hague, where it successfully raised the issue that the Australian Government had spied on their internal communications while at the same time negotiating the agreement. There are many other issues like this at the business and international levels. At the consumer level, there are other issues, some of which are examined here in more detail.

Australians buying goods and services face a variety of challenges. There is always a range of choice as well as a range of prices for any particular good or service. Investigating the best choice for the best price can involve visiting a retail outlet or going online or a combination of both. Payment can be made for goods and services in a variety of ways—by cash, credit card, cheque, or by electronic transfer. Completing an agreement to do all these things is a major challenge for the average Australian.

PRACTICAL APPLICATION

The collage contains several advertisements:

- Cleaning Service:** 000 555 0007
- Garage:** THIS FRIDAY 10:00h, Oak street 56, Fred & Lisa Smith, Sale!
- Anti Freeze:** New! Anti Freeze, WINTER PROTECTION, BEST CHOICE FOR YOUR CAR, 000 555 0007
- Vintage Flower Shop:** DELIVERED WITH CARE, MERCHANT DISTRICT 8/A, BEAUTIFUL FLOWERS FOR SPECIAL OCCASIONS
- Bill's Garage:** AUTO REPAIR, AUTO PARTS, TIRE SERVICE, Mechanic on duty, 000 555 0007
- Restaurant:** Cold drink & Warm meal, Open 24 hours, RESTAURANT, Today's Menu

Chicken wings.....	\$1,20
Roast beef.....	\$1,60
Tomato soup.....	\$0,50
Yorkshire pudding.....	\$0,70
Apple pie.....	\$0,40

1. Brainstorm the types of transactions suggested by the collage. Add any suggested to you by the collage. [C] [A]
2. Describe the types of sellers and buyers involved in the transactions you have identified from the collage. Do you think the buyers would need assistance to understand the nature of the agreements between themselves and the sellers? In these agreements, are the buyers ever likely to be at a disadvantage? Give your reasons. [A] [E]

18.2 CONSUMERS NEED STATUTORY PROTECTION

While the vast majority of individuals and businesses that interact commercially in the Australian economy are honest, there are enough examples of dishonest practices from which consumers need to be protected. *The Trade Practices Act 1974* (Cth) was passed by the Commonwealth Government to protect Australian consumers from **misleading and deceptive conduct** in the Australian economy. Improvements to this protection have continued since the Act was first passed, and are now found in the *Australian Consumer Law* (ACL), which is a part of the *Competition and Consumer Act 2010* (Cth).



INQUIRY



SHOULD THE AUSTRALIAN CONSUMER LAW (ACL) PROTECT AUSTRALIAN CONSUMERS FROM MISLEADING ADVERTISING, IN PARTICULAR, TICKET SCAMS AND MISLEADING RETAIL PRICING?

PRACTICAL APPLICATION

21 MARCH 2014

WAS/NOW PRICING CLAIMS UNDER SPOTLIGHT

South Australia's consumer watchdog is joining consumer protection agencies across the country to crackdown on misleading retail pricing claims.

Retailers who advertise discounted goods with 'was/now' pricing will be targeted by Consumer and Business Services (CBS) as part of a nationwide compliance operation.

Commissioner for Consumer Affairs Paul White said retailers will be called upon to substantiate their claims about discounts in was/now advertising.

"Was/now pricing, also known as 'strike through' or 'two-price' advertising, is where a business advertises that a product was a certain price but is now on sale for a discounted price," Mr White said.

"Businesses often advertise a specific saving on a product in comparison to its previous non-sale price, wholesale price, a competitor's price or recommended retail price (RRP).

"Consumers need to be able to trust an advertisement as a true representation of the savings on offer.

"For example, stating that a product 'Was \$100 Now \$50' or '\$50' is likely to be misleading, and consequently unlawful, if that product had not been sold at \$100 in a

reasonable period immediately before the sale commenced.

"These types of advertisements can also be considered misleading if the 'was' price wasn't a true offer, for example, if only a limited amount of the product was on offer at the higher price immediately before the sale began.

"CBS will be visiting businesses around the state to educate them and make sure they are not misleading consumers with was/now pricing.

"We will be on the lookout for bait advertising, pricing which is misleading or deceptive, overcharging and instances where the original cost, RRP or saving amount has been inflated or wasn't a true offer.

"The maximum civil penalty for providing false or misleading information is \$1.1 million for a corporation and \$220,000 for an individual. Criminal penalties for the same amounts may also be imposed.

"Our aim is to make both businesses and consumers more aware of their rights and obligations under the Australian Consumer Law (ACL) regarding was/now pricing."

SOURCE: Attorney-General's Department, Government of South Australia (Consumer and Business Services):

PRACTICAL APPLICATION CONTINUED...

1. Who are being targeted by CBS? [C]
2. Outline the behaviour being targeted by CBS. [C] [A]
3. In what circumstances would the target behaviour be misleading? [A]
4. Who is being protected by CBS? [C]
5. Are the laws which allow CBS to target misleading advertising in 'was/now' pricing justified? [A] [E]



PRACTICAL APPLICATION

IT'S SHEER GREED, CALL FOR NATIONAL CRACKDOWN ON TICKET SCALPERS FLEEING FANS

SOURCE: DARRYL PASSMORE, COURIERMAIL.COM.AU, 18 MARCH 2018 (EXCERPTS ONLY)

Queensland is demanding urgent national action to crack down on shonky scalpers ripping off music and sports fans with overpriced or fake tickets to major events. It comes as the State's leading venue operator warns that hundreds of disappointed concertgoers could be denied entry to this week's two Ed Sheeran shows in Brisbane because they have unknowingly bought invalid tickets.

The industry wants sweeping reforms to protect consumers, including outlawing the use of automated bots that scoop up huge numbers of newly released tickets, often for crime syndicates, using lists of stolen credit card numbers. Other measures sought include orders blocking the websites of overseas-based commercial operators such as Viagogo, which reap lucrative commissions--often 25% or more--from the resale of tickets at massive mark-ups from the original value. And resellers based in Australia may have to be licensed in future, with tough penalties for breaking rules on increasing prices for second-hand tickets.

Last year, The Federal Treasury developed an options paper on the issue, and a meeting with all state and territory consumer affairs ministers is planned, with a date yet to be set. A Palaszczuk Government spokesman said the problems had to be tackled at a national level and had "been allowed to fester for far too long." The Queensland Office of Fair Trading has received 140 complaints about Swiss online ticket reseller Viagogo since January last year. "Viagogo's conduct to date shows that they have little interest in resolving consumer complaints," a Palaszczuk government spokesman said.

Rex Davison got a shock as he pressed the "purchase" button for tickets to one of the Adele's Brisbane concerts last year on resale site Viagogo. A message popped up telling him he'd just spent \$1040 on the four tickets--almost twice the \$560 he thought he was paying. "I was horrified as I was unable to cancel the order and Viagogo did not have any e-mail or phone contacts on their website to speak to them," the Gold Coast man said.

Things got worse when Mr Davison and three friends, who had come from New Zealand, arrived at The Gabba for the show, as they were refused entry. The staff said, "Your tickets are a rip-off. They have been bought and resold. All those tickets have been cancelled." On his smart phone, Mr Davison bought more tickets from official seller Ticketmaster for \$1247. His daughter later pointed him to a 'Victims of Viagogo' Facebook page, where there were complaints from hundreds of people in different countries.

He received a call a few days later from a Viagogo staff member in Ireland who promised him a refund and a credit as compensation. He received a refund of the \$1040 he paid Viagogo, but no compensation.

PRACTICAL APPLICATION CONTINUED...

1. Who are the stakeholders in each of the above cases? [C]
2. Which of them have lost money? In what manner? [C] [A]
3. Do the stakeholders who have lost money have a legitimate complaint? Describe and explain the circumstances which have led to their complaint? [C] [A]
4. In what other ways can these complaints be addressed, and will they prevent future complaints of the same kind? [C] [A] [E]
5. Is it justified to have a national crackdown on ticket scalpers? Is it likely to be successful? [C] [A] [E]
6. Is it appropriate for state and federal authorities to be involved in preventing these occurrences? In whose interest might they be acting? Give your reasons. [C] [A] [E]

RESEARCH

The Australian Competition and Consumer Commission (ACCC) has a brochure available online entitled 'Buying tickets online', at www.accc.gov.au/consumers/online-shopping/buying-tickets-online. Access this brochure and prepare a short talk to present to your class about the dangers of buying tickets online and the ways in which it is possible to protect yourself as a consumer from ticket scams. Find other resources to help you prepare your talk. [C] [S] [A] [R]

18.3 THE ROLE OF AUSTRALIAN CONSUMER LAW IN PROVIDING CONSUMER PROTECTION

Before the *Australian Consumer Law* (ACL) came into force on 1 January 2011, each state in Australia had its own *Fair Trading Act*, each in similar terms to the others. A comprehensive new national approach to consumer protection was announced following a meeting of the Commonwealth and State Governments Ministerial Council on Consumer Affairs which resulted in the ACL. The Ministerial Council issued a statement that all governments in Australia, including the Territories would adopt a common overarching objective and supporting operational objectives for Australian consumer policy "to improve consumer well-being through consumer empowerment and protection, fostering effective competition and enabling a confident participation of consumers in markets in which both consumers and suppliers trade fairly" (see Chapter 1-Introduction, Background, ACL).

The former *Trade Practices Act 1974* (Cth) was replaced by the *Competition and Consumer Act 2010* (Cth). The new Act incorporated in Schedule 2 the Australian Consumer Law, to be administered through an Office of Fair Trading in each state and territory. The Trade Practices Commission was replaced by the Australian Competition and Consumer Commission (ACCC) which has expanded powers of enforcement under the ACL. You will study the consumer protection provisions of the ACL later in Chapters 24 and 25.

REVIEW

1. Explain the need for consumers to have statutory protection. [A]
2. Explain how ticket scams work. [C] [A]

TOPIC 2: CONTRACTUAL OBLIGATIONS

CHAPTER 19: HOW A CONTRACT IS FORMED

FOCUS SUBJECT MATTER

19.1 PROMISES, PROMISES!

19.2 ESSENTIAL ELEMENTS TO FORM A CONTRACT

19.3 WHAT IS AN OFFER?

19.4 WHAT IS ACCEPTANCE?

19.5 WHAT ARE CONSIDERATION AND FORMALITIES?

TO UNDERSTAND AND APPRECIATE:

- ▶ some agreements are legally binding while others are not;
- ▶ there is a body of legal principles found in case law relating to agreements (the common law); and
- ▶ agreements must satisfy certain requirements to be legally binding.

19.1 PROMISES, PROMISES!

Promises and pie crusts are made to be broken — Jonathan Swift

Promises, so it is said, are made to be broken. Broken promises, however, mean disappointment, and disappointment can seek a remedy in the court. In the 18th Century English case of *Everett v Williams* (1725) Ch., Everett sued Williams. Everett claimed he was in business selling silver, rings and watches. When Williams asked to be taken into partnership, Everett agreed. After dealing together for some time, they had a disagreement over their respective shares of the profits. Everett claimed that Williams was not keeping to the contract and was holding onto more than his proper share. Everett commenced court proceedings and filed 'a bill against his partner for an account'. That is, to calculate what the partnership was worth and divide it equally.

It turned out, however, that the business was illegal. Everett and Williams were highway robbers! Their agreement was illegal and unenforceable at law. The bill was dismissed with costs. The barrister who signed the bill was made to pay the costs. The solicitors acting in the case were fined £50 and the parties were both hanged!

This case raises a special problem. When should a court **enforce** the promises people make to each other? What is the **reason** for doing so? Why should the law enforce promises and why should we have to keep them?

People seeking to rely on another person's promise need certainty and predictability. A broken promise by a friend is upsetting. However, it is not the function of our courts to become involved with purely social arrangements. In the commercial world and, at times, in a domestic or social context, a broken promise can mean financial loss. Our court system has developed rules to decide which agreements will be enforced. The law becomes directly involved when the parties intend that their promises to each other will have legal consequences if not carried out. In such cases, the parties have entered into a pact, or agreement, which is known as a legal contract.



A body of law about contracts has developed over many years as a result of the settlement of a variety of disputes. The body of law has its origins in the decisions made by judges. It is called the **common law of contract**. It can be contrasted with statute law which is law made by Parliament. Over the years, however, the common law of contract has been changed by statute law. For example, the Commonwealth Parliament passed the *Trade Practices Act* ('TPA') in 1974 to

- ▶ Promote competition and fair trading, and
- ▶ Provide for consumer protection.

Each of the Australian States and the ACT and the Northern Territory passed similar laws applying to their respective jurisdictions.

On 2 July 2009 an agreement was signed by the Premier of each State and the then Prime Minister Kevin Rudd, to bring into force an Act applying to the whole of Australia to deliver a 'Seamless National Economy'. On 1 January 2011 the *Competition and Consumer Act 2010* (Cth) (the ACL) commenced. The ACL removed the TPA and reformed consumer law in Australia, implementing uniform national consumer laws.

The common law and statute law must be considered together when attempting to identify the legal standing of agreements.



Ch 20.3



Ch 14.1



Ch 23.1

19.2 ESSENTIAL ELEMENTS TO FORM A CONTRACT

A **valid contract** is defined as an agreement made between two or more parties that creates legal rights and obligations which the law will enforce. If three essential elements are present, a binding or valid contract will be created. These are:

1. INTENTION TO CREATE LEGAL RELATIONS
2. OFFER AND ACCEPTANCE
3. CONSIDERATION

Even though a legally binding agreement exists, it may be able to be challenged for other reasons. Generally, a contract can be set aside if one of the parties lacks **legal capacity**, there is not **genuine consent** to the agreement or the contract has an **illegal purpose**, as in the case of *Everett v Williams*. These matters are discussed later at Chapter 23.

INTENTION TO CREATE LEGAL RELATIONS

In some cases people making agreements do not intend to be legally bound. Private and social arrangements are not usually intended to carry legal consequences. If they did, every private or social arrangement legally enforceable, life would be complicated, expensive and very difficult. The courts have, on many occasions, considered whether or not an arrangement is intended to have legal consequences. Two cases are set out below:

CASE STUDY

Simpkins v Pays (1955) 107 ALR 1, 66 ALJR 408

Facts: An elderly woman and her boarder frequently entered competitions in newspapers. The boarder drew up the form in the name of the woman and the entry fees were shared. The woman promised to share any winnings. However, when she won a prize of £750 in a competition, she refused to share it with her boarder.

Legal Issue: Was the arrangement with the boarder a binding contract?

Decision: It was the combined effort of the woman and the boarder and the sharing of expenses which led to the prize. The woman was obliged to share the prize. An intention to create legal relations was evident from the conduct of the parties and the promise of the woman.



YOU BE THE JUDGE



In *Simpkins v Pays*, suppose that the elderly woman always drew up the form on her own and she always paid the entry fees herself.

Do you think that the Court would have made the same decision? [A] [E]

CASE STUDY

Todd v Nicol (1957) SASR 72

Facts: Mrs Nicol wrote to her sister-in-law in Scotland. She invited Mrs Todd to migrate with her daughter to Australia and to share her home on a permanent basis. They accepted this invitation and travelled to Australia and took up residence. Soon they were in dispute. Mrs Nicol would not share her home with Mrs Todd.

Legal Issue: Did the parties intend the agreement to be binding?

Decision: The court decided it was a binding agreement. Mrs Todd had incurred considerable expense and inconvenience. She had relied on Mrs Nicol's promise. This took the arrangement beyond the social to the commercial realm.



YOU BE THE JUDGE



In *Todd v Nicol*, suppose the facts were different as follows:

Mrs Nicol only wrote to Mrs Todd telling her how wonderful it was to live in Australia. Mrs Nicol did not promise Mrs Todd that she could live in her home on a permanent basis. Mrs Todd was attracted by Mrs Nicol's description of Australia and came out to Australia to live of her own accord. When she got here she did not like it and blamed Mrs Nicol.

Do you think that the Court would still decide that Mrs Nicol and Mrs Todd had a binding agreement? [A] [E]

OFFER AND ACCEPTANCE

Before an agreement can be legally binding, there must be an offer by one party which is accepted by another party. This is a simple idea, but disputes over the years have shown that, like many simple ideas, it needs close analysis to understand it. Start by reviewing when these concepts were introduced into the common law of contract in England in **Chapter 14: Historical Background**. What follows is an examination of how the courts have looked at the ideas of 'offer' and 'acceptance'.



Ch 14

19.3 WHAT IS AN OFFER?

An offer is a proposal by one party to enter into a legally binding contract with another. An offer can be made orally, by conduct, or in writing. The offer must be clear and certain.

In our cartoon example, an offer is made by the words, "I'll buy it for that." The words, "I wish I could sell my car. It's probably only worth \$2000," are merely an invitation to make an offer. They are not an offer because they are too ambiguous. It is uncertain as to their intention. The words used do not clearly convey an unambiguous offer.



An invitation to make an offer is called an invitation to treat. An invitation to treat is not an offer. For example, what might appear to be an offer is a mere willingness to trade or deal. When shopkeepers display their stock in windows or on shelves, they are usually inviting the customer to make an offer. This is an 'invitation to treat.'



Ch 14.1

The system used in each shop will determine when the offer occurs. For example, if the customer simply hands all the items to an attendant at a cash register, who enters a price on each item producing a total, and then says “that will be \$54.25 please” then these words are the offer. Clearly a customer can change his or her mind at this point and take out any items so that the total cost is changed. Acceptance would then be the act by the customer of tendering the money.

It is not hard to think of different scenarios which may occur at the point of sale in a self service shop which would change this. For example, people who buy a newspaper from a corner store often go into the store, pick up the paper, hand the correct money across the counter and the owner or attendant says thank you and nothing else. In this case the act of tendering the money would be an offer and the act of accepting the money and saying thank you together would constitute acceptance.

There are a number of cases in which the courts have distinguished between statements (orally or in writing) to decide if they constitute an offer or not. An important and well known case, in which this question was considered, was set in a self service chemist in 1953 in the United Kingdom. This case is set out below, then followed by another case in which the same question was important in the judge’s decision.

CASE STUDY

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern Limited) (1953) AC 1 QB 401

Facts: Drugs and medicines were displayed on shelves in packages or other containers in a shop. The shop was one room with two exits. The customers used a wire basket to collect what they wanted themselves. The customers then took the articles they collected to a cashier at one of the exits. The cashier totalled the price and received payment. One of the items submitted by the customer was labelled with the wrong price. The cashier refused to sell the item at the labelled price and the customer objected.

Legal Issue: Did the display of goods at specified prices (self service system) amount to an offer by the owner of the shop to sell the goods which could be accepted by the customer?

Decision: The self service system was not an offer to sell but merely an invitation to treat. The offer was made when the cashier offered to sell the articles by telling the customer the price. Acceptance occurred when the customer paid the cashier for the articles.



YOU BE THE JUDGE



In a modern supermarket, sometimes the price of an item is labelled incorrectly. If the cashier scans the bar code and the price displayed electronically is greater, a dispute can arise.

1. Are these facts similar to those in the case of *Boots Cash Chemists* above? [A]
2. Would that same decision be made? Why? [A]
3. What would you do if you were in charge of the supermarket? [A] [E]



CASE STUDY

Harris v Nicolson (1873) 8 QB 286

Facts: The defendant advertised that certain things would be sold at auction on named days. The plaintiff went to the auction with the intention of bidding for certain pieces of furniture. Some of the lots in which the plaintiff was interested had been withdrawn from sale. The plaintiff claimed to be entitled to compensation for breach of contract. The plaintiff said that the defendant's advertisement was an offer of an opportunity to bid for the particular pieces of furniture. The plaintiff said that he accepted that offer by travelling to the auction.

Legal Issue: Was the advertisement an offer which the plaintiff could accept?

Decision: The court decided that the advertisement only set out items for auction to indicate an intention to sell those items. It was not an offer which could be accepted, but was merely an invitation to treat.



YOU BE THE JUDGE



Suppose that in the above case the defendant's advertisement read –

'The dining room suite in the picture can only be bought at the auction on Friday and will be sold on that day. Come and bid for this wonderful piece of furniture!'

1. If the plaintiffs travelled to the auction on Friday specifically to buy the dining room suite and the defendant had withdrawn it from the auction, would the decision in *Harris v Nicolson* be the same? [A]
2. Can you think of a different advertisement which would make the plaintiff succeed? [A] [E]

Some of the general principles which explain how the courts have interpreted what an offer means are set out below. In each case, the principle is identified before the case study.

AN OFFER MAY BE MADE TO A PARTICULAR PERSON, TO A CLASS OF PERSONS, OR TO ALL THE WORLD.

The case of *Carlill v Carbolic Smoke Ball Company* set out below is an example of this rule. It is a very famous case. Mrs Carlill successfully sued the company by responding to their advertisement. Do you think Mrs Carlill would respond to this advertisement in the same way today? We are much more cynical about reacting to such advertisements.

CASE STUDY

£100 REWARD

WILL BE PAID BY THE
CARBOLIC SMOKE BALL CO.

To any Person who contracts the increasing Epidemic,
INFLUENZA,
colds, or any diseases caused by taking cold, after having used the CARBOLIC SMOKE BALL according to the printed directions supplied with each ball.

£1,000 IS DEPOSITED

with the ALLIANCE BANK, Regent Street, showing our sincerity in the matter.

During the lasr epidemic of INFLUENZA many thousand CARBOLIC SMOKE BALLS were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the CARBOLIC SMOKE BALL.

CASE STUDY CONTINUED...

Carlill v Carbolic Smoke Ball Company (1893) CA 1 QB 256

Facts: (See above). Mrs Carlill met these conditions and sued for £100 pounds when the company refused to pay her.

Legal Issue: Was the advertisement an offer or an invitation to treat? If it was an offer, did Mrs Carlill accept the offer by performing the conditions set out in the offer or should she have communicated her acceptance of the offer to the company before doing so?

Decision: The advertisement was not merely an invitation to treat, but was an offer to become liable to anyone who, performed the condition. The offer impliedly dispensed with the need for notification of acceptance, and anyone who performed the conditions accepted the offer.



YOU BE THE JUDGE



Suppose that in Carlill's case, the advertisement said: 'you must produce the printed directions used at Carbolic Smoke Ball Company and a receipt to show that you bought the Smoke Ball yourself'. If Mrs Carlill could not produce the printed directions and a receipt, do you think that she would have been successful? [A]

THE OFFER MUST BE COMMUNICATED TO THE PERSON ACCEPTING THE OFFER.

Imagine the difficulty the owner of a talent agency would have, if a singer who wanted to sing at a concert in the Queen Street Mall in Brisbane could argue that his or her offer did not need to be communicated. Knowing an offer must be communicated gives certainty, both to the person making the offer and the person who is accepting it. Sometimes, the court has been obliged to intervene, where parties cannot agree about what has happened. For example, in the case of *Taylor v Laird* which follows:



CASE STUDY

Taylor v Laird (1856) 25 LJ Ex 329

Facts: The plaintiff was under contract to captain a ship. During the voyage he resigned the captaincy. This left the ship without a competent navigator. Even though the plaintiff had resigned, he rendered services in navigating the ship to its destination. The owner of the ship had not requested the captain to provide the navigation services. The captain did not communicate to the owner that he would provide such services.

Legal Issue: Could the captain recover remuneration for the navigation services he provided?

Decision: The court said that the owner was not in a binding contract with the captain for the navigation services. The captain had not communicated to the owner that he offered to provide such services and the owner did not have the opportunity to refuse the services. There was no binding contract.

ALL THE TERMS OF THE OFFER MUST BE COMMUNICATED TO THE PERSON ACCEPTING THE OFFER (THE OFFEREE) AND BROUGHT TO HIS OR HER NOTICE.

CASE STUDY

Causer v Browne (1952) VLR 1

Facts: Causer took a dress to Browne for dry cleaning. Causer received a docket when depositing the dress. On the docket there were printed conditions purporting to exempt the firm from liability for loss or injury. When Causer collected the frock it was damaged. When Causer deposited the frock, no one pointed out to her the conditions on the docket exempting Browne from liability. It was given to Causer as though it was simply a docket entitling her to collect the frock when it was dry cleaned.

Legal Issue: Were the conditions exempting Browne from liability part of the contract?

Decision: The conditions on the docket ought to have been made clear to Causer at the time the docket was

given to her. It was delivered merely as a voucher or a receipt. The exemption term was not communicated and therefore was not part of the contract.



YOU BE THE JUDGE

Suppose Brown said to Causer, when depositing the dress, words to the effect 'I will not be responsible if your dress is damaged and you should read the conditions on the docket I have given you'.

What would the decision be, given the above facts? [A]

Suppose that Brown said nothing to Causer, but there was a large sign behind the counter behind Brown stating:

'NO RESPONSIBILITY ACCEPTED FOR DAMAGE DURING DRYCLEANING TO ANY GARMENT.'

Would Brown be responsible for the damage? [A]

19.4 WHAT IS ACCEPTANCE?

Acceptance occurs when the party to whom the concept of offer is made (offeree) agrees to the proposal of the person making the offer (offeror). As with an offer, the courts are usually concerned with the same question when issues arise about acceptance. Is the acceptance which someone claims to have made binding on the person who makes the offer, so there is a valid contract? Like an offer, the courts have also developed precedents as to the legal meaning of acceptance.)

One important difference between the concept of an offer and an acceptance is that when we refer to communication of an offer we mean that an offer must be actually communicated. That is, it must be brought to the knowledge of the other party.

Acceptance can occur without actual communication. It is always necessary to look at the manner prescribed or indicated in the offer which may determine how an offer is to be accepted. A good example of this is in the case of *Carlill v Carbolic Smoke Ball* which you have previously read. The court said:

If the acceptance is made in the manner laid down for acceptance by the offeror, then it is immaterial that the acceptance does not in fact come to the notice of the offeree.

On the other hand, there are times when acceptance must be actually communicated. An example of this is given obiter dicta by a judge of the English Court of Appeal in *Entores Limited v Miles Far East Corporation* (1955) 2 QB 327.

Suppose, for instance, that I shouted an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait until the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound.

Clearly, in the *Entores* case, the judges were referring to a situation where a contract was being made by way of word of mouth. So, when you read the cases and examples that follow, remember each case is different, and the precedent can only be applied where circumstances are the same.

ACCEPTANCE MUST BE ACTUALLY COMMUNICATED UNLESS THE OFFER REQUIRES AN ACT TO BE DONE WHICH DOES NOT HAVE TO BE COMMUNICATED TO THE PERSON MAKING THE OFFER.

An example of a case where acceptance is communicated by performing an act is *Carlill's* case.

CASE STUDY

Felthouse v Bindley (1862) 11 CB(NS) 869

Facts: A wrote to B offering to buy B's horse for a stated price and adding "if I hear no more about him I consider the horse is mine at £30.15 shillings". B made no reply to this offer although it appeared from subsequent dealings that he had made up his mind to accept it.

Legal Issue: Was there a binding contract? Did B accept the offer even though he had not communicated it expressly?

Decision: The court decided that there was no contract. Silence in such a case does not constitute acceptance.



YOU BE THE JUDGE

Suppose B said, 'You can have the horse for £30.15 shillings if you collect him by Friday'. B did not arrive on Friday, so A sold the horse to someone else on Saturday. B arrived late on Saturday to collect the horse and tender his money.

Was there a binding contract? Give your reasons. [A]

A QUALIFIED ACCEPTANCE CANNOT BE MADE. ANY OFFER MUST BE WHOLLY ACCEPTED.

A qualified acceptance amounts to a counter-offer. An example of how this principle works follows:

HYPOTHETICAL

Facts: Ruth offers to sell her eight year old Toyota to James. She says, 'I will sell you the car for \$3,000'. James replies, 'I accept. However, you will need to provide a new tyre because one tyre is faulty.' The next day James arrives with a cheque for \$3,000 for Ruth. The new tyre has not been put on the car. James says, 'I will not take the car. The new tyre has not been done'. Ruth says, 'You must take the car, we have a binding contract'.

Legal Issue: Is the contract binding? Do the words 'You will need to put a new tyre on the car before I take it' constitute a counter-offer?

Decision: Clearly the words 'You will need to provide a new tyre' is a counter-offer which qualifies James' acceptance. He can refuse to perform. There is no contract.



ANY CONDITIONS STATED IN THE OFFER MUST BE FOLLOWED BEFORE AN ACCEPTANCE CAN BE SAID TO HAVE TAKEN PLACE.

An example of how this principle works follows.

CASE STUDY

Gilbert J McCaul (Australia) Pty Ltd v Pitt Club Limited (1957) 59 SR(NSW) 122

Facts: A lease contained an option to renew. The lease said that the tenant had to:

- ▶ give three months notice in writing prior to the end of the lease; and
- ▶ pay the rent punctually; and
- ▶ otherwise perform all of the terms of the lease.

If the tenant did not do these things then it could not exercise the option to renew the lease validly unless the landlord agreed. During the term of the lease the tenant was rarely on time paying the rent. The landlord did not

object. The lease said that it did not matter whether the landlord objected or not. The tenant sought to renew the lease by exercising the option. The landlord said the option was not validly exercised and refused to grant a new term.

Legal Issue: Was the punctual payment of rent a condition which had to be fulfilled before the tenant could validly exercise the option?

Decision: The court said that it was clearly a term of the acceptance by the landlord of an option to renew that the rent must have been paid on time. The tenant was not entitled to renew the lease and exercise the option.



YOU BE THE JUDGE



Suppose Emily was a member of Mr Lawson's class, but she was away sick on the day that he made the offer to his class to work on his farm.

Could Emily accept Mr Lawson's offer in those circumstances? [A]

THE PERSON ACCEPTING AN OFFER MUST KNOW THAT IT EXISTS. NO ONE CAN ACCEPT AN OFFER IF SHE OR HE DOES NOT KNOW THAT IT EXISTS.

CASE STUDY

R v Clarke (1927) 40 CLR 227

Facts: In 1927 a man was murdered. A reward of £1,000 was issued by the government for information leading to the arrest and conviction of the murderer. Clarke was charged with the murder. When interviewed he gave police information which led to the arrest and conviction of the murderers. He did not remember about the reward at the time of the interview. He later claimed the reward.

Legal Issue: Could Clarke accept the offer of a reward in exchange for information?

Decision: The High Court held that he was not entitled to the reward because at the time he gave information to the police it was in order to clear himself of the charge of murder, not in response to the offer of a reward. Therefore, there was no legal acceptance and therefore no contract.



INQUIRY



HOW HAS CONTRACT LAW RESPONDED TO TECHNOLOGICAL CHANGE?

As indicated above, the courts will look at the circumstances of each case, and if a precedent (one of the rules) applies, it will be followed. If not, the court attempts to apply the law fairly to the situation.

THE POSTAL RULE

This exception to the principle that acceptance must actually be communicated was decided in the case of *Adams v Lindsell*.

CASE STUDY

Adams v Lindsell (1818) 106 ER 250

Facts: A dealer wrote to a manufacturer on 2 September, offering him a quantity of wool at a certain price. The letter was delayed and didn't arrive until 5 September. The manufacturer accepted at once and wrote a letter saying so. Meanwhile the dealer grew uneasy, not knowing his letter had been delayed. So, having heard nothing from the manufacturer from whom he expected a reply on 7 September, he sold the wool to someone else on 8 September. Next day he received the manufacturer's letter of acceptance. The manufacturer sued for breach of contract.

Legal Issue:

1. Was there ever a contract between the dealer and the manufacturer?

2. If so, when was it formed?

3. When should contracts by post be complete – when the acceptor posts the letter of acceptance or when the offeror receives it?

Decision: There is a binding contract which is formed when the letter of acceptance is posted. The dealer's offer, when made by post, repeats the offer every instant of time until it reaches its destination, unless withdrawn before it arrives.



When a universal system of publicly administered postal communication was introduced, the courts needed to decide what would happen where the parties used the post as the means of communicating to finalise a contract. A good statement of the rule is found in *Henthorn v Fraser* (1892) 2 Ch. 27 where it was said by Lord Herschell:

Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

The postal rule is that acceptance occurs when the letter of acceptance is posted, and the contract commences from that time.

HYPOTHETICAL

You accept an offer by posting a letter at 9.00am on Wednesday. The offer was agreed to be accepted by post. At 12.00pm on Wednesday, you realised you could have made a much more advantageous agreement with someone else. Do you phone the person who made you the offer withdrawing the acceptance in the letter which has not yet been received? [A]



TELEPHONE, TELEX, FACSIMILE, EMAIL - INSTANTANEOUS COMMUNICATION

In *Entores LD v Miles Far East Corporation* (1955) 2QB page 330, Counsel for the plaintiffs stated:

When a contract is negotiated by telephone, telex or other form of instantaneous communication, the contract is not complete until the acceptance is actually received by the offeror, and further, the contract is made at the place where that acceptance is received and not at the place where it is spoken or, in the case of telex, typed.

The decision in the *Entores* case will be set out later in this section.

How correct was the submission made on behalf of Counsel for the plaintiff? Since the Postal Rule, which was an exception to the rule that acceptance must be actually communicated, the Courts have had to deal with changes in technology, in particular:-



LETTER



TELEX



FACSIMILE



E-MAIL

It was not until electronic communications by e-mail, that laws were passed by Parliament dealing with the consequences of any of these changes. This, in Queensland occurred with the introduction of the *Electronic Transactions Act 1999* (Cth) and the *Electronic Transactions Act 2001* (Qld) (the *Electronic Acts*).

Before this, the common law addressed such issues by applying previous cases and developing the law to deal with the new circumstances. The *Entores* case was one of the first cases where there was a new medium of communication.

CASE STUDY

Entores Ltd v Miles Far East Corporation [1955] 2QB 327

Facts: The plaintiff and the defendant were negotiating a contract. There was a series of communications by telex between the plaintiffs in London and the defendant (a Dutch company) in Holland. A counter offer was made by the plaintiffs on 8 September 1954, and an acceptance of that counter offer by the Dutch company was received by the plaintiffs in London by Telex on 10 September 1954.

Legal Issue: Where was the contract made? That is, where did acceptance take place? Did it take place in Amsterdam from where the telex was sent or in London where it was received by the plaintiffs?

Decision: The court held that the contract was made in London where the acceptance was received. Birkett L. J. at page 335 said,

In my opinion, the cases governing the making of contracts by letters passing through the post have no application to the making of contracts by telex communications. The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror, and the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree.

Where communication is instantaneous, for example by telephone, email or internet, or where the parties agree to a method of communication and how it should be applied, the courts do not appear to have had any problem in establishing when a contract has been validly formed or when acceptance has taken place.

The *Entores* case accepted that the **general rule applied to telex communications**. It therefore said that unlike the postal rule, which says that acceptance occurs when the letter is posted and not when it is received, acceptance by telex communications occurs when the **telex is received**. This also applies to email and internet communications. Of course, as you know from the previous discussion regarding the postal rule, it must be in the contemplation of the parties at the time of entering the contract that acceptance by telex would occur.



WHAT DO YOU THINK?



At this stage, perhaps we should pause to reflect and consider the question, "What difference will communication by email make to persons who wish to use that method of communication to conclude contracts?" [A]

EMAIL - THE ELECTRONIC ACTS

Existing law applies to electronic transactions. To prove a binding contract online, it is still necessary to prove that:

- a There is an intention by all parties to create legal relations when entering the contract;
- b A valid offer has been made by one party to another;
- c The offer has been accepted by the other party or parties; and
- d The promises made by the parties in the contract are for valuable consideration.

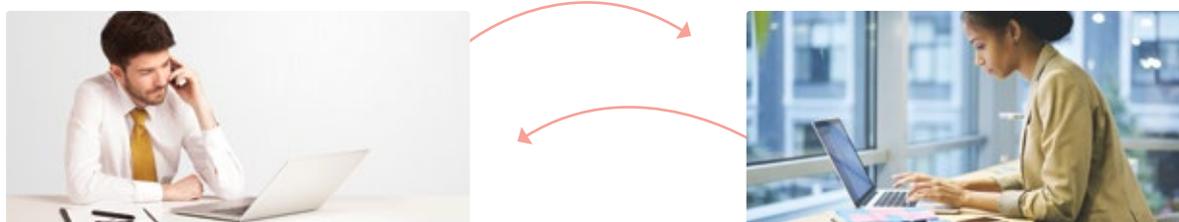
Nevertheless, both the Commonwealth and all State Governments decided that there was a need for legislation in an increasingly electronic environment.

The community needs to understand these differences and, therefore, the Commonwealth and the States passed various *Electronic Acts*.

PURPOSE OF LEGISLATION

The purpose of the *Electronic Acts* is to provide a regulatory framework that:

- a recognises the importance of the information economy to the future economy and social prosperity of Australia (Queensland);
- b facilitates the use of electronic transactions;
- c promotes business and community confidence in the use of electronic transactions; and
- d enables business and community to use electronic communications in their dealings with Governments.



SIMPLIFIED OUTLINE OF THE ACT

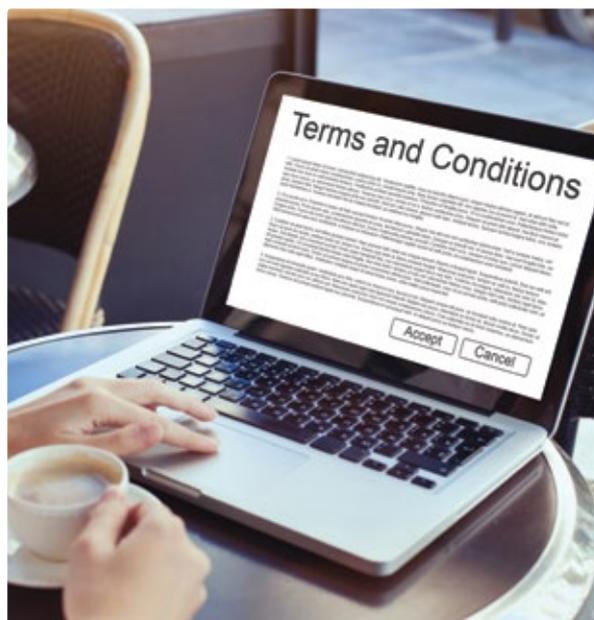
The *Electronic Acts* say:

1. As a general rule, a transaction is not invalid simply because it took place through an electronic communication;
2. The Electronics Acts apply to all electronic communications, whether some or all of the parties are located within Australia or elsewhere.
3. Invitations to treat
Electronic communications
 - (a) not addressed to one or more specific parties; and
 - (b) generally accessible to parties making use of information systems
 are to be considered as an invitation to make offers, unless they clearly indicate the intention of the party making the proposal to be bound in case of acceptance. These requirements can generally be met in electronic form unless the law says otherwise.
4. The Electronic Acts, specifically provide for:
 - ▶ The time of dispatch (sending) of an electronic communication
 - ▶ The time of receipt of an electronic communication
 - ▶ The place an electronic communication is sent
5. A person sending electronic communication is only bound by the communication if it was sent with that person's authority.

MAKING A CONTRACT ONLINE

Many online contracts are entered into by consumers who buy goods and services or electronic materials, such as books, music, software, clothing, appliances, and other consumer goods. Many other online contracts are entered into between businesses, and on behalf of businesses by legal firms. These contracts are generally of less concern to the community, because they are entered into by persons of considerable business and commercial experience, and do not involve the same processes.

In the case of contracts which involve electronic materials, the internet is the place where performance takes place. In the case of contracts for physical goods and services, if a contract is concluded, performance will take place elsewhere. That is, the goods or services are delivered or provided to the buyer after the contract is concluded on the internet.



Some practical experience of the internet is important for you to understand the way in which a contract can be concluded on the internet. A practical application follows, which is designed to give you this experience.

PRACTICAL APPLICATION

1. Log on to an internet site for a product that you would like to buy. For example, a book, CD, movie tickets, magazine or clothes. [C]
2. Download and print out the pages that constitute, in your opinion, the offer for the product you would like to buy. [C]
3. Answer the following questions with reference to the offer:
 - (a) What are you buying? [C]
 - (b) What does it cost? [C]
 - (c) How can you order it? [C]
 - (d) How can you pay for it? [C]
 - (e) How is it delivered and when? [C]
4. Is there an offer or an invitation to treat set out on the website? [A]
5. Can you accept the offer or must you provide a counter offer? [A]
6. Describe and explain the process you must carry out on-line to accept the offer or make a counter offer. [C] [A] [E] [R]
7. A 'click wrap agreement' is one where a buyer clicks 'I agree' or 'I accept' after reading terms set out on the website. A 'browse wrap agreement' is one where a statement indicates the existence of terms and conditions elsewhere, viewed through an electronic link or incorporated by reference, and requests the buyer to check these before agreeing, accepting or proceeding to pay for the good or service. Did you observe Internet sites of both of these types of agreement? Did you find them easy to navigate and clear as to your rights and obligations as a buyer? Were any online sites unable to be described in this way? Explain your answer. [C] [S] [A]

ACCEPTANCE ONLINE

The *Electronic Transactions Act 2001* [Qld] states:

Time of receipt:

'If the addressee of an electronic communication has designated an information system to receive electronic communications, then unless otherwise agreed between the originator of the communication and the addressee, the time of receipt of the communication is the time when it enters the information system.' [s24 *Electronic Transactions Act 2001* (Qld)].

In other words, when you go online and tick the box or enter the word which says 'accept' or 'final acceptance' (or its equivalent) and your message enters the information system online, acceptance takes place.

As we have seen from the cases on telex and facsimile, it is frequently not only when an acceptance occurs, but **where it occurs**, which **can be important**. Where it occurs is usually the place at which either party can commence a legal action, unless the contract says otherwise. The *Electronic Transactions Act 2001* (Qld) also address this issue as follows:

Place of dispatch and receipt

Unless otherwise agreed between the originator of electronic communication and the addressee of the communication –

- (a) The communication is taken to have been dispatched from the originator's place of business; and
- (b) The communication is taken to have been received at the addressee's place of business. [s25 *Electronic Transactions Act 2001* (Qld)].

PRACTICAL APPLICATION

Facts: Michael wants to buy a teddy bear for his grandson. He does a search on the Internet. A seller of teddy bears in the United States advertises a bear which sings Christmas carols in Greek. Just what he wants! The seller's requirements are that Michael must pay the price by direct electronic transfer of funds or by credit card, including postage, and the bear is posted to his address. Michael completes the requirements on the Internet. The teddy bear, paid for by Michael, does not arrive. The website does not specify when and how acceptance takes place, just that any order is concluded by clicking on the appropriate box and making payment.

Legal Issue: Was there a legally binding contract between Michael and the seller? If there was, can Michael sue the seller in Australia to get his money back or compel the seller to deliver the teddy bear? If Michael is not able to sue the seller in Australia, could Michael sue the seller in the United States?

Your decision – set out your reasons.

Suppose before the box which was ticked to conclude the order, there was a statement which read:

'Any order placed will be governed by the law of the USA'.

Do the Electronic Acts apply? [A]

Michael concludes the order and pays after reading the above statement. Where does acceptance take place, in Australia or in the United States? [C] [A]



CASE STUDY

Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd [2016] QCA 213

Facts: A contract was negotiated and concluded online between the parties. An architect was commissioned by the owners of the land (Surfstone) to design a warehouse building. The architect assisted negotiations between the parties and hired Morgan Consulting (Morgan) to perform engineering services. Morgan proposed a fee and included in the fee proposal a statement that indicated that the commission would be generally in accordance with the Australian Consulting Engineers Association (ACEA) Guidelines Terms of Agreement. The ACEA guidelines were not attached to the fee proposal and not signed by Surfstone. Morgan did not provide a copy of the ACEA guideline terms of agreement to Surfstone either. The guidelines included a clause limiting Morgan's liability to one year from the date of completion of the engineering services.

A defect became apparent five years after completion of the services, which was nine years after the last invoice was submitted. The owners of the house claimed that Morgan was negligent in carrying out the work. They (Surfstone) submitted that there was no evidence to show that Morgan's had drawn to their attention the clause

limiting liability and accordingly it was not part of the contract. Morgan argued that the ACEA guideline terms excluded its liability.

Legal issue: Did the Queensland Court of Appeal agree with the trial judge that the ACEA guidelines were incorporated in the fee proposal, and therefore were part of the contract?

Decision: To decide if the ACEA guidelines were incorporated in the fee proposal, and therefore binding on the parties, the Court of Appeal had regard to:

- (a) the construction of the words of the proposal letter;
- (b) what a reasonable person would understand as the offer; and
- (c) whether the term is commonly used in the industry.

The Queensland Court of Appeal agreed with the trial judge that the ACEA guideline terms were incorporated in the fee proposal. Consequently, Surfstone had no right to sue Morgans in relation to the defect.

Would the case had been decided differently if there was no statement in the fee proposal indicating that commission would be in accordance with the ACEA guidelines? Explain your answer. [A][E]



WHAT DO YOU THINK?



Describe and explain how contract law has been able to keep up with and accommodate to the modern Australian economy.[C] [S] [A]

19.5 WHAT ARE CONSIDERATION AND FORMALITIES?

CONSIDERATION

At the beginning of this chapter we asked the question, 'When should a court enforce the promises people make to each other?' The same question can be asked in another way. How does the law decide whether a promise is serious enough to concern the courts?

We have seen that one measure of the seriousness of the parties to an agreement is whether or not they **intend to create legal relations**. What if someone makes a promise in a really serious way and intends to keep it but does not do so? Should we make such promises enforceable at law? **How do people make it absolutely clear** that they are being serious? Some people wear special clothes (like judges). Other

people speak in a special place (like a church). Some people say what they say under oath and swear it. Children say ‘cross my heart and hope to die’, when emphasising the truth of what they say. Some people have written down their words in a special document. They then sign the document and have it witnessed. In early England, if you were lucky enough to have a seal (for example a coat of arms) you melted some wax and applied the seal. We have seen this same question concerned the common law courts as far back as the mid-16th century, when it was asked to enforce a promise made by one party to another.

Historically, the last method above was chosen by the common law as a recognised way of making a promise serious and binding. It had to be written on parchment, signed by its maker and sealed with wax. Such documents became known as **deeds** and are still known as **deeds** today. The promises contained in deeds are known as **covenants** or **promises under seal**. Early English law recognised only those promises which were made under seal as having legal force. All others were just ‘bare’ promises. Bare promises had no legal effect.

There was one exception. The exception becomes the rule in common law. As Napoleon remarked, England was a nation of shop keepers. There is nothing more important to a shop keeper than a deal or a bargain. For commerce to work, a bargain must be kept by both sides.

For an agreement to be binding some gain or benefit must pass to the person making the promise. If you buy a DVD, you usually pay money in return for possession of the DVD. The seller of the DVD gives up possession of the DVD in return for the money. You have paid money for a promise to sell you a DVD. Each party has given something of value in return for something of value. **This gain or benefit is called consideration.** Except where the promise is ‘**under seal**’, it must be present in all contracts if they are to be valid (legally enforceable agreements). The most common type of consideration is money, but in more complex contracts it can be something else. **A gift can only be made enforceable by putting it into writing in the form of a deed** (a promise under seal) which by definition does not require the return of any gain or benefit. Normally a gift is a ‘bare’ promise which is not enforceable.

DEEDS

This was decided in *Rann v Hughes (1778)*, and continues to be good law. A deed is a written contract that has a clause added at the end which says ‘signed, sealed and delivered by.’ Both parties sign next to this expression and their signatures are witnessed. The form of a deed is consideration in itself.

In other words, the form of the deed is what makes it enforceable.

SIMPLE CONTRACTS

Simple contracts are all contracts which are not deeds. This definition may sound trite, but it is correct! Deeds are really a special form of agreement. Simple contracts may be formed by verbal agreement (oral contracts), implied from the conduct of the parties or made in writing (evidenced by some written note). In simple contracts an agreement can only be enforced if the party who wants to rely on the agreement can show that he or she has given or promised to give something in return for the other party’s promise. **If consideration cannot be shown then the agreement is not legally enforceable** unless it is in the form of a deed.

THE FORM OF A CONTRACT - ORAL OR IN WRITING?

Oral contracts frequently occur in everyday situations such as when buying a small item from a department store. Most contracts which occur are of this type and reach a satisfactory conclusion by all parties meeting their obligations. On occasions, quite important agreements are made orally. They may be perfectly valid in the technical sense, but if something goes wrong there will be great difficulties involved in proving the terms agreed to orally. **Important agreements are mainly detailed in writing** in order that all parties have a clear record of the agreement made.

It may be that a contract is neither in writing nor oral but nevertheless the parties did enter into a contract. In these cases **the contract** is said to be **implied by conduct**. Sometimes this can arise where goods are delivered following a pattern of behaviour. An example would be putting milk bottles and money out in front of a house and the milkman delivering milk in response.

CONTRACTS REQUIRED TO BE IN WRITING

In September 2002, the Queensland Fair Trading Minister at the time, Merri Rose, proposed new laws to control dating agencies.

The industry had been plagued by corrupt and fly-by-night operators who did not live up to the promises of helping clients who paid to find love. The Minister proposed reforms to the introduction industry to regulate how agencies charged clients fees for their services; required them to obtain a licence; to issue written contracts; and to provide a three (3) day cooling off period .

The Queensland Government kept its promise and passed *The Introduction Agents Act 2001* (Qld) proclaimed in March 2002. The Act

- ▶ defines the meaning of an introduction agent and persons carrying on the business of an introduction agent in s8;
- ▶ defines an introduction service in s9;
- ▶ requires introduction agents or persons carrying on the business of an introduction agent to be licenced (s18);
- ▶ requires introduction agreements to include a pre-contractual disclosure statement;
- ▶ requires **agreements to be in writing easily legible and clearly expressed**; and
- ▶ requires that the client must be given a copy of the agreement.

If any of the above requirements are not met, the agreement can be set aside. There are many other matters set out in the Act, which ensure that persons who seek the services of an introduction agent or persons who carry on business as an introduction agent are protected.

The idea that some contracts need a special form has been retained. As the law of contract has developed, laws have been passed to make simple contracts into contracts which must be in writing or be evidenced in writing.

Some contracts which **must be in writing** are:

- a. Bills of exchange, cheques and promissory notes [*Bills of Exchange Act 1986* (Cth)].
- b. Assignments of copyright [*Copyright Act 1968* (Cth)].
- c. Contracts of marine insurance [*Marine Insurance Act 1909* (Cth)].
- d. Contracts for the employment of seamen [*Navigation Act 1912* (Cth)].
- e. An acknowledgment of debt to extend the limitation period in the [*Limitations of Actions Act 1974* (Qld)].
- f. A transfer of the shares in a company [*Corporations Act 2001* (Cth) s59].
- g. Contracts for sale of land [*Property Law Act 1974* (Qld)].
- h. Guarantees.

Like offer and acceptance, there have been many important case decisions about consideration. Some are set out following.

CONSIDERATION MUST EXIST IN EVERY SIMPLE CONTRACT.**CASE STUDY*****Heaton v Richards* (1881) 2 LR (NSW) 73**

Facts: The plaintiff wanted to print and publish a book. The government agreed to do this if the plaintiff paid for all of the costs of printing. The agreement made it clear that the government was not receiving any benefit from printing and publishing the book for the plaintiff. The government was unable to print and publish the book when the plaintiff required it to be done. Eventually, the plaintiff sued the government for not carrying out the contract.

Legal Issue: Was there a binding agreement? Was there any consideration passing from the plaintiff to the government?

Decision: The government could not be sued for not carrying out the contract because there was no

consideration passing to it from the plaintiff. There was no contract.

**YOU BE THE JUDGE**

Suppose that the agreement required the plaintiff to pay for the cost of printing and the government to add 10% of the costs as a fee.

Has consideration passed from the plaintiff to the government? Is there a binding agreement? [A]

AS LONG AS THERE IS CONSIDERATION, THE COURT IS NOT CONCERNED AS TO ITS ADEQUACY, PROVIDED IT IS OF SOME VALUE.

CASE STUDY***Chappell and Co. Limited v Nestle Co. Limited* (1960) AC 87**

Facts: The respondents offered to sell a record for one shilling and six pence plus three chocolate bar wrappers. The applicants sued the respondents because the respondents refused to deliver the record for one and six. The applicants did not supply the chocolate wrappers as requested by the respondents in the offer. The argument brought by the applicants was that the chocolate wrappers were of no value to the respondents. That is, it did not matter if the applicants gave the respondents the chocolate bar wrappers or not.

Legal Issue: Were the chocolate wrappers part of the consideration?

Decision: A contracting party can stipulate what consideration he or she chooses. Because the respondent, as a term of the offer required the chocolate wrappers to be provided, it was within its rights to refuse the offer of the applicants and therefore there was no binding contract.

CONSIDERATION MUST NOT BE ILLEGAL OR UNLAWFUL.**CASE STUDY****Alexander v Rayson (1936) 1 KB 169**

Facts: Alexander let a flat to Rayson at a rental of £1,200 per year.

Two agreements were entered into – one to let the flat for £450 per year and the other for Rayson to pay £750 per year for services in connection with the flat. The two agreements were made so that the local authority would rate the property by reference to the rental agreement for the lower amount of £450. Alexander sued Rayson when

he did not pay the instalment of £750. Evidence was led that the two agreements were made to defraud the rating authority.

Legal Issue: Could Alexander successfully recover £750 from Rayson?

Decision: The court held that because the agreement was made to defraud the local authority it was illegal and therefore void. Alexander did not succeed.

**YOU BE THE JUDGE**

Suppose the cost of services was included in the one rental agreement and disclosed to the local authority. The agreement was not unlawful. The local authority was entitled to make its own decision about rating the property because it had full information.

Is the changed agreement fraudulent? Could Alexander succeed? [C] [A]

CONSIDERATION MUST BE DEFINITE.**CASE STUDY****Shiels v Drysdale (1880) 6 VLR 126**

Facts: A daughter promised to look after her aged father and mother as long as they lived. In return, the father agreed, when requested by her, to transfer to her his interest in some of his land. The father did not transfer any land to the daughter when she made the request. She sued on the agreement claiming that the land should be transferred to her.

Legal Issue: Could the subject matter of the contract be identified? That is, could the land which was to be the consideration for the promise to look after the father and mother be identified so it could be transferred?

Decision: Because the land was not identified clearly, it was not possible to transfer any land to the daughter. The court held that the contract was void because of uncertainty. Consideration must be definite.

CONSIDERATION OFFERED NOW IN RETURN FOR PAST PERFORMANCE IS NOT GOOD CONSIDERATION.**CASE STUDY****Roscorla v Thomas (1842) 3 QB 234**

Facts: Roscorla bought a horse from Thomas. After Thomas delivered the horse to Roscorla, Thomas said that the horse was “free from vice”. In fact the horse was a vicious animal. Prior to the sale there had been no representation by Thomas about the horse and Roscorla had satisfied himself that the animal was sound. Roscorla sued Thomas saying that he promised that the horse was “free from vice” and should receive his money back.

Legal Issue: Was the promise made by Thomas that the horse was “free from vice” part of the consideration?

Decision: The court held that the prior sale was not consideration for the promise that the horse was “free from vice”. The promise made by Thomas was therefore not enforceable, as it was made after the sale had been completed.

IF SOMEONE PROMISES TO DO SOMETHING OR DOES SOMETHING WHICH HE OR SHE IS ALREADY OBLIGED TO DO UNDER A CONTRACT, THEN THAT PROMISE IS NOT FURTHER CONSIDERATION.

CASE STUDY

Folkes v Beer (1884) 9 AC 605

Facts: The plaintiff won a court judgment against the defendant. The defendant asked for time to pay. The plaintiff was entitled to payment of the judgment debt plus interest which accrued on any outstanding balance. It was agreed by the plaintiff that the defendant would pay a certain sum at once and the balance by instalments. The defendant eventually paid the whole of the judgment debt but did not pay the interest which had accrued on the unpaid balances. The plaintiff sued the defendant.

Legal Issue: Was the agreement by the plaintiff to accept payment by instalments consideration for the whole of the judgment debt plus interest?

Decision: It was held that the defendant was not relieved from the obligation to pay interest. The defendant had not promised to do anything other than what he was obliged to do in any event. There was no further consideration

REVIEW

1. Describe the following words and phrases: [C]

Contract | invitation to treat | offer | acceptance | consideration | formalities

2. Describe and explain the following. [C] [A]

(a) The essential elements of a contract.

(b) The difference between an invitation to treat and an offer.

(c) The postal rule.

(d) The difference between a simple contract and a deed.

(e) The purpose of the Electronic Transactions Acts.

(f) The need for some contracts to be in writing.

3. Describe and explain how contract law has responded to the needs of the modern Australian economy. Do you think the common law has been able to adapt to technological change? [C][A][E]

TOPIC 2: CONTRACTUAL OBLIGATIONS

CHAPTER 20: THE TERMS OF THE CONTRACT

FOCUS SUBJECT MATTER

20.1 WHAT ARE THE TERMS OF THE CONTRACT?

20.2 WHEN IS A REPRESENTATION A TERM OF THE CONTRACT?

20.3 WHEN CAN TERMS BE IMPLIED INTO A CONTRACT?

20.4 DISTINGUISHING BETWEEN CONDITIONS AND WARRANTIES

20.5 EXCLUSION CLAUSES

TO UNDERSTAND AND APPRECIATE:

- ▶ interpreting a contract involves identifying its terms;
- ▶ a representation may or may not be a term of the contract;
- ▶ terms can be implied into a contract by a court or by statute;
- ▶ the more important terms of the contract are called conditions, and may have a particular legal effect; and
- ▶ the courts have developed an approach to clauses which attempt to limit the liability of a party to a contract (exclusion clauses).

20.1 WHAT ARE THE TERMS OF THE CONTRACT?

Read the following Witness Statement relating to a contract dispute.

HYPOTHETICAL

The MPD Contract Witness Statement dated 30 November 2002

1. My name is Owen Thomas. I live at 12 Perry Street, Brighton.
2. I know Max Patrick. I met him before August 2001. I also know his family and his wife Dell.
3. In August 2006, I was talking to Max about the possibility of constructing a house for investment. Max said, "I own a building construction company MPD Pty Ltd (MPD) which could build a house for you."
Dell said, "I am a director."
I said, "Perhaps we could build a house together as an investment?"
Dell said, "Max, I don't think we have enough money."
4. I said to Max and Dell, "I'll go ahead and get the land anyway and we'll see."
5. I bought the land and arranged for the building plans for the house to be approved by the council.
6. I negotiated a price of \$300,000 with Dell for MPD to build the house. This price did not require Max to supervise the construction. A written contract for the construction of the house was signed by myself and by Dell as a Director of MPD to construct the house for a fixed price of \$300,000 ("the building contract"). There was no discussion about sharing the profit if the house was sold and no term in the building contract to that effect.
7. Soon after I signed the building contract, Max asked me on behalf of MPD for \$10,000 for initial expenses to clear the site and prepare it for building. I paid MPD this on 20 October 2006. I have a copy of this cheque here with me.
8. The day before the construction started, Max presented me with a written proposal. It said that I was to pay him a fee of \$20,000 up-front for supervising the construction and to lend him a further \$30,000 which he would pay back before 30 June 2007 together with 10% interest. He said, "I do not want to share the profits from the sale of the house with you. MPD will not build your house unless I supervise the construction." I agreed and said, "That's fine. Let's go ahead on that basis" ("the loan agreement").
9. On 30 November 2006, I paid Max \$20,000 up-front to supervise the construction and a second cheque for \$30,000 as the loan.
10. Before the house was finished, Dell wanted something in writing about the arrangement. I wrote out a handwritten memo for Max to sign which said:
'I owe Owen Thomas \$30,000 and will pay him interest at 10% per annum on any amount of the principal owing. I will pay it back before 30 June 2007.'
11. I have a copy of the written memo signed by Max.
12. The house was completed on time and I paid MPD the remainder of the price for building it.
13. Max is still refusing to pay me back the loan. He now says that I promised to share the profit from building the house with him. He also says that Dell is not a Director and had no authority to sign the building contract for MPD. I have paid MPD for the construction of the house and I have sold the house. After taking everything into account, I have actually made a loss.
14. Max is refusing to pay back the \$30,000.

Negotiations
not directly
relevant

Documentary
evidence

Written offer

Terms of loan
agreement

Oral
acceptance

Documentary
evidence

Breach
of loan
agreement

HYPOTHETICAL CONTINUED...

1. Is the loan agreement wholly oral? Partly oral and partly in writing? Wholly in writing? Established by a course of conduct? Set out its terms. [C] [A]
2. Is the loan agreement separate from the building contract? Set out your reasons. [C] [A]
3. What are the important terms of Owen's contract with MPD? Did MPD perform its side of the bargain? [C] [A]
4. Do you think Max had any right to say MPD would not build the house if he did not get paid to supervise the construction? [C] [A]
5. How has Max taken advantage of the situation? Is this, in your view, fair and reasonable behaviour? [E]
6. Describe and explain how the contractual arrangements between Max and Owen were used by both of them to achieve their respective objectives. Were they able to satisfy their respective competing interests without dispute? [C] [A] [E]



It is often the case that once parties have entered into a contract questions arise between them which involve interpreting the meaning of the contract. The first step in interpreting a contract is for the terms of the contract to be determined by looking at all the available evidence. The terms are the details of the promises made by each party: for example, the price, when goods will be delivered, who will be responsible for delivery, and so on. The next step is to interpret the terms by reference to the set of rules developed by the courts. In determining the terms of the contract the approach will vary according to the form in which the contract was made.

If the contract is wholly or partly oral, and the parties disagree as to the terms of the contract, they may take their dispute to court. The court will hear oral evidence and decide what the terms of the contract are, before it attempts to interpret them. That is, the court will decide what promises were agreed to by the parties and then it will make a judgment about their meaning. In the Hypothetical on the previous page, Owen and Max would both need to give evidence about what was said, and produce copies of the documents exchanged to the court. This would enable the court to decide the terms of the contract.

Courts frequently consider a range of circumstances in which they are asked to rule on what are the terms of a contract. Sometimes this is to ask the court to say that a part of a written contract should be left out or excluded from the contract. Sometimes it is to ask the court to include a promise which has been made orally when it has not been included in documents which set out the other terms. Two case studies follow which illustrate these points:

CASE STUDY

L'Estrange v F Graucob Limited (1934) 2KB394

Facts: The buyer bought an automatic slot machine. The buyer signed the seller's order form which contained a number of terms. Some of the terms were in ordinary print and others were typed in small print. One of the terms in small print was an exemption clause. This said that the seller was not responsible for damages under any warranty including one that was provided for in any legislation. The machine did not work satisfactorily and the buyer claimed damages for breach of a warranty implied by legislation which said that the slot machine should be fit for the purpose for which it was sold. The legislation expressly permitted the parties to agree that the warranty did not apply. The contract did not say this.

Legal Issue: Was the seller able to rely on the exemption (exclusion) clause or not? This depended on the Court

deciding whether or not the exemption clause was part of the Contract.

Decision: The Court held that the exemption clause formed part of the Contract. It was effective to deny the buyer damages for breach of the implied warranty. This is an example of the general principle that if a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing the document is bound by its terms. It does not matter whether the signing party has read the document or not. What matters is that the signing party had the opportunity to read it and it was contained in the document which was signed.

Hot Topic

The law in Australia has moved beyond the law as set out in the case of *L'Estrange -v-F. Graucob Limited*. The *Trade Practices Act*, which is now the *Competition and Consumer Act 2010 (CCA)*, now makes all contracts subject to implied warranties and it is not possible to exclude them even if they are not written in the contract. In addition, the CCA now changes the law so that consumers are protected if the written terms in a standard contract which they sign are unfair. The court can exclude the unfair terms. Debate the topic "Consumers should be protected from unfair contracts by legislation". [R]



20.2 WHEN IS A REPRESENTATION A TERM OF THE CONTRACT?

Not every statement made in the course of negotiations to enter a contract is a term of the contract. Some statements are only mere representations (sales talk). These are relatively insignificant comments about the subject of the contract used to draw the other party into the contract. Whether a statement is a term of the contract depends on the intention of the parties, having regard to all the circumstances of the case. It is very important to decide which statements made in the course of negotiations are terms of the contract. The importance of establishing if a statement is a term of the contract is that damages for breach of contract will not be available unless the statement which is breached is a term. The only exception is that representations which are not a term of the contract may give rise to damages if fraud or negligence can be proved.



Ch 19.2

CASE STUDY

Hospital Products Limited v United States Surgical Corporation (1984) 156CLR41

Facts: The United States Surgical Corporation ("USSC") sold product in Australia. Mr Blackman was to be the sole Australian distributor of USSC products. At a meeting at a restaurant Mr Blackman promised representatives of USSC that he would promote USSC products in Australia and would not deal with or promote any products that would be in competition with the USSC products. Letters were exchanged confirming the agreements, but this promise by Mr Blackman was not included. Later, a company owned by Mr Blackman called Hospital Products International Pty Ltd ("HPL") changed places with Mr Blackman as a distributor. It began

to distribute someone else's products to the existing customers of USSC in direct competition with those of USSC. USSC sued HPL and Blackman.

Legal Issue: Were the oral statements made at the restaurant by Mr Blackman a term of the contract?

Decision: The High Court by majority of 4 to 1 held that they were. It said that the intention of the parties was that the promise by Mr Blackman was to be binding on the parties and found in favour of USSC. They said the oral statement was not a mere representation.

CASE STUDY

Oscar Chess Ltd v Williams (1957) 1 WLR 370

Facts: A dealer accepted a trade-in of a Morris car from a customer. The customer described the car as a 1948 model because the logbook showed the first date of purchase (by someone else earlier) as 1948. Eight months later the dealer found out that the Morris was a 1939 model. Someone else (prior to the customer owning the vehicle) had fraudulently altered the log book.

The dealer sued the customer for damages on the ground that the customer's representation as to the model of the Morris car was a term of the contract.

Legal Issue: Was the customer's statement that the car was a 1948 model a term of the contract or a mere representation?

Decision: The court held that the customer's statement to the dealer was a mere representation and not a term of the contract and found in favour of the customer. The dealer should have made the necessary checks to ascertain the correct model.



WHAT DO YOU THINK?



Having regard to the circumstances of each of the above cases, explain why the court may have made two different decisions. Do you think the outcomes for the parties in each case were a satisfactory balance of their competing interests? [C][A][E]

20.3 WHEN CAN TERMS BE IMPLIED INTO A CONTRACT?

Express terms are specifically included in the contract. Implied terms are not included but they are assumed to be included.

Apart from the terms agreed by the parties which are written into the contract there are often terms **implied** into the contract by the **court, custom or trade usage, and/or statutes**.

A court will imply terms into the contract to give it business efficacy (that is, make it capable of being put into operation). It will also imply terms into certain types of contract which have been historically established. For example, where a worker carries out repairs, there is an implied term that reasonable care and skill will be exercised in the performance of the work and that the materials used will be reasonably fit for the purpose intended.

Where parties have contracted against the background of a particular trade, the customs or usages of that trade may be implied into the contract.

In some cases there are terms implied into the contract by statute. Some examples include the *Fair Trading Act 1989* (Qld) and the *Competition and Consumer Act 2010* (Cth).

PRACTICAL APPLICATION

1. Collect examples of contracts from local businesses or from other sources. Classify the contents of each under the following headings:

- ▶ Object of contract
- ▶ Main terms (conditions)
- ▶ Minor terms (warranties)

Are the contracts in 'standard form'? [C]

2. If possible, examine several contracts concerning the same activity, for example, the purchase of a mobile phone, a motor vehicle, or the contract for use of a credit card. Identify common clauses and also cases where clauses differ. Give reasons for the differences. [A]

3. Do you think any of the terms are unfair? [E]

20.4 DISTINGUISHING BETWEEN CONDITIONS AND WARRANTIES

Once it has been established that a statement is a term of a contract, it is then important to establish if it is a condition of the contract. Some terms of a contract are more important than others. The more **important terms are referred to as conditions** and the **less important terms are called warranties**. These words are used in a legal sense.

The distinction between a condition and a warranty is important when remedies for breach of contract are considered.

The court has certain tests that are applied when deciding whether a term of a contract is a condition or a warranty. A term will be a condition if:

- ▶ the term is an essential part of the contract; and
- ▶ the term is not carried out, it would make the performance of the rest of the contract totally different from what was agreed.

A warranty is a less important term of the contract and is regarded as subsidiary to the main purpose of the contract. The basic nature of a contract is not changed by a failure to perform a warranty term. Failure to do so is still a breach of contract, but, as will be seen later, the injured parties' remedies are different.

CASE STUDY

Bettini v Gye (1876) 1 QBD 183

Facts: Bettini, an opera singer, contracted to sing exclusively for Gye's opera company, in London, for three months. It was a term of the contract that Bettini would be in London at least six days before the first performance for rehearsals. Bettini fell ill and did not arrive until two days before the first performance. Gye told Bettini, when he arrived in London, that he had breached the contract and refused to accept his services as a singer.

Legal Issue: Could Gye terminate the contract?

Decision: The court held that the term relating to the time of Bettini's arrival was not a condition but a warranty. Accordingly, Gye could not treat the contract as terminated and was only entitled to damages because of Bettini's late arrival.



CASE STUDY

Poussard v Spiers and Pond (1876) 1 QBD 410

Facts: Madame Poussard agreed in writing to sing and play the lead role at Spiers and Ponds' French opera at the Criterion Theatre including performing at the opening night. It was a new opera never before performed. Madame Poussard arrived on time for rehearsal but became ill and missed the last part of the rehearsal and the first three days of the Opera. Spiers and Pond engaged an understudy when Madame Poussard became ill and the understudy continued in the role for the first three days. After three days of illness Madame Poussard returned to work but was told she was no longer required. Her husband sued Spiers and Bond on her behalf. Evidence was led that it was of great importance to the defendants that the Opera should start well, and that the failure of Madame Poussard to be able to perform on the opening night and early performances was a very serious detriment

to Spiers and Bond. The trial judge found that employing the understudy was reasonable in the circumstances, and Spiers and Bond were given permission to claim money they had paid Madame Poussard in advance. The Poussards appealed.

Legal issue: Did Madame Poussard breach the terms of the agreement? Were Spiers and Bond entitled to rescind the contract?

Decision: The Court of Appeal held that failing to turn up at the first performance entitled Spiers and Bond to rescind the contract. It said this went to the root of the matter. The court confirmed the view of the trial judge that the term of the contract requiring Madame Poussard to be present on the opening night and early performances was an important condition of her engagement.

20.5 EXCLUSION CLAUSES

A clause which attempts to limit or exclude altogether the liability of one party to another under a contract is called an exemption clause or an exclusion clause.

Contracts that have been drafted by lawyers or people in business often contain exemption clauses. Business people attempt to limit their responsibilities under contracts or exclude them altogether so that the risk in any particular transaction is reduced.

PRACTICAL APPLICATION

Exemption clause statements

BRISBANE CITY COUNCIL
PARKING TICKET

Conditions of parking

1. The Council does not accept any responsibility for the loss or damage to any vehicle or for loss or damage to any article or thing in or upon any vehicle or for any injury to any person howsoever such loss damage or injury which may arise is caused.
2. This ticket must be presented to an attendant at a pay station prior to leaving the car park otherwise a charge will be assessed from the opening time of the day on which the vehicle was parked until released.
3. Parking fees are those as currently displayed at both Adelaide Street and Roma Street entrances and adjacent to the two pay stations.
4. For special release when the car park is closed, telephone 3275 3031. A special fee is applicable to this service in addition to the fee due to the time of closing and for the period the car park is closed.



This ticket is sold by BASS Victoria as agent for and on behalf of the 'seller' and all complaints or claims are the responsibility of the seller and not BASS Victoria. This ticket is sold subject to the seller's conditions of sale a copy of which is available for inspection at the time of purchase and/or collection of this ticket and also (to the extent that they are not inconsistent with the seller's conditions of sale) the following:

1. The ticket cannot be exchanged or returned after purchase.
2. The right is reserved to add, withdraw or substitute artists and/or to vary advertised programs, seating arrangements and audience capacity.
3. The right of admission is reserved. Cameras and tape recorders may not be permitted. Late arrivals may result in non-admittance until a suitable break in performance.
4. If an outdoor performance/event is cancelled due to adverse weather or for any other cause reasonably beyond the seller's control, there is no right to refund or exchange, and no obligation assumed by the seller for the arranging of a substitute service, event or performance.

To continue tick accept

1. What events do each of the ticket conditions exclude? [C] [A]
2. Do you think that the nature of the exemptions are reasonable having regard to the reason for buying each ticket? [E]

ENFORCING EXEMPTION CLAUSES

Parties who enter into contracts are presumed to do so of their own free will and courts will enforce exemption clauses subject to any requirements under Acts of Parliament.

For example, there are some sections in the *Competition and Consumer Act* which state that the parties cannot rely on exemption clauses if they are inconsistent with the law as stated in the Act.

However, although the courts will enforce exemption clauses as part of a contract, they will not do so lightly. The court will not allow a party to a contract to avoid liability unless it is satisfied with certain things. For example, **before an exemption clause can be relied upon the parties seeking to rely on it must show that it is a term of the contract.** To decide this, a court would look at a number of matters, not the least of which would be whether or not the clauses were included in a written document which the parties had signed. Another important consideration is whether or not the clause has been brought to the attention or notice of the party affected by it.

Reasonable notice of the exemption clause must be given before the contract has been formed, that is before an offer has been accepted. Notice given after the contract has been formed is not sufficient. Obviously this is because the contract is already formed.

The exemption clause can only be enforced against a party to the contract, not against strangers.

In addition to these requirements, **if the wording of an exemption clause is ambiguous or unclear, a court will interpret the clause against the party seeking to rely on it. This is known as the ‘contra proferentem’ rule.** The court will reject words or clauses in the exemption clause if they are inconsistent with the main purpose of the contract.

A good statement of the way a court interprets an exemption clause is found in *Noosa Shire Council v Farr and Ors* [2001] QSC 60. The Noosa Shire Council engaged Farr’s company, who were engineers, to design and build a scheme to move water from the Mary River by pipeline to Lake Macdonald, the storage area for the Noosa Shire Council water supply. The design the engineers constructed failed. There were exclusion clauses in the contract limiting the liability of Farr to the damages directly caused by the consulting engineer. In the course of the judgment, the judge had to consider the meaning of the exclusion clause, and set out the test for the interpretation of an exclusion clause as follows:

The interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears, including the nature and object of the contract and, where appropriate, construing the clause contra proferentem in case of ambiguity.

CASE STUDY

Curtis v Chemical Cleaning & Dyeing Co Ltd (1951) 1 KB 805

Facts: Mrs Curtis took a dress to Acme Dry Cleaners to be cleaned and was asked to sign a receipt which contained, among other terms, a clause that the article ‘is accepted on condition that the company is not liable for any damage howsoever arising’. Mrs Curtis asked why she had to sign and was told that Acme Dry Cleaners would not accept liability for damage to beads or sequins. She then signed. The dress was returned stained.

Legal Issue: Could Acme Dry Cleaners rely on the clause and prevent Mrs Curtis recovering damages for the stained dress?

Decision: Mrs Curtis could recover. The exemption clause never became part of the contract. Mrs Curtis’ signature was obtained by innocent misrepresentation as to the effect of the document. She was only told about the exclusion for damage to beads or sequins.

PRACTICAL APPLICATION

1. Collect examples of contracts from local businesses or from other sources. Classify the contents of each under the following headings:
 - ▶ Object of contract
 - ▶ Main terms (conditions)
 - ▶ Minor terms (warranties)

Are the contracts in ‘standard form’? [C]

2. If possible, examine several contracts concerning the same activity, for example, the purchase of a mobile phone, a motor vehicle, or the contract for use of a credit card. Identify common clauses and also cases where clauses differ. Give reasons for the differences. [A]
3. Do you think any of the terms are unfair? [A][E]
4. Describe and explain how the contract balances the rights and obligations of the parties to the contracts. Should any changes be made to the contracts? [A][S][A][E]

REVIEW

1. Describe the following: [C]

Condition | warranty | implied term | exclusion clause | the contra proferentem rule

2. Describe and explain the following: [C] [A]

- (a) How a court decides disagreements about the terms of an oral contract.
- (b) How a court decides which statements made in the course of negotiations are terms of a contract.
- (c) Why is it important to decide which statements made in the course of negotiations are terms of a contract.
- (d) How does a court distinguish between conditions and warranties.
- (e) The approach a court will take to an exclusion (exemption) clause contested by a party to a contract.

TOPIC 2: CONTRACTUAL OBLIGATIONS

CHAPTER 21: ENDING A CONTRACT

FOCUS SUBJECT MATTER

21.1 SETTING ASIDE CONTRACTS

21.2 DISCHARGE OF CONTRACTS

TO UNDERSTAND AND APPRECIATE:

- ▶ contracts can be set aside on recognised legal grounds (including statutory grounds) after the parties enter them;
- ▶ there are different ways in which a contract can be discharged; and
- ▶ the way in which a contract is discharged will determine the ongoing rights and obligations of the parties to the contract.

21.1 SETTING ASIDE CONTRACTS

Even after a contract has been validly entered into, it can be set aside on a number of well established grounds. These are, in general terms:

LACK OF LEGAL CAPACITY

LACK OF GENUINE CONSENT

LEGALITY OF OBJECT

The effect of being able to set the contract aside is that it may be found to be **void** or **voidable**. Void means that the contract never existed in the first place. Voidable means that the injured party (the innocent party) can decide if the contract is to continue.

This chapter is of **particular importance to children** (minors) because, as a general rule, all minors lack legal capacity.

LACK OF LEGAL CAPACITY

Before a court will enforce an agreement it insists that the parties to the agreement have the power or ability to enter into that agreement. For example, bankrupts, criminals, persons with mental illness, and some intoxicated persons are said to lack capacity to contract.

There are also special rules which apply to many groups which must be satisfied before a valid contract can be created. For example, there are rules which apply to persons who are not Australian citizens and corporations (companies).

Many contracts are obviously made between parties who are not equals. Here the law asks the question, 'Is this agreement fair or has the stronger party driven too hard a bargain?' One category of contract which is not between equals should be of particular interest to you. These are contracts which are entered into by people below the age of majority – those whom the law (perhaps insultingly) calls infants.

INFANTS

In Australia, an infant is defined as a person who has not reached the age of 18 years (prior to 1974 the age was 21 years in Queensland). All states in Australia have passed laws making the age of majority 18 years (see *Age of Majority Act 1974 Qld*). Each State determines the legal age at which an infant becomes an adult. Generally an infant lacks capacity to enter into contracts. There are **four main exceptions** to this general rule.

1. CONTRACTS FOR NECESSARIES

An infant who contracts for necessities is bound by that contract. 'Necessaries' are not confined to things which are needed to maintain life, but include things that are used to maintain the infant in question at the standard of living (eg food, clothing, shelter) which he or she enjoys. The infant's social position, age and occupation are all relevant factors that the court will take into consideration. For example, the court has held that an infant who bought a bicycle to ride 20 kilometres to work each day was obliged to pay for the bicycle. The court said that this was a necessary.

In *Sultman v Bond* (1956) 80 St RQd 180 the Court held that a contract to build a house for an infant who was engaged to be married was a contract for 'necessaries'. The contract for the home building involved borrowing money to pay for it. Once it is determined the contract is one for necessities, and in particular, price is mentioned in the contract, then *The Sale of Goods Act 1896 (Qld)* provides that where necessities are sold and delivered to an infant he must pay a reasonable price for them.

An infant is also liable to pay for **services** which are 'necessaries.' This may include medical services, transportation, legal services or contracts for education.

2. CONTRACTS FOR THE BENEFIT OF INFANTS

Where an infant enters a contract for an apprenticeship or some other agreement which is to his or her benefit he or she is usually bound by such agreements.

The question of benefit is determined by the facts of each case. For example, in *Mercantile Union Guarantee Corp Ltd v Ball* (1937) 2 KB 498 a minor was sued for arrears of instalments under a hire purchase agreement for a lorry which he used in his haulage business. The court held that the purchase of a large and expensive lorry on very expensive hire purchase terms could not be for the infant's benefit.

By way of contrast in *Mercantile Credit Ltd v Spinks* (1968) QWN 32 the Supreme Court of Queensland held that an infant aged 20 was liable to repay a loan to a finance company. The infant had fraudulently misrepresented that he was over 21. The loan was for a vehicle which was indispensable to the infant in his occupation as a sales representative.

In *Minister for Education v Oxwell Moreschini* (1966) WAR 39 the Western Australian Supreme Court held that a teacher training agreement signed by an infant aged 17 was enforceable against both her and her father who had also signed the agreement as a guarantor. The court found that the contract was for the benefit of the infant. Her defence of infancy failed because the terms of the contract provided her with a profession and financial support while she was in the course of training.

CASE STUDY

Chaplin v Leslie Frewin (Publishers) Ltd (1966) Ch 71

Facts: In March 1965, Michael Chaplin was aged 19 (the age of majority was then 21). He was the son of Charlie Chaplin the famous actor in silent movies. He entered into two written agreements with a publisher to write his autobiography, in order to earn money to support his wife and child.

Legal Issue: Could the publisher enforce the agreement against Michael Chaplin?

Decision: The English Court of Appeal held that the contract was like a contract of service because it would enable him to earn his living and support his family.

It was therefore a contract for his benefit and was enforceable by the publishers.



YOU BE THE JUDGE



Suppose Michael Chaplin was not married, did not have a child and lived at home being supported by his parents.

Do you think the same decision would be made? Why? [A]

LONG-TERM CONTRACTS – BINDING UNLESS REPUDIATED.

A third exception is those contracts which involve a continuing obligation, and contracts where a minor acquires property of a permanent nature.

A minor can buy shares in a company, join a partnership, or purchase the goodwill of a business. Unless the minor repudiates such contracts within a reasonable time after turning 18, the agreements become legally binding. What is a 'reasonable time' is a matter for interpretation by the court.

WHERE AN INFANT NEEDS TO RATIFY A CONTRACT FOR IT TO BE BINDING

On reaching 18 years an infant may elect to confirm an agreement made previously, so that he or she becomes legally bound by the terms of the contract. This is known as ratification. Generally, any contract which is not already binding, such as the purchase of goods which are not necessities, must be ratified for it to be binding on the infant.

PRACTICAL APPLICATION

Conduct a survey of your class using the following questions: [C] [A]

1. Give your age and the name of the other party to any agreement you have entered as a party.
2. What is the purpose of the agreement?
3. What are the terms of the agreement?
4. What will happen to the agreement when you turn 18?
5. Select two of the students who have entered agreements. Write to each of them advising about their current legal position and recommending a course of action when he or she turns 18.

LACK OF GENUINE CONSENT?

Previously, you have read that it is necessary for there to be a 'meeting of the minds' for parties to enter a valid binding agreement. **Sometimes, the state of mind of each party, at the moment agreement is reached, means that this 'meeting of the minds' does not occur.** This can be because of:

- ▶ Mistake of law
- ▶ Mistake of fact
- ▶ Misrepresentation
- ▶ Duress
- ▶ Undue influence
- ▶ Unconscionability
- ▶ Unfair contract terms

Mistakes are easily made. They are made all the time in minor contracts when people buy things and hand over cash. These mistakes are usually remedied on the spot.

A discussion of the above categories follows.

MISTAKE OF LAW

Sometimes parties to contracts seek to avoid their obligations by claiming they did not know the applicable law when they entered the contract. These parties claim that if they had known the law, they would not have entered into the contract.

Many laws are not widely known. Despite this, if one or both parties to a contract makes a mistake as to the law, such a mistake cannot be used to set aside the contract. Everyone should know that 'ignorance of the law is no excuse'. Everyone is presumed to know the law and cannot say that lack of knowledge of the law is a reason for setting aside a contract.

MISTAKE OF FACT

One or both of the parties to a contract may make a mistake of fact. The courts do not necessarily set aside contracts when a mistake is made. It is only where the court can say that mistakes were such that 'a reasonable man' would not have entered into the contract that it would set aside such a contract.

CASE STUDY

Lewis v Averay (1972) 1 QB 198

Facts: Lewis sold his car to a man who said he was Richard Green, a well known film actor, and showed a studio pass to prove it. The man gave a valueless cheque and, before the fraud was discovered, the man (Richard Green) sold the car to Averay who bought it in good faith. Lewis sued Averay for the value of the car.

Legal Issue: Could Lewis recover the car or its value from Averay?

Decision: On the face of the dealing, Lewis made a contract with the man who said he was Richard Green.

The mistake as to his identity did not mean that there was no contract, with the man who said he was Richard Green (though it could be set aside for fraud). This however did not apply to Averay who bought the car in good faith (with no knowledge of the fraud) for value. Property in the car had therefore passed to Averay and Lewis could not recover.



YOU BE THE JUDGE



Suppose Averay admitted that he and 'Richard Green' had discussed giving Lewis a valueless cheque and that Averay at the same time agreed to buy the car from 'Richard Green' for a lesser amount.

Do you think the Judge would have made the same decision? [A] [E]

MISREPRESENTATION

Usually when parties are negotiating a contract, they will say things to help each other reach a concluded agreement. When it is argued that a contract should be avoided because of misrepresentation, one party is usually seeking to avoid the contract because he or she has relied on something said by the other party.

Beyond the Black Stump



A misrepresentation is a representation which is untrue. Put another way, it is a statement of fact which is untrue. It does not have to be a term of the contract, it may simply be an oral statement to draw the other person into a contract. A misrepresentation may be made **deliberately** or **innocently**. This distinction is important because it affects the rights of the injured party.

If there is misrepresentation, the injured party may then terminate or end the contract. Such a contract is said to be voidable. That is, the contract may be ended by the injured party. This will give the injured party certain rights against the party making the misrepresentation.

THE DIFFERENCE BETWEEN INNOCENT MISREPRESENTATION AND FRAUD.

Obviously, a misrepresentation may be made innocently or fraudulently. A person may make a statement believing it to be true and not knowing that what he or she says is incorrect. This would be an example of innocent misrepresentation. On the other hand, someone else saying the same thing, could make the same statement knowing it is untrue, or without believing it to be true, or not even caring whether it is true or not. Here the misrepresentation is fraudulent in nature.



In the case of *Derry v Peek* (1889) 14 AC 337 it was said that fraud exists 'when it is shown that a false representation has been made: (a) knowingly, (b) without belief in its truth, or (c) recklessly, not caring whether it be true or false'.

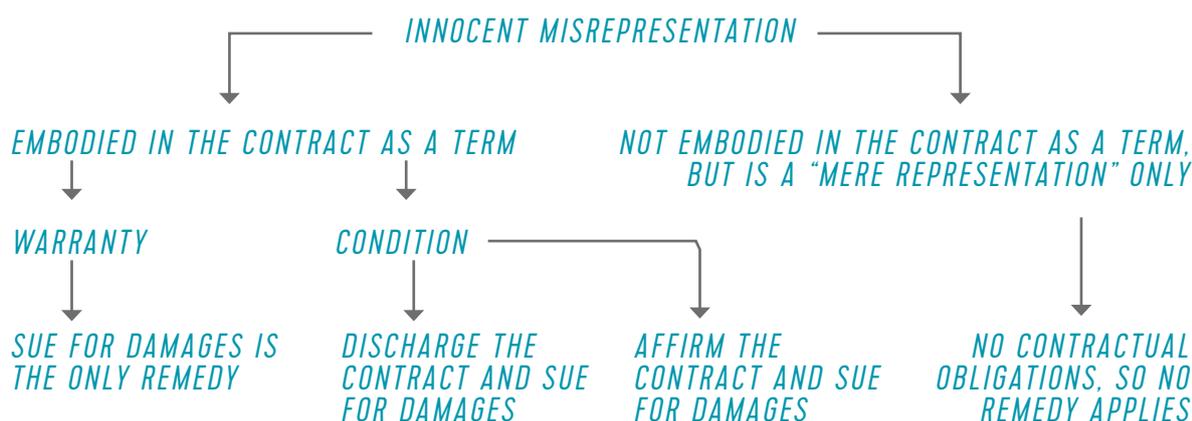
So, for fraudulent misrepresentation to exist, it must be established that:

- ▶ there is a representation of fact (not opinion).
- ▶ the representation must be untrue.
- ▶ the person who makes the representation must know that what he or she is stating is false,
- ▶ or he or she must not believe it is true, or not care whether it is true or false.
- ▶ the person who makes the representation must intend the other party to act on it.
- ▶ the representation must have been acted on by the other party.
- ▶ the party claiming must have suffered damage.

If all of the above elements are established, an action to terminate a contract because of fraud will succeed.

If a misrepresentation has been made innocently the remedies available depend on whether or not the misrepresentation concerns a term of the contract. Should it be classified as a 'mere representation' (sales talk is a good example), and not a term, then no remedy exists. The contract is valid. On the other hand, if a term of the contract is affected, the remedies depend on whether the term is a warranty or a condition.

Only in the case of an innocently misrepresented condition may the contract be ended or discharged, though the injured party does have the option to continue with the contract and sue for damages later. In the case of a warranty, the only remedy is to sue for damages. What can happen in the case of innocent misrepresentation is shown in the diagram below.



CASE STUDY

Holmes v Jones (1907) 4 CLR 1692

Facts: Jones and others purchased a pastoral property from Holmes. In the course of negotiations, Holmes wrote a letter to Jones stating the number and ages of the cattle upon the property.

This information was incorrect. Subsequently, Jones and his fellow purchasers sent an agent to inspect the property and he was given the correct information. The contract was then signed.

Legal Issue: Jones and his fellow purchasers sought rescission of the contract on the basis that there was

fraudulent misrepresentation as to the number and ages of the cattle upon the property in the letter sent to them.

Decision: The action failed. Jones and the other purchasers could not show that the misrepresentation induced the contract, since they had chosen to rely upon the report of the agent. They had not relied upon the misrepresentation in the letter as they entered the contract after receiving the correct information.

DURESS

Duress is actual or threatened violence (or imprisonment) to the contracting party, or his immediate family or near relatives, by the other party to the contract, or some person acting on behalf of such other party. A person will not be held to the terms of a contract into which he has been forced by actual or threatened violence, because he has been deprived of his free will to act.

UNDUE INFLUENCE

Undue influence occurs when one person uses the power he or she holds over another person to cause that person to enter into a contract. It is not a free voluntary act. Undue influence is a type of moral pressure. Settled cases have set out certain relationships where undue influence is presumed to exist. The onus of proving that it was not exercised is on the party denying it. That party must prove that he or she did not exercise undue influence. These relationships are:

- ▶ parent and child;
- ▶ guardian and ward;
- ▶ trustee and beneficiary;
- ▶ solicitor and client;
- ▶ religious adviser and devotee; and
- ▶ physician and patient.

It is also possible to establish that a relationship of undue influence has occurred in other circumstances as well. The onus of proof is on the claimant to establish that a relationship of undue influence exists if it is not one of the settled categories.

CASE STUDY

O Sullivan v Management Music Agency Pty Ltd (1985) QB428

Facts: In 1976 the rock star, Gilbert O'Sullivan, sued his manager for the profits earned by his manager as a result of an agreement entered into in 1970 when he was still an unknown postal clerk.

Legal Issue: Was the contract able to be set aside because of undue influence?

Decision: The court found in favour of O'Sullivan and also held that the copyrights of the songs and the master tapes be handed over to him. It said that the agreement was the result of undue influence exercised over him by his manager.

If a relationship of undue influence, or actual undue influence has been established in relationships other than those listed above, the onus of proof then shifts from the person claiming the undue influence to the other party. That is, it shifts to the person who has been influencing the first party. To successfully defend the case, that party must prove that the transaction in question was the 'pure voluntary and well-understood' act of the other. The claim would be, therefore, that though the weaker party entered into a contract with him or her it was not because of any undue influence on his or her part.

UNCONSCIONABILITY

It should be already apparent from reading the earlier parts of this chapter that people are presumed to know their own minds, and that the court will not interfere where contracts are entered into by parties of their own free will. A court will not interfere simply because a part of a contract or a term of the contract operates harshly against a party to a contract.

Sometimes, however, there is inequality of bargaining power. For example, in *Lloyds Bank Limited v Bundy* (1975) QB 326, an elderly farmer guaranteed the indebtedness of his son's company. The elderly farmer was not able to resist the pressure put on him to sign the guarantee. He did not understand the terms of the guarantee and he was not given independent advice. The court set aside the guarantee on the ground of undue influence. In *Bundy's case*, Lord Denning MR. said:

English Law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers power for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of another.

In Australia, it was not until 1983 in *Amadio's case*, that the High Court had an opportunity to deal with these issues. In that case, the Court said that where someone is placed at a special disadvantage and unfair or unconscionable advantage is then taken of the opportunity, it could set aside the transaction.

CASE STUDY

Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447

Facts: Mr and Mrs Amadio were an elderly Italian couple. They had little formal education and limited knowledge of English. They signed a mortgage to the Commercial Bank of Australia over a block of shops they owned as security for payment of the bank debts by one of their son's building companies. The mortgage included a guarantee under which they became liable for the total present and future indebtedness of their son's company.

When they signed the mortgage/guarantee they believed their son's company was prosperous. It was, in fact, in serious financial difficulty and the bank knew this. Their son telephoned them just before they signed and told them their liability was limited to \$50,000 and would end after six months. Later the same day the manager of their son's bank called on Mr and Mrs Amadio at their home with the mortgage/guarantee contract. They did not try to read the document. The manager did not try to explain

its meaning or effect except to tell Mr and Mrs Amadio that it was not correct that it would end in six months. After they signed, the bank manager left without even leaving them a copy of the agreement. The son's company went into liquidation and the bank claimed nearly \$240,000 from Mr and Mrs Amadio under the terms of the mortgage/guarantee.

Legal Issue: Could Mr and Mrs Amadio have the contract set aside?

Decision: The High Court held that Mr and Mrs Amadio were entitled to have the contract set aside on the grounds of unconscionable dealing. They were in a position of special disadvantage. They were mistaken about the extent of their responsibility for the debts of their son's company. They mistakenly believed their son's

CASE STUDY CONTINUED...

company was financially viable. Their age and background contributed to their position of special disadvantage. Their son's misleading advice also contributed to this position. Also, it must have been obvious to the bank manager that it was not a prudent transaction for Mr and Mrs Amadio to enter into. It should have been clear to the bank manager that they did so because they were unable to make a judgment as to what was in their best interest.



WHAT DO YOU THINK?

Do you think it is possible to describe all circumstances which might give rise to a situation of special disadvantage? [R]

Much earlier than *Amadio's case* in the High Court decision in *Blomley v Ryan* (1956) 99 CLR 362 at 405, Fullagar J. said that it was impossible to classify satisfactorily all of the circumstances which might lead to the Court setting aside a transaction. He listed some of them:

poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.

The remedy of unconscionability is now enshrined in statute law. Where the terms of a contract have been found by a court to be 'unjust' or 'unconscionable, harsh or oppressive' then the court can grant relief of the kind granted in *Amadio's case*. This has been the situation in New South Wales since 1980 when it introduced the *New South Wales Contracts Review Act 1980*. Now, the *Competition and Consumer Act 2010 (Cth)* (the CCA) which applies Australia wide includes provisions which contain a general prohibition against persons and corporations:

- ▶ in trade or commerce
- ▶ engaging in unconscionable conduct
- ▶ in connection with the supply of goods or services to individuals and corporations (not a listed public company)
- ▶ where the acquisition of the goods or services was for use by a consumer for individuals and for business purposes for corporations.

The CCA is broader in its application than the common law concept of unconscionability, which is imported into the Act. It allows the courts to apply the remedies under the former *Trade Practices Act*.

The CCA contains a series of considerations to which the court may have regard for the purpose of determining that unconscionable conduct has taken place. These are set out in the *Australian Consumer Law (ACL)* (schedule 2 of the CCA) in section 21(2) as they relate to consumers and in sections 22(2) and 22(3) where goods or services are supplied to a business.

Broadly speaking, the court may have regard to a number of matters set out in the CCA, including the following:

- ▶ the relevant strengths of bargaining positions of the parties;
- ▶ whether consumers are required to comply with conditions not reasonably necessary to protect a supplier's legitimate interest;
- ▶ whether the consumer is able to understand documentation;
- ▶ whether undue influence or pressure was exerted or unfair tactics used; and
- ▶ the price for alternative identical or equivalent goods or services.

Additional requirements where businesses are involved are found at sections 22(2) and 22(3) of the two ACL.

It is important to note that all of the common law concepts set out earlier in this section about unconscionability have now been taken up and extended by the statute law in the ACL.

LEGALITY OF OBJECT

The object of a contract can be described as **the purpose for which it came into being**. If the object of a contract is illegal, the contract is void and of no legal effect.

Agreements entered into by two or more people to commit a crime are not enforceable at law. An obvious example is the agreement made by a person driving a getaway vehicle for a group of bank robbers. He promises to wait outside the bank for a share of the robbery and to drive the bank robbers away from justice. Such an agreement is illegal because the object of the contract is illegal. The purpose of the agreement is to rob a bank.

This is an extreme example but there are other situations where it is not acceptable to the community to enforce agreements between people as these contracts are regarded as illegal.

Here are some examples of contracts which are illegal:

- ▶ An agreement to commit a crime or tort.
- ▶ An agreement which hinders the administration of justice.
- ▶ An agreement which prejudices the relationship of one country with another.
- ▶ An agreement which tends to injure the public services.
- ▶ An agreement designed to defraud the Deputy Commissioner of Taxation.
- ▶ An agreement which is an unreasonable restraint of trade.

There are contracts which are illegal because a Commonwealth or State Act says that they are. For example, in Queensland it is not possible to enter a contract or wager with a starting-price bookmaker. It is also not possible in Queensland to transfer the ownership of a motor vehicle without producing a roadworthy certificate. Therefore any agreement to sell a car without a roadworthy certificate is void and of no legal effect.

If a contract is illegal then it is void.

PRACTICAL APPLICATION

In class discussion develop an example of each of these illegal contracts. Explain what aspects of good order are disturbed by these contracts. [S] [A] [E]

In our modern free enterprise economy, there are many commercial agreements in which organisations try to restrict the free movement of labour. This happens between employers and employees, in business relationships, and in sport. Courts are frequently asked to adjudicate in these disputes.

RESTRAINT OF TRADE

Contracts which contain unreasonable restraints of trade will have an unlawful purpose and therefore be void. What is unreasonable is always a question of fact but generally the courts have approached this issue by considering the following:

- ▶ The restraint must be no wider than is reasonably necessary to protect the person for whose benefit it is imposed.
- ▶ It must be in no way injurious to the public.

CASE STUDY

Woolworths v Banks (NSW Supreme Court) [2007] NSW SC45

Facts: Woolworths sued Mr Banks, a former executive employee. Mr Banks employment contract said that he could not be employed by “a business competitor” for a period of up to 12 months after his employment with Woolworths ended. Mr Banks was employed by Myer.

- ▶ Woolworths argued that Myer was “a competitive business” as defined in the contract; and
- ▶ Mr Banks should be restrained from accepting employment at Myer for a six month period after leaving Woolworths in order to protect information confidential to Woolworths and

known to Mr Banks. It argued that this restraint was reasonably necessary to protect Woolworths.

Legal Issue: Was Myer a business competitor?

Was the restraint sought by Woolworths reasonably necessary in the circumstances?

Decision: Woolworths was not successful. The court found that the needs of the two companies were quite distinct. Myer was not a business competitive with Woolworths. Further, the court found that Mr Banks did not have confidential information belonging to Woolworths that would benefit Myer. The restraint was not reasonably necessary.

CASE STUDY

Clifford Davis Management Ltd v WEA Records Ltd (1975) 1 WLR 61

Facts: Two members of the rock group ‘Fleetwood Mac’ entered into an agreement with the group’s publisher/ manager. It provided for the copyright in any musical composition to be vested in the publisher for the consideration of one shilling per composition. The agreement was to last for a period of five years and at the option of the management could be extended for a further five years.

The copyright was worldwide.

Legal Issue: Could the agreement be set aside so that the group could compose for another publisher?

Decision: The court set aside the contract on the ground that it was an unreasonable restraint of trade as it required the composers to give their services to one person only, to the exclusion of all others, for a long term of years. It was considered that the songwriters were in a disadvantageous position. There was inequality of bargaining power. The needs of the songwriters were dependent upon the publisher’s will, the publisher being skilled in business and finance whereas the composers were not. The composers had received no independent advice, legal or otherwise, when the agreements (which were in standard form contract style and full of legal phrases) were signed.

CASE STUDY

Adamson v West Perth Football Club (Inc) (1979) 27 ACR 475

Facts: Adamson was an Aussie Rules league footballer who had played for West Perth. He moved to South Australia and applied to the National Football League of Australia Ltd for clearance to play for the Norwood team in South Australia. The rules of the National Football League included clearance and permit regulations which imposed restrictions on the ability of players to change clubs.

Legal Issue: Were the regulations of the NFL an unreasonable restraint of trade?

Decision: The Federal Court held that the market to which the regulations applied could not be limited and therefore the regulations operated as a restraint of trade which was unreasonable and unjustified.

21.2 DISCHARGE OF CONTRACTS

A contract may be discharged by:

- a. performance;
- b. agreement between the parties;
- c. operation of law;
- d. frustration; and
- e. breach of contract.

A. DISCHARGE BY PERFORMANCE

Most contracts are discharged by performance. This means that once the parties to a contract have carried out all their obligations under the contract, the contract is over.

CASE STUDY

Cutter v Powell (1795) 6 TR 320

Facts: A shipowner gave Cutter a written note promising to pay him 30 guineas if he did his duty as second mate in the Governor Parry on its voyage from Kingston to Liverpool. Cutter died during the voyage, and his executor sued for his wages.

Legal Issue: Could Cutter be paid his wages even though he did not finish the voyage?

Decision: The Court decided that it was a condition precedent to any payment that Cutter perform his duty during the whole voyage. The executor's action failed.

B. DISCHARGE BY AGREEMENT

In the same way that a contract is created by agreement, it may be ended by mutual agreement. The original contract can be ended by the parties cancelling or by substituting a new contract for the old one.

Sometimes the original contract may contain a term of which allows either party to end the contract by giving appropriate notice. Alternatively, a term of the original contract may provide for discharge or termination when some event occurs.

When drafting a contract the parties should always include a term which says how the contract is to be ended if a party wishes to do so. This is particularly important in contracts such as partnership agreements.

HYPOTHETICAL

Facts: Adam agrees to allow Colin to use his flat, rent-free, while Adam is overseas for a year. The agreement contains a clause requiring Colin to vacate the flat if he marries during the period of the contract.

Legal Issue: If Colin gets married, could Adam require him to vacate the flat? [A]

C. DISCHARGE BY OPERATION OF LAW

A contract can be discharged without reference to the wishes of either party by operation of law. For example, where one party becomes bankrupt he is generally released from personal liability under contracts entered into prior to bankruptcy. However, the Trustee in Bankruptcy who winds up the bankrupt's estate is required to pay the bankrupt's debts to the extent possible considering the financial resources available. Some people owed a debt will receive a part payment (which fully discharges the debt) while others may receive nothing at all. A bankrupt may not be sued at a later time for debts existing at the time of the bankruptcy action, providing the bankrupt fully discloses them.

D. DISCHARGE BY FRUSTRATION

There have been occasions when contracts could not be performed because of **circumstances outside the control of the parties**. When this occurs, the law says that the contract is frustrated. What are frustrating circumstances is a matter of fact, and the courts have developed tests for assessing whether or not the frustrating event does end the contract. The test most commonly applied is that if the frustrating event makes performance of the contract something **radically different** from that which was contemplated by the parties then the contract is said to have been frustrated.

CASE STUDY

Krell v Henry (1903) 2 KB 740

Facts: The plaintiff hired a flat in Pall Mall to the defendant for 26 and 27 June 1902. The defendant wanted the flat to enable him to view the coronation procession of Edward VII. The procession was cancelled due to the King's illness.

Legal Issue: Could the plaintiff compel the defendant to pay the rent?

Decision: The court held that the contract was 'frustrated', because performance was rendered pointless.

Sometimes government interference can have this effect. Other examples would be when a person who is bound to perform certain personal services dies or the subject matter of the contract is destroyed before performance can take place. For example, a building which is hired for a future date may be burnt down before the hiring can take place.

CASE STUDY

Jackson v Union Marine Insurance Company Limited (1874) LR 10 CD 125

Facts: The defendants contracted to ship a cargo by the SS Orlando.

The cargo was to leave Alexandria in January. The ship became stranded before the date of the contract and was not available as a cargo vessel.

Legal Issue: Could the defendants avoid the contract because of the unavailability of the SS Orlando?

Decision: The court held that the contract was at an end due to frustration. The ship, while still in existence, was no longer available for the purposes of the contract.

When a contract is ended by 'frustration', the parties do not lose all their rights under the contract. Any rights which the parties are entitled to up until the exact moment of frustration may be enforced each against the other. Similarly, any liabilities the parties have under the contract may be enforced up until the moment of frustration.

It must be stressed that just because a contract becomes tiresome or a burden does not amount to frustration. The performance of a contract must be no longer possible.

E. DISCHARGE BY BREACH OF CONTRACT

To breach a contract means to break it. A party can breach a contract either by breaking a part of the contract, or by repudiating the whole of the contract. A repudiation occurs when one party renounces the contract completely. This can be done by simply saying, 'I do not wish to proceed with this contract' or by making it impossible to perform the contract. Repudiation can also occur by one party doing something totally inconsistent with his or her obligations under the contract.

A contract is not automatically terminated when one party repudiates it. The other party is entitled to reject the repudiation and treat the contract as still being on foot. When it is decided to treat the contract as being still in existence, the injured party can insist on performance. However, if the injured party accepts the repudiation, damages are then the only remedy available.

When one party is in breach by not fulfilling a term of the contract, the nature of the term which has been breached will decide whether or not the injured party can elect to end the contract. If the term breached is a condition, then the injured party can elect to discharge the contract and sue for damages. On the other hand, if the breached term is a warranty then the injured party cannot elect to terminate or discharge the contract but only has a remedy in damages.

PRACTICAL APPLICATION

KING JOKER WINS PRICE OF BERNIE BANTER

SOURCE: WAYNE HOWELL, THE BULLETIN (GOLD COAST), 14 JUNE 2003 (EXCERPTS ONLY)

Celebrity chef, Bernard King, joked about big bums and unmarried mothers with ghastly hair after a District Court judge yesterday found his offensive comments did not warrant the termination of his contract.

King won \$101,978 in damages after Judge Richard Rolfe found Brisbane-based cookware company Dine-Rite had unlawfully cancelled his ten-year contract four years early in 1998.

King said after the hearing he was funny, not offensive. King said mothers were the most delightful creatures who huddled together in little ghettos in special suburbs like Inala in Brisbane, Ultimo in Sydney and Footscray in Melbourne.

"They club together in a large group. You can't walk down Glebe Point Road in Sydney without being bashed over the head by an unmarried mother with ghastly hair and a kid in a pram," he said outside the NSW District Court.

But King conceded he might have "crossed the line a smidgin" when he told a cooking demonstration audience "if you don't brown it well enough it's going to come out like a stillborn baby".

Dine-Rite claimed he breached his contract to promote its products by being banned from the Brisbane and Mackay shows, making offensive comments during cooking demonstrations, promoting rival products and refusing to appear at some shows.

Judge Rolfe rejected all the claims, but said the stillborn comment was in extremely bad taste. But he said the remarks did not warrant King's contract being terminated, especially after he agreed not to repeat them when he was chastised by Dine-Rite director, Paul Cunningham.

Judge Rolfe said Dine-Rite knew King was a flamboyant entertainer who could attract crowds by employing jokes, satire, humour and sending up audience members.

1. Who is the plaintiff? [C]
2. Who is the defendant? [C]

PRACTICAL APPLICATION CONTINUED...

3. What allegation did King make against the company Dine-Rite? [C]
4. In whose favour did Judge Rolfe decide? [C]
5. Outline the reasons given by Judge Rolfe for his decision. [C] [A]
6. Do you think that the judge's decision was fair? [E]
7. Would it make any difference to the judge's decision if there was a term of the contract which said:

'King shall not make comments which offend ordinary standards of decency and taste while conducting cooking demonstrations when he advertises Dine-Rite products'.

Give your reasons in a letter of advice to Dine-Rite suggesting the inclusion of such a clause in future contracts. [E] [R]
8. This story was reported in 2003. Do you think that if these comments have been made in 2018, the judge sitting in the trial might have made a different decision? How could he/she have done this if there was no term of the contract like the one set out above in question 7? [C] [S] [A] [E]

CASE STUDY

Brien v Dwyer (1978) 141 CLR 378

Facts: The parties entered a contract for the sale and purchase of land. It was a term of the contract that a deposit had to be paid within fourteen days of the date of the contract. The deposit was 10% of the purchase price. The buyer failed to pay the deposit in the time stipulated by the contract. The seller immediately gave notice terminating the contract on the basis that the buyer's failure to pay the deposit was a breach of a fundamental term of the contract. The seller alleged that the requirement to pay a deposit was a condition of the contract. As such, it was a fundamental term that goes to the root of the contract entitling the seller to immediately

terminate and renounce further performance. The buyer disputed this.

Legal Issue: Was the requirement to pay the deposit within fourteen days of the date of the contract a condition of the contract which entitled the seller to terminate?

Decision: The court decided that the term relating to the deposit was an essential term (a condition) going to the very root of the contract. The breach of that term would immediately entitle the seller to terminate the contract.

REVIEW

1. Describe the following: [C]

Void | voidable | necessities | repudiation | ratification

2. Describe and explain the following: [C] [A]

illegality of purpose | mistake of fact | misrepresentation | duress | undue influence |
 restraint of trade | unconscionability | breach of contract

3. Describe and explain when a consumer can declare all or part of the contract void (end it) under the CCA because of unfair terms. [A]
4. Describe and explain the test applied to determine if an event occurs which discharges a contract by frustration. [A] [E]

TOPIC 2: CONTRACTUAL OBLIGATIONS

CHAPTER 22: AUSTRALIAN CONSUMER LAW

FOCUS SUBJECT MATTER

22.2 THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

22.2 STATUTORY PROTECTION AVAILABLE UNDER THE *AUSTRALIAN CONSUMER LAW* (ACL)

TO UNDERSTAND AND APPRECIATE:

- ▶ the roles of the ACCC and the ACL in the law of contract affecting consumers;
- ▶ there is a range of statutory measures to counter what would otherwise be unfair relative bargaining positions between parties to contracts under the common law; and
- ▶ most statutory measures affecting consumers (e.g. the ACL) are not able to be varied by contractual agreement.

22.1 THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

In **Chapter 18.2: Consumers Need Statutory Protection** we set out examples which showed the importance of government intervention to protect consumers. In truth, it has been the case for many years that this has happened. When the *Trade Practices Act 1974* (Cth) was renamed the *Competition and Consumer Act 2010* (Cth) (the CCA), and the *Australian Consumer Law* (ACL) was incorporated into Schedule 2 of the CCA, it heralded a new era for consumer protection. The mandate of the ACCC is to protect consumer rights, business rights and obligations, perform industry regulation and price monitoring and prevent illegal anti-competitive behaviour.

Our society is dominated by large corporations using high-powered advertising and sales strategies. Consumers and these corporations are not in an equal bargaining position. In the past, trading corporations were able to rely on a long-standing legal saying, ‘**caveat emptor**’ which means ‘**let the buyer beware**’. While the charter of the ACCC under the CCA is not intended to favour either the consumer or supplier/retailer, the ACCC has exercised its authority in a number of retail areas, for example:

- ▶ fining retailer Target for false advertising;
- ▶ fining Woolworths for anti-competitive liquor deals;
- ▶ reporting on the strategies used by Woolworths and Coles to prevent shopping centre managers from leasing space to other competing supermarkets; and
- ▶ in conjunction with state and territory offices of fair trading, developing and enforcing mandatory consumer product safety standards (e.g. in food products, motor vehicles, electrical goods, therapeutic goods and agricultural products such as pesticides).

RESEARCH

Go online to the website of the ACCC, at www.accc.gov.au/consumers.

1. Describe the range of topics set out on the relevant page on the ACCC website. [C]
2. Select one of the topics of interest to you (e.g. consumer rights and guarantees, consumer protection, misleading claims and advertising, sales and delivery, internet and phone). Investigate the aspects of the topic you have chosen which are set out on the website, then search for examples of them in the media. Prepare a report to present to your class and teacher. Describe and explain how the ACCC website addresses your chosen topic, and decide how useful the website would be to consumers. [C] [S] [A] [E] [R]

The role of the ACCC is to act both on behalf of **all consumers as a group** as well as **individual consumers** which are set out later in this chapter. A good recent example of its ability to provide policy-generating influence in the area of consumer protection is its report released on 10 July 2018 following its inquiry into electricity prices. This is the subject of the Practical Application which follows.

PRACTICAL APPLICATION

THE ACCC SAYS YOUR ENERGY BILLS TOO HIGH. HERE'S HOW IT THINKS PRICES CAN BE SLASHED.

SOURCE: AMY BAINBRIDGE, ABC. NET.AU/NEWS, 11 JULY 2018 (EXCERPTS ONLY)

The consumer watchdog believes Australians are paying too much for their electricity.

A lack of competition in the energy market and policy mistakes by successive state and federal governments has added significant costs to power bills, according to the Australian Competition and Consumer Commission (ACCC). The watchdog says power bills can be reduced by at least 25%... if governments adopt a series of recommendations from its report on the energy market.

Some of the suggestions include:

- ▶ setting a default rate for electricity prices;
- ▶ changes to the way companies advertise discounts; and
- ▶ voluntary write-downs of network over-investment.



The biggest change would require a base or 'default' price for power in each jurisdiction... (This will mean) when a customer sees the discount of 20% one player and 15% of another player, they have every confidence that 20% discount is the best offer. The ACCC said another key way to slash bills would be for governments to fund the write-down of network assets, such as the poles and wires. Tony Wood from the Grattan Institute said that was a good idea.

ENERGY INDUSTRY NOT HAPPY ABOUT P.M. WIELDING A 'BIG STICK'

SOURCE: COLE LATIMER, PETER HANNAM, SYDNEY MORNING HERALD, 21 AUGUST 2018. (EXCERPTS ONLY)

The energy industry has reacted sharply to proposals for forced sales of power company assets and government-fixed electricity prices in the wake of yet another major policy shift. Prime Minister Malcolm Turnbull announced yesterday the quashing of federally legislated emissions reduction targets within the NEG, saying the government would pivot to implement recommendations from the recent Australian Competition and Consumer Commission electricity investigation to reduce high power costs as a higher priority.

The ACCC's recommendations focused on preventing excessive market power and better informing consumers. It stopped short of seeking the power to force companies to sell assets, but the government flagged it would introduce that measure as a 'big stick' prompting concern from business. 'Forced investiture would be a serious step specifically ruled out by the ACCC in their recent comprehensive report on improving electricity prices,' said Australian Industry Group chief executive Innes Willox, who argued the potential for the forcible breakup of electricity businesses needs to be treated with caution.

Federal Treasurer Scott Morrison said the potential to regulate prices through the setting of a maximum standing offer price, would 'protect consumers'. But Australian Energy Council said re-regulating electricity prices and 'aggressive market interventions' would not provide a long-term answer to energy prices. Environmental groups generally panned the Turnbull Government decision to axe emissions targets.

PRACTICAL APPLICATION CONTINUED...

1. Is the ACCC report on electricity prices within its authority and expertise? [C]
2. List three suggestions made by the ACCC to bring about reduced electricity prices. [C]
3. Describe and explain how the ACCC proposes to make it possible to compare discounted prices? [C] [A]
4. Does the ACCC have the power to put into effect and enforce any of the proposals it has suggested? [C] [A] [E]
5. Name the stakeholders who react to the Prime Minister's announcement that the government would implement proposals by the ACCC. [C]
6. What policy did the government announce which did not adopt a proposal by the ACCC? [C] [S] [A]
7. Describe the reaction of each of the stakeholders to the policies announced by the Prime Minister. [C] [S] [A] [E]
8. Describe and explain the role of the ACCC in this conversation between the government and the different stakeholders. Who represents the interests of consumers in this conversation? [A] [E] [R]

22.2 STATUTORY PROTECTION AVAILABLE UNDER AUSTRALIAN CONSUMER LAW (ACL)

Each state in Australia has a government authority which administers the laws that affect consumers, and the businesses which provide goods and services to consumers. All of these authorities predate October 2010, which is the date on which the legislation containing the ACL was passed by the government and came into being on 1 January 2011. This legislation was subsequently adopted by each state in Australia. It overrides the state legislation if it addresses the same issue. This does not mean that all previous state acts have been replaced, but that when looking for the remedies which apply to consumers, it is important to go to the CCA (ACL) first and see if it applies. In this chapter we will not look at the previous state laws, and will only look at the ACL.

We have already seen in **Chapter 21.1: Setting Aside Contracts**, that all contracts can be set aside on the basis of **unconscionable conduct**. The ACL also contains provisions that contracts can be set aside for containing **unfair contract terms**, and for **misleading or deceptive conduct**. The remedies for misleading or deceptive conduct can be relied on by both businesses and consumers.

CONSUMER GUARANTEES

We have seen that all contracts can be set aside on the basis of **unconscionable conduct**, and where there are **unfair contract terms**. The ACL also contains provisions that contracts can be set aside for **misleading or deceptive conduct**. These remedies can be relied on by both businesses and consumers.

GUARANTEES RELATING TO THE SUPPLY OF GOODS

There are provisions in the ACL called **Consumer Guarantees** on which only consumers can rely. These are set out in s51 to s68 of the ACL. The ACL introduces a new approach to consumer contracts. Previously the Act contained a number of warranties and conditions which were implied into consumer contracts. These are now called consumer guarantees.

1. The supplier must have a right to sell (s51).
2. The buyer has a right to undisturbed possession of the goods (s52).

3. The goods must be free from any security, charge, or encumbrance not disclosed to the consumer (s53).
4. The goods must be of acceptable quality (s54).
5. The goods must be reasonably fit for any disclosed purpose (s55).
6. The goods must match their description (s56).
7. The goods must match the sample or demonstration model (s57).
8. The manufacturer of goods must take reasonable action to ensure that facilities for repair and parts for the goods are reasonably available for a reasonable period (s58).
9. The supplier and manufacturer must comply with any express warranty given or made by the manufacturer (s59).

GUARANTEES RELATING TO SUPPLY OF SERVICES

- ▶ A supplier of services to a consumer guarantees that the services will be rendered with due care and skill (s60).
- ▶ A supplier of services to a consumer, where the consumer, expressly or by implication, makes known to the supplier the particular purpose for which the services are being acquired, guarantees that the services, and any product resulting from the service, will be reasonably fit for that purpose (s61).
- ▶ A supplier of services to a consumer, where the time for supply is not fixed or agreed guarantees that the services will be supplied within a reasonable time (s62).

GUARANTEES NOT TO BE EXCLUDED

- ▶ The guarantees in the ACL are not able to be excluded by the term of a contract between the supplier and a consumer (s64).
- ▶ A supplier of goods and services to a consumer cannot avoid a term of the contract for failing to comply with a guarantee because the term limits the supplier's liability (s64A).

INTERSTATE AND OVERSEAS TRANSACTIONS

- ▶ A supplier of goods and services to a consumer in any part of Australia, is bound by the law of Australia contained in the ACL and not by the law of a state or territory (s7).
- ▶ A supplier of goods and services to an international consumer, or from an international supplier to an Australian consumer is subject to the *United Nations Convention on Contracts for the International Sale of Goods* (the *Vienna Sales Convention*) (s68).
- ▶ The **Consumer Guarantees relating to the supply of goods** are now examined below in some detail, to illustrate how the law in statutes is now of overriding importance to the consumer, and how the common law has been changed.



1. The supplier must have a right to sell (s51).

The seller must have title (ownership) in the goods being sold.

CASE STUDY

Rowland v. Divall [1923] 2KB500

Facts: Rowland, a car dealer, bought a car from Divall. He sold it to a customer. After three months, the car was taken by the police as it had been stolen. The police returned the car to the original owner. Rowland gave a refund for the car to his customer. He then sued Divall seeking an order that he return the money he had paid Divall for the car. Divall did not know, at the time that he offered the car for sale to Rowland, that it had been stolen.

Legal Issue: Did Divall have the right to sell the car to Rowland? Was Rowland entitled to any compensation for work he did on the car before selling it to his customer?

Decision: Divall did not have the right to sell the car as he did not have good title at the time that he sold it to Rowland. He could not obtain good title from the thief.

Ownership remained with the original owner. Divall was ordered to pay back Rowland. Rowland was not entitled to any compensation for the work he carried out on the car.



2. The buyer has a right to undisturbed possession of the goods (s52).

The effect of this guarantee is that the buyer enjoys the use of the goods free from any interference from, or claims by, other persons.

CASE STUDY

Gencab of Canada Ltd v Murray-Jensen Manufacturing Ltd (1980) 29 OR(2D) 552

Facts: Machinery was sold for the purpose of manufacturing a certain product. The seller impliedly warranted that the buyer would be able to use the machinery for that purpose. The holder of the patent on the product threatened to sue the buyer because he was using the machinery without approval.

Legal Issue: Would the seller be in breach of the warranty

to give the buyer quiet enjoyment of the goods?

Decision: The seller was in breach of the implied warranty as to quiet enjoyment because the buyer was brought into a disagreement with the owner of the patent.

3. The goods must be free from any security, charge, or encumbrance not disclosed to the consumer (s53).

The effect of this guarantee is that the buyer is entitled to enjoy the use of the goods free from any interference from, or claims by, other persons. In effect, this guarantee is an extension of the right to undisturbed possession. If the security, charge, or encumbrance is disclosed to the consumer and the consumer buys the goods, it will “take on” these obligations.

HYPOTHETICAL

Facts: Bob transfers a car to his partner Alison. The car is subject to a lease. Bob and Alison draw up an agreement to say she will make the monthly lease payments. The lessor writes to Alison and Bob and confirms that it consents to Alison becoming the owner of the vehicle. Alison stops making the monthly lease payments. The lessor repossesses the vehicle. Alison asks her lawyer if she can get back the car from the lessor.

Legal Issue: Could Alison require the car to be returned by the lessor?

Decision: The lease over the car was disclosed to Alison. The provisions of the ACL do not prevent the lessor from repossessing the car. Alison is not able to stop the lessor from doing so.



4. The goods must be of acceptable quality (s54).

This statutory guarantee says that goods supplied to a consumer must be:

- ▶ fit for the purposes for which they are commonly supplied;
- ▶ free from defects;
- ▶ of acceptable appearance and finish; and
- ▶ as safe and durable as a reasonable consumer would expect.

This guarantee gives a right of action both against the supplier and the manufacturer of the goods.

CASE STUDY

Medtel Pty Ltd v. Courtney [2003] FCAFC151

Facts: Courtney had a Tempo pacemaker implanted in his body. The Therapeutic Goods Administration issued a hazard alert on 5 June 2000 warning that the particular batch of pacemakers:

- ▶ had an increased risk of early battery depletion; and
- ▶ affected some 1,048 people in Australia.

The only way Courtney's pacemaker could be checked was by taking it out of his body and testing it. Courtney's pacemaker, when removed was found to be functioning normally.

Courtney brought an action against Medtel Pty Ltd for compensation under the section of the Trade Practices Act (TPA) which is now replaced under section s54 of the ACL. Mr Courtney alleged that the pacemaker was not of acceptable quality.

Legal Issue: Was Courtney's pacemaker not of acceptable quality, given that both before and after removal, the device was found to be operating normally?

Decision: The judge concluded that a reasonable consumer would expect that the Tempo pacemaker would not be manufactured using materials that would create a substantially greater risk of premature failure than that applicable to pacemakers generally. Because each of the pacemakers were subject to a hazard alert and many of them had actually failed, even though Courtney's was not actually defective, the Judge found that none of the pacemakers were of acceptable quality. Courtney was successful and was awarded compensation for pain and discomfort, but he did not receive compensation for stress, worry and anxiety (damages available under the ACL) because he said that he was already worried before the hazard alert and was only "slightly worried" upon becoming aware that his pacemaker might be defective and would need to be removed to be checked.



WHAT DO YOU THINK?



Do you think it is possible to describe all circumstances which might give rise to a situation of special disadvantage? [A] [E]

CASE STUDY

Grant v Australian Knitting Mills Ltd (1936) 54 CLR 49

Facts: The plaintiff purchased woollen underwear from a retailer and developed dermatitis because of the presence of a chemical irritant in the garments.

Legal Issue: Could Grant sue the retailer for breach of the implied term of merchantable quality?

Decision: The court held that the retailer was in breach of the implied term of merchantable quality. The court stated that 'merchantable quality' means 'saleable' and that the purpose to which the goods are put is relevant to the question.

This condition is not implied if the buyer examined the goods and failed to find defects which an examination should have revealed, or if the defects were specifically drawn to the purchaser's attention.



WHAT DO YOU THINK?



Grant's case was decided before the introduction of the Act. Would it now be decided in the same way? [A] [E]

5. The goods must be reasonably fit for any disclosed purpose (s55).

Where the consumer discloses to the supplier and/or the manufacturer, the purpose for which the goods are being acquired, whether or not the purpose is a purpose for which the goods are commonly supplied, the supplier and manufacturer are bound to provide goods which are reasonably fit for the disclosed purpose.



CASE STUDY

Ryan v Great Lakes Council [1999] FCA 177 (5 March 1999)

Facts: Ryan, as a representative of a number of consumers, sued the Great Lakes Council and a number of oyster growers from Wallace Lake in the Hunter River area of New South Wales. The oysters were contaminated by faeces which the Great Lakes Council allowed to escape from the sewage system into the water ways. Barclay Oysters was one of the oyster growers sued for selling the contaminated oysters. As a result of the contamination of the oysters, Ryan contracted the Hepatitis A Virus.

Legal Issue: Was Barclay Oysters liable under the former Trade Practices Act (now the ACL) for supplying the oysters

to Ryan and other consumers not reasonably fit or fit at all for human consumption.

Decision: The judge said that when consumers buy oysters from an oyster farmer, there is an implied condition that the oysters would be fit for the purpose for which they were intended.

By buying the oysters, the consumer made known to the oyster farmer that they were going to be eaten and they should therefore be reasonably fit for human consumption. Ryan succeeded and was granted compensation.

6. The goods must match their description (s56).

When goods are supplied by description to a consumer, there is a guarantee that the goods will correspond with the description.

CASE STUDY

Elders Smith Goldsborough Mort Ltd v McBride (1976) 2 NSWLR 631

Facts: The plaintiff bought a bull at an auction sale of stud cattle at the 1970 Royal Easter Show in Sydney. The bull was described as 'a breeding bull'. The bull subsequently proved to be sterile. The plaintiff paid \$21,000 for the bull. Its value for slaughtering purposes was only \$500.

Legal Issue: Could the plaintiff establish that there was an implied condition under the Sale of Goods Act that the bull would correspond with its description as a 'breeding bull' and that therefore there was a breach of that implied condition as a result of the bull's sterility?

Decision: The plaintiff purchaser was entitled to recover from the seller (defendant) because there was an implied condition which had been breached by the purchaser. The plaintiff recovered the sum of \$20,500 – the price of the bull less its value for slaughtering purposes.



WHAT DO YOU THINK?



The same result would apply in the above case if ACL s56 was applicable. Do you think that the implied condition which the defendant (seller) breached has resulted in a fair adjustment to the rights of the buyer and seller in this instance? Would it not be fairer to 'split the difference'? [A] [E]

7. The goods must match the sample or demonstration model (s57).

The effect of this guarantee is that goods supplied to a consumer by reference to a sample or demonstration model must correspond to the sample or demonstration model in quality, state and condition and free from any defect not apparent on reasonable examination of the sample or demonstration model that would cause the goods not to be of acceptable quality. This guarantee does not apply where goods are sold at auction.

CASE STUDY

Nichol v Godts (1854) 156 ER 410

Facts: The plaintiff was sold oil as “foreign refined rape oil, warranted only equal to sample”. Oil was delivered equal to the sample, but was not “foreign refined rape oil”.

Legal Issue: Could the buyer reject the oil on the basis of any implied condition under the *Sale of Goods Act*?

Decision: Although the buyer could not rely on the implied condition for the sale by sample as the sample corresponded to the goods, the buyer could still reject the oil as it did not correspond with the description as it was not “foreign refined rape oil”.



WHAT DO YOU THINK?



Is it fair that the seller who might make an honest mistake describing goods should be penalised if a sample is provided which has been checked by the buyer and then the goods delivered correspond with the sample? [A] [E]

8. The manufacturer of goods must take reasonable action to ensure the facilities for repair and parts of goods are reasonably available for a reasonable period (s58).

This guarantee, has the effect of requiring manufacturers to take reasonable action to provide spare parts and repair facilities for goods supplied to consumers.

CASE STUDY

Jillawarra Grazing Co v John Shearer Ltd (1984) ATPR 40-441

Facts: Jillawarra Grazing bought an air seeder from John Shearer, the manufacturer. A number of things went wrong with the air seeder and there was a dispute between the parties about the service and parts provided by John Shearer under the contract of sale. Evidence was led that John Shearer supplied parts (corrected drive gears and a sprocket) to Jillawarra within 24 hours of request by Jillawarra for the parts to be replaced.

Legal Issue: Under s74F of the former *Trade Practices Act* (now ACL s 58) was John Shearer in breach of the obligation to take reasonable action to ensure the facilities for repair and parts for the goods were reasonably available?

Decision: The court decided that John Shearer had provided adequate service and parts within a reasonable time of any request made by Jillawarra and therefore Jillawarra failed in its claim.



9. The supplier and manufacturer must comply with any express warranty given or made by the manufacturer (s59).

This section provides a statutory guarantee that goods supplied to a consumer, other than by auction, will comply with any express warranty given by the manufacturer or supplier. An express warranty is that given to the consumer in writing as part of the contract.

UNFAIR CONTRACTS

It is now possible to set aside all or part of a contract because it contains unfair terms.

A court can declare a term of a contract to be unfair and therefore void. If the contract is not capable of operating without the unfair terms, the court will end the whole contract.

Schedule 2 to the *Competition and Consumer Act 2010* (CCA) entitled the *Australian Consumer Law* (ACL) came into effect on 1 July 2010. The provisions, with respect to unfair contract terms, are designed to protect consumers. They do not apply to business transactions.

A consumer contract is defined by the ACL as:

a contract for supply to an individual who acquires the relevant goods, services or interest in land wholly or predominantly for personal, domestic or household use or consumption.

Previously, the *Fair Trading Act 1999* (Victoria) 2003 had enacted, unfair contract terms provisions. These have now been taken over by the ACL which applies to all states of Australia.

Section 23 of the ACL applies to contracts entered into on or after commencement of the Act. It can also apply to a contract which is renewed on or after the commencement of the Act or varied on or after the commencement of the Act.

Section 23 of the ACL states:

1. [void term]

A term of a consumer contract is void if:

- (a) the term is unfair; and
- (b) the contract is a standard form contract:

2. [effect of unfair term on a contract]

The contract continues to bind the parties if it is capable of operating without the unfair term. A term will only be regarded as “unfair” if it meets three tests:

- ▶ The term must cause a significant imbalance in the parties rights and obligations under the contract;
- ▶ The term must not be reasonably necessary to protect the legitimate interests of the party advantaged by the term;
- ▶ The term must cause financial or other detriment to a consumer if it were relied on.

There are exceptions to the application of the Act which are set out in sections 26(1) and 28(1) of the ACL. Section 23 does not apply to terms that:

- ▶ define the main subject matter of the contract;
- ▶ set the upfront price payable under the contract;
- ▶ are required, or expressly permitted, by a Commonwealth, State or Territory Law;

- ▶ are in a contract of marine salvage or towage, a charter party of a ship;
- ▶ are in a contract for the carriage of goods by ship; or
- ▶ are in the constitution of a company, managed investment scheme or other kind of body

STANDARD FORM CONTRACTS

As stated in s23(1) the provisions in the ACL about unfair contract terms apply to standard form contracts only. Under s27 of the ACL, if a person alleges that a contract is a standard form contract, it is presumed to be one unless another party to the proceeding proves otherwise. A court can take into account such matters as it considers relevant, but it must take into account a number of matters under the Act. Some of these are:

- (a) Whether one of the parties has all or most of the bargaining power relating to the transaction;
- (b) Whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- (c) Whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented; and
- (d) Whether another party was given an effective opportunity to negotiate the terms of the contract.

CASE STUDY

Jetstar Airways Pty Ltd v Free [2008] VSC File 39

Facts: Free bought a restricted fare airline ticket for herself and her sister. Her sister could not travel on the nominated dates so she sought to substitute her niece. The airline required Free to pay an additional amount to make the change, in accordance with the terms on which the ticket had been issued. Free brought proceedings to have the relevant contract terms declared unfair under the Fair Trading Act 1999 (Victoria).

Legal Issue: Could Jetstar Airways rely on the contract terms and require Free to pay an additional amount to make a change to the ticket, to substitute her niece.

Decision: The Victorian Supreme Court heard the matter on appeal from a decision made in the Civil and Administrative Tribunal which found that the relevant terms were unfair. The Supreme Court said that the terms were not unfair and overturned the Tribunal's findings.



CASE STUDY

Director of Consumer Affairs v AAPT Limited [2006] VCAT1493

Facts: AAPT Limited required consumers to sign a standard form contract for mobile phone services. The contract contained a unilateral variation clause and a clause providing for the customer to pay a reconnection fee if the service was disconnected for any reason.

Legal Issue: Were the clauses unfair within the meaning of Section 32W of the Victorian Fair Trading Act 1999.

Decision: The Tribunal decided that both of the terms set out above were unfair. (Please note that the Victorian Act has been taken over by the ACL which would apply in the same way to make those terms unfair).



REVIEW

1. Describe the following: [C]

the mandate of the ACCC | caveat emptor | standard contracts
unfair contract terms | consumer guarantees

2. Describe and explain the following: [C] [A]

(a) Some examples of ACCC actions in the retail area.

(b) The ACCC role with respect to electricity prices.

(c) How can be ACCC protect all consumers?

(d) The change of emphasis in the responsibility for fair dealing from the buyer to the seller.

3. Describe and explain 'undisturbed possession of the goods'. If goods are subject to a charge or encumbrance which is disclosed to the consumer, how does this affect consumers rights? [C] [A]

4. Explain the difference between the two following guarantees: [A] [E]

(a) The goods must be of acceptable quality.

(b) The goods must be reasonably fit for any disclosed purpose.

5. Describe and explain the difference between the following two statutory guarantees: [A] [E]

(a) The goods must match the description.

(b) The goods must match the sample or demonstration model.

6. Describe and explain the effect of an unfair term on a contract. [A]

TOPIC 2: CONTRACTUAL OBLIGATIONS

CHAPTER 23: REMEDIES FOR BREACH OF CONTRACT

FOCUS SUBJECT MATTER

23.1 INTRODUCTION

23.2 COMMON LAW REMEDIES FOR BREACH OF CONTRACT

23.3 INQUIRY INTO COMMON LAW REMEDIES FOR UNJUST ENRICHMENT

23.4 REMEDIES FOR BREACH OF STATUTORY OBLIGATIONS UNDER THE *AUSTRALIAN CONSUMER LAW*

TO UNDERSTAND AND APPRECIATE:

- ▶ there are remedies which may be granted to a person who applies for them, when a party acts in a manner inconsistent with the contract, depending on the circumstances;
- ▶ some remedies arise, not because of agreement, but because of the courts' underlying policy of ensuring fairness in transactions under the common law;
- ▶ some remedies arise, not because of agreement, but because of conditions imposed on the parties by statute;
- ▶ there is a range of statutory measures to counter what would otherwise be seen as unfair relative bargaining positions between parties to contracts under the common law; and
- ▶ many statutory measures are not able to be varied by contractual agreement.

23.1 INTRODUCTION

The approach taken to the subject matter of this chapter is to deal separately with the remedies for breach of contract, the remedy of unjust enrichment, and the remedies which are available for breach of the implied statutory conditions under the *Australian Consumer Law*.

The scope of ‘remedies for breach of contract’ has been interpreted to include the statutory remedies implied into all relevant contracts under the *Australian Consumer Law*. We have also included the remedy of unjust enrichment, an equitable remedy which does not arise from breach of contract. This last remedy illustrates the ability of the common law to adjust to unusual claims (that is, claims which arise outside the scope of the settled common law of contract) to provide a remedy which gives fairness to the parties in dispute.

23.2 COMMON LAW REMEDIES FOR BREACH OF CONTRACT

To breach a contract means to break it. A party can breach a contract either by breaking a part of the contract, or by repudiating the whole of the contract. A repudiation occurs when one party renounces the contract completely. This can be done by simply saying, ‘I do not wish to proceed with this contract’ or by making it impossible to perform the contract. Repudiation can also occur by one party doing something totally inconsistent with his or her obligations under the contract.

A contract is not automatically terminated when one party repudiates it. The other party is entitled to reject the repudiation and treat the contract as still being effective. When it is decided to treat the contract as being still in existence, the injured party can insist on performance. However, if the injured party accepts the repudiation, damages are then the only remedy available.

When one party is in breach by not fulfilling a term of the contract, the nature of the term which has been breached will decide whether or not the injured party can elect to end the contract. If the term breached is a condition, then the injured party can elect to discharge the contract and sue for damages. On the other hand, if the breached term is a warranty then the injured party cannot elect to terminate or discharge the contract but only has a remedy in damages.

If the nature of the breach of contract **gives one party the right to end the contract**, he or she can either continue on with the contract or rescind. To rescind a contract simply means to tell the other party that you regard the contract as having been ended.

If one party decides to end the contract because of another’s breach, he or she may:

- ▶ refuse to perform his or her part of the contract;
- ▶ resist any action brought by the defaulting party either for damages or specific performance;
- ▶ recover any money paid provided there has been a total failure of consideration;
- ▶ take action against the offending party for the damages sustained by the breach; or
- ▶ take action against the offending party for an amount equivalent to the value of labour performed or goods supplied.

If the nature of the breach **does not entitle one party to the contract to end the contract**, or if the innocent party decides not to elect to treat the contract as having been ended when entitled to do so, the innocent party may:

- ▶ in certain cases sue for specific performance;
- ▶ in certain cases sue for an injunction; or
- ▶ sue for damages.

SPECIFIC PERFORMANCE

Specific performance is a remedy which involves making the defaulting party carry out the contract as originally agreed. It will only be granted by the court if damages are not an adequate remedy and the court can supervise the carrying out of the order for specific performance. There are other considerations the court looks at but the above two are the most important. Most orders for specific performance have been made where the contracts are for the sale of land or the subject matter of the contract is of a unique nature: for example, famous paintings or items of jewellery.

CASE STUDY

JC Williamson Limited v Lukey and Mulholland (1931) 45 CLR 282

Facts: The defendant company, J C Williamson Limited, gave the plaintiffs (Lukey and Mulholland) a lease of a shop for five years in a theatre in which drinks, lollies and ice-cream (confectionary) could be sold to the audience. The contract contained conditions about how the confectionary could be sold and about the arrangements for boys and girls to move around the theatre at certain times under the supervision of the theatre manager to sell the confectionary.

Before the term of the agreement expired, the defendant company said that no fixed period had been agreed upon and repudiated the contract. The plaintiffs sued the company. Instead of suing for damages which is a remedy for the breach of contract (caused by the repudiation) the plaintiffs asked the court to grant an injunction for specific performance.

That is, they asked the court to make an order that the defendant company must allow the plaintiffs to continue

to operate the confectionary shop and to sell lollies, icecream and drinks in the theatre under the supervision of the manager.

Legal Issue: Would the court make an order for specific performance making the company perform the contract for the balance of the term so that the plaintiffs could continue to operate the shop in the theatre?

Decision: The court said that the performance of the contract on an ongoing basis would have required its supervision.

If it made an order compelling the defendant company to perform its obligations for the balance of the term, it could not guarantee that the company would fully carry out its obligations as contemplated by the agreement. In those circumstances, the court was not prepared to grant the order for specific performance.

INJUNCTION

An injunction is an order of the court **restraining a person from doing a wrongful act**. For example, there may be a term in the contract which prevents the defaulting party from doing something during the term of the contract. If the defaulting party ignores the restricting term of the contract, the other party may apply for an injunction prohibiting the defaulting party from taking the action. A common example is the situation where someone has contracted to provide a personal service on the understanding that he or she would not provide that service to anyone else.

CASE STUDY

Page One Records Limited v Britton (1968) 1 WLR 157

Facts: The Troggs, a pop group, appointed Page One Records Limited (the plaintiff) as manager for five years. It was a term of the contract that the Troggs would not appoint anyone else to act for them during the five year period. After one year, the Troggs dismissed Page One Records Limited and decided to appoint another manager.

Page One Records Limited went to court to ask for an injunction to restrain the Troggs from appointing another manager.

Legal Issue: Would the court give Page One Records an injunction restraining the Troggs from appointing another manager?

Decision: The injunction was refused. The court recognised that pop groups could not operate successfully in the entertainment industry without a manager. This would mean that an injunction would have indirectly compelled the Troggs to continue to employ Page One Records or remain idle. The court said that this would amount to enforcing a contract for personal services and the court was not prepared to grant an injunction which would have that effect. Effectively, it said, that such an injunction would amount to specific performance of the contract.

Warner Bros Pictures Inc v Nelson (1937) 1 KB 209

Facts: The defendant, a film actress, whose stage name was Bette Davis, contracted to work exclusively for the plaintiff film producers for one year. It was also a term of the contract that she would agree, during the period of the contract, not to work as an actress for any other person. In breach of the contract, she agreed to work as an actress for someone else at the same time. The plaintiffs, Warner Bros Pictures Inc, sought an injunction to restrain Bette Davis from acting in breach of her contract with them.

Legal Issue: Would the court grant an order (injunction) stopping Bette Davis from working for another film company as an actress?

Decision: The court granted the injunction. The court took the view that granting the injunction did not make Bette Davis work for the plaintiffs (Warner Bros). She could, if she wanted, work in some capacity other than as an actress. As a result, the injunction did not have the effect of enforcing a contract for personal services.



WHAT DO YOU THINK?



Compare the two cases: the *Page One case* and the *Warner Bros case*. Do you really think there is any difference between the two decisions? Explain your answer. [A] [E]

DAMAGES

When one party is entitled to sue the other for breach of contract there is no point in doing so unless the breach has caused a loss. The loss is referred to as damages.

The court awards a money judgment as damages; that is, the court compensates the injured party by either awarding an actual loss or estimating an amount which compensates the injured party for the loss.

Calculating what someone has lost as a result of breach of contract is not an easy task and the courts have established various principles to enable calculations to be made consistently and fairly.



THE GENERAL PRINCIPLE

The basic principle is that the injured party is entitled to recover an amount which will put him or her in the same position as if the contract had been properly performed.

The classic statement of this common law principle is in judgment of Parke B in *Robinson v Harman* (1848) 154 ER 363 at 365.

Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

THE DAMAGE MUST NOT BE TOO REMOTE

Quite often a breach of contract results in a chain of events so that the injured party loses something quite removed from the event or act originally causing the breach.

The question which arises is whether or not a loss which is well removed from the original event can still be recovered by the injured party. The legal principle which governs this area is the principle of remoteness of damage. Where the loss is too far away from the original event causing the breach, it is said to be 'too remote'.

In the landmark case of *Hadley v Baxendale* (1854) 156 ER 145 the principle used by the court is clearly stated in the words of Alderson B:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Briefly summarised, the above statement of principle means that a recoverable loss is not too remote if the loss:

1. **arises naturally from the breach** (in the usual or normal course of things); or
2. is **actually contemplated as a probable result of the breach** (because special or exceptional circumstance were made known to the party in breach at the time of entering the contract).

CASE STUDY

Hadley v Baxendale (1854) 156 ER 145

Facts: The plaintiffs were owners of a flour mill. They contracted with the defendants who were couriers, to have a broken crankshaft carried to engineers for the purpose of manufacturing a new shaft. Delivery of the shaft was delayed and the consequence for the plaintiffs was that the mill was stopped for five days longer than it should have been and profits were lost.

Legal Issue: Could the plaintiff recover the lost profits?

Decision: The court held that the defendants were not liable for the lost profits as they were merely carriers

who did not know that the mill would be stopped. The plaintiffs' loss of profits was not something which the defendants should have contemplated as occurring in the usual course of things.

If an injured party wants to recover some loss which does not meet this test, it is only possible if the other party knew of the existence of exceptional circumstances likely to cause a special loss if the contract was breached. The time at which the circumstances have to be made known to the defaulting party is when the parties enter into the agreement, not at the time of the loss.

Victoria Laundry Ltd v Newman Industries (1949) 2 KB 528

Facts: Victoria Laundry contracted for the installation of a new boiler by Newman Industries. When the boiler was not forthcoming the plaintiffs sued to recover losses incurred. Newman Industries was aware that the Laundry wanted it for immediate use for the purposes of their laundry and dyeing business. The boiler was delivered twenty weeks late.

Legal Issue: Could Victoria Laundry recover their loss of profits for the twenty week period or for a longer period?

Decision: They were successful in obtaining damages equal to the loss of profits during the period of inaction as these fell within the 'reasonable contemplation' test. However, they were not able to claim for loss of potential profits from a very substantial contract they would have gained had the boiler been in place.

The court ruled that the potential profits were too remote from the defendants as they did not know of the possible contract now missed.

THE DUTY TO MITIGATE THE LOSS

The law imposes a duty upon a person claiming damages to take all reasonable steps to mitigate the loss caused by the breach of contract. **This means to minimise the loss.** What are reasonable steps is a question of fact in each particular circumstance.

Some standard form contracts include clauses that specify amounts that are payable as anticipatory losses in the case of a breach. If the sum is excessive, the court may treat it as a penalty and not enforce it.

CASE STUDY

Payzu Limited v Saunders (1919) 2 KB 581

Facts: The defendant was selling goods to the plaintiff by instalments. It was a term of the contract that the buyer (plaintiff) would pay for the goods delivered within one month of each delivery less 2.5% discount. The buyer (the plaintiff) did not make the first payment on time. The seller treated the buyer's failure to pay as a breach of a condition justifying the repudiation of the contract. At the same time, the seller offered to continue deliveries at the contract price (without the discount) if the buyer

would pay cash at the time of each order. The buyer refused the offer. The price of the goods in the market place rose and the buyer had to pay more for the product from someone else. The buyer sued the seller for breach of contract.

Legal Issues:

1. Could the buyer recover damages for the breach of contract from the seller?

CASE STUDY CONTINUED...

2. Should the buyer have mitigated its loss by accepting the seller's offer to supply the goods at the contract price on a cash basis without discount?

Decision: The court found that the seller had breached the contract by wrongly terminating the contract when the buyer did not pay the first instalment. It therefore found that the buyer was entitled to damages. However, the buyer, the court said, should have accepted the seller's offer to take delivery of the goods at the contract price. In other words, the buyer did not mitigate its loss when it should have.

The court added that the loss suffered by the buyer was not the difference between the contract and the market price. The loss it was prepared to award was the loss that would have been suffered if the offer of the seller had been accepted. This loss would be the 2.5% discount which the seller removed and the cost of interest on the amount normally paid at the end of each month because the seller required the buyer to pay cash on delivery.

DAMAGES ARE NOT USUALLY RECOVERABLE FOR DISAPPOINTMENT OR DISTRESS

Historically the common law has not been prepared to compensate an injured plaintiff for mere inconvenience, distress, or injured feelings arising from a breach of contract. However, the High Court in Australia has been prepared to give damages where a promise has been made in the contract which entitles the party who is suing to pleasure, enjoyment or personal protection, and where the resulting distress or disappointment has occurred as a result of being injured or suffering physical inconvenience. In *Baltic Shipping Co v Dylan* (1993) 176 CLR 344 the High Court awarded compensation for disappointment and distress to a plaintiff who paid for a fourteen day cruise in the South Pacific. After eight days the ship struck a rock and sank. In addition to the damages for loss of belongings the plaintiff was awarded \$5,000 for disappointment and distress. There have been a number of similar cases where people have been promised holidays of a particular kind and the promise has been breached. Clearly, if the court is satisfied that there is a breach of an express or implied term that a benefit which flows to a party in the contract is pleasure and enjoyment, the court will award damages for disappointment or distress when those benefits are lost.

PUNITIVE AND NOMINAL DAMAGES

Occasionally, the court will award damages to punish the party in default, or nominate a sum even though the party has not suffered actual loss in order to compensate it for the infringement of its legal rights. Punishment situations have arisen in cases where the court considers the conduct to be not only in breach of contract, but also reprehensible in some way. Nominal damages may be awarded when there has been a breach of a contract but no real loss has occurred.

TIME LIMITS

The right to sue someone for a breach of contract may be lost if:

- ▶ it is compromised; or
- ▶ there is something in the contract itself which says that after a period of time neither party is allowed to sue for breach.

However, as a matter of public policy, all States in Australia have Acts (called 'Statutes of Limitations') which prevent suits for breach of contract after a specified time. If the contract is a simple contract any action after six years is barred. This is the case in all Australian States. The States do not have uniform laws with regard to contracts under seal (deeds). In Queensland, a contract under seal is barred after 12 years. The time restriction runs from the date upon which the cause of action arose, not from the date on which the contract was commenced.

23.3 INQUIRY INTO COMMON LAW REMEDIES FOR UNJUST ENRICHMENT



INQUIRY



IN WHAT CIRCUMSTANCES HAS THE HIGH COURT MADE DECISIONS BASED ON THE IDEA OF UNJUST ENRICHMENT?

RESTITUTION

The term restitution is the legal word which is used to discuss a remedy based on the idea of unjust enrichment. Where a defendant would be unjustly enriched at a plaintiff's expense, the High Court has made decisions obliging a defendant to make restitution for a benefit derived at the plaintiff's expense.

Restitution will usually be awarded only where:

- a. the defendant had received some form of benefit (that is, has been 'enriched');
- b. the benefit or 'enrichment' was at the plaintiff's expense;
- c. it would be 'unjust' to permit the defendant to retain the benefit; and
- d. there are no defences available to the defendant, for example, change of position, estoppel, incapacity or illegality.

CIRCUMSTANCES WHERE RESTITUTION APPLIES

There are two basic situations in which restitution may provide an appropriate remedy:

1. where the plaintiff is claiming **the return of money**, for example, because of a total failure of consideration, or it was paid under a mistake; and
2. when the plaintiff is claiming a '**reasonable remuneration**' for work done or services provided and there is no enforceable contract between the parties.



1. Recovery of Money Paid

CASE STUDY

McCormack v Commonwealth (1984) 155 CLR 273

Facts: McCormack leased some land from the Commonwealth Government. Eventually, the government decided that it wanted to use the land for something else and that McCormack should leave. McCormack had a long lease and had spent considerable money putting buildings and other improvements on the land. There was a dispute about compensation for the improvements.

To convince McCormack to leave straight away the government paid McCormack an advance of \$75,000 while both parties waited for an arbitration hearing to decide how much compensation McCormack should receive. The arbitration determined that the government should

pay a total of \$215,000 to McCormack. The government mistakenly paid the full amount and McCormack refused to pay back the \$75,000 advance which was made before the arbitration.

Legal Issue: Should McCormack be ordered to return the \$75,000?

Decision: The High Court held that the Commonwealth Government made a mistake when it paid the full award of \$215,000 and it was entitled to recover the \$75,000 over payment. McCormack would be unjustly enriched if he kept the \$75,000.

CASE STUDY

Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516

Facts: Roxborough bought cigarettes from Rothmans. The parties thought tax was payable to the government on the sale by Rothmans. The price for the cigarettes included an itemised amount for the tax. The transaction proceeded but it turned out that Rothmans did not have to pay the tax to the government. Roxborough requested Rothmans to pay back the tax component of the price. Rothmans refused, and Roxborough sued, claiming restitution from Rothmans of the tax element of the price. The matter eventually found its way on appeal to the High Court.

Legal issue: Was Roxborough entitled to restitution (that is, to be paid back the tax component) of the amount Rothmans did not have to pay the government?

Decision: The High Court found that there had been a failure of consideration in the sense that the expected state of affairs did not happen, that is, Rothmans were not required to pay the tax. It did not matter that Rothmans had 'passed on' the cost of the tax to its own customers as part of the price of cigarettes sold. It was also despite the fact that the money had been paid to Rothmans pursuant to a valid contract. The High Court said that tax component should be returned because there was unjust enrichment.

Do you think the High Court achieved a fair balance between the competing interests of the parties by making this decision? Give your reasons. [A] [E]

2. Recovery of a 'Reasonable Remuneration'

A plaintiff who does work for, supplies goods or provides services to, the defendant and for some reason has no contractual entitlement to payment, may recover a 'reasonable remuneration'. Such claims are commonly referred to as an action on a quantum meruit. The expression quantum meruit literally means 'for as much as he or she has earned'. The essence of a quantum meruit action is that the defendant has received some benefit from the plaintiff and would be unjustly enriched if he or she was not required to pay a reasonable sum for the benefit accepted.

CASE STUDY

Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221

Facts: In New South Wales the *Builders Licensing Act* 1971, Section 45(1) provided that the contract under which a licensed builder undertakes to carry out any building work is not enforceable against the other party to the contract unless it is in writing and signed by each of the parties. The builder orally agreed to carry out certain renovations for Mrs Paul. When the work was completed, Mrs Paul refused to pay the balance of the money owing to the builder. The builder sued Mrs Paul. Mrs Paul defended the action on the basis that there was no written contract.

Legal Issue: Was there a binding contract? If there was not a contract, could the builder recover a reasonable sum for the work he carried out by way of an action on quantum meruit?

Decision: The majority of the High Court reversed a decision in the New South Wales Court of Appeal. It agreed there was no contract because of the provisions of the Builders Licensing Act. However, it also said that the builder was entitled to recover a reasonable sum for the work he carried out by way of an action on quantum meruit. The court said that the action was based on a

claim for restitution or unjust enrichment arising from Mrs Paul's acceptance of the benefit accruing to her from the builder's performance of the unenforceable oral contract.



CASE STUDY

Lumbers v W Cook Builders Pty Ltd [2008] HCA 27

Facts: W Cook Builders Pty Ltd (Builders) contracted with Cook & Sons (Sons) to do the building work for Sons, who had contracted with Lumbers to build a house for them. Four years after Builders finished constructing the house, it was still owed \$261,715. Builders was in liquidation. The liquidator decided to sue Lumbers, not Sons. Builders contract was with Sons. It had no contract with Lumbers, so it brought a direct claim against the owner, Lumbers, who still owed the money to Sons. The Full Court of the Supreme Court of South Australia accepted the claim for restitution by Builders against Lumbers. Lumbers appealed to the High Court.

Legal issue: Was Builders entitled to restitution against Lumbers? In other words, should the High Court overturn

the decision made by the Full Court of the Supreme Court of South Australia?

Decision: Previous cases on restitution had rested on establishing that the benefit or 'enrichment' was at the plaintiff's expense. In this case, Lumbers did not owe any debt to Builders. It had no contract with Builders, only with Sons. In the words of Gleeson CJ 'If [the Lumbers] have been enriched, it is at the expense of Sons.' The High Court also said that to grant restitution would undermine a valid contract between Lumbers and Sons. The High Court granted the appeal and denied restitution to Lumbers.

Explain how the idea of restitution is subject to the principle of privity of contract. That is, to sue someone you must be in a contractual relationship with them, and not rely on someone else's contract to sue them. Do you think this is an acceptable limitation to the operation of the claim for restitution for unjust enrichment? [A] [E]

23.4 REMEDIES FOR BREACH OF STATUTORY OBLIGATIONS UNDER THE AUSTRALIAN CONSUMER LAW

If a seller of goods fails to comply with the legal obligations imposed by the *Australian Consumer Law* ACL, certain remedies are available to the consumer. In substance, the consumer can rescind the contract (bring it to an end), reject the goods, and sue for the financial loss suffered. In some cases, the consumer can also sue for general damages (pain and suffering) and compensatory damages (punitive damages).

There are technical rules in the ACL about how the consumer must communicate rejection of the goods and terminate the contract. These rules must be strictly obeyed by the consumer.

ACTION AGAINST SUPPLIERS OF GOODS

Section 259 and the following sections in the ACL set out the remedies regime where a statutory guarantee in relation to goods supplied in trade or commerce to a consumer is breached.

NOT A “MAJOR FAILURE”

If the failure of the goods is not a “major failure” and can be remedied, the consumer can require the supplier to remedy the failure within a reasonable time. If the supplier does not do so, the consumer may either reject the goods and recover the money paid, or have the failure remedied and recover the reasonable costs of doing so from the supplier. Damages for loss or damage may also be recovered.

If the consumer requires the supplier to remedy the failure, the supplier may repair the goods, replace the goods with identical goods or refund the amount paid by the consumer. If the defect relates to title, the supplier may cure the defect by ensuring the title is properly passed to the consumer.

REMEDY FOR “MAJOR FAILURE”

If the failure cannot be remedied, or is a “major failure”, the consumer can either recover compensation for any reduction in value, or reject the goods. Damages for loss or damage may also be recovered.

“A major failure” is one where:

- ▶ a reasonable consumer would not have acquired the goods, had the consumer been fully aware of the failure;
- ▶ the goods are unsafe;
- ▶ the goods are substantially unfit for purpose; or
- ▶ the goods have departed significantly from the demonstration model or sample.

A consumer is not entitled to reject goods:

- ▶ unless the consumer does so within a reasonable period after the failure became apparent;
- ▶ if the goods were damaged after the consumer took possession for reasons not related to the failure; or
- ▶ if they had been lost, destroyed or disposed of by the consumer.

If a consumer is entitled to reject the goods and does so, the consumer must return the goods to the supplier unless there is significant cost in doing so. In that case the supplier must collect the goods at its expense. The consumer is entitled to elect either to have replacement goods or a refund and the supplier must comply.

REVIEW

1. Describe the following: [C]

breach of contract | repudiation | specific performance | injunction
restitution | unjust | enrichment

2. Describe and explain the following: [C] [A]

- (a) The options for the injured party when the other party breaches the contract.
- (b) The circumstances in which a court will order specific performance.
- (c) The circumstances in which a court will order an injunction
- (d) The principle that is used by the court to determine the damages payable to the injured party.
- (e) The rights of the consumer where there has been a 'major failure'.

TOPIC 2: CONTRACTUAL OBLIGATIONS

CHAPTER 24: CONTRACT LAW ISSUES

FOCUS SUBJECT MATTER

24.1 RESOLVING CONTRACT DISPUTES

24.2 A RESIDENTIAL TENANCY DISPUTE

24.3 SPORTING CONTRACTS, RIGHTS AND OBLIGATIONS

24.4 ENTERING A MOBILE PHONE CONTRACT

TO UNDERSTAND AND APPRECIATE:

- ▶ the range of measures available to resolve a contract dispute;
- ▶ taking the option of last resort, a tribunal or the court;
- ▶ the importance of knowing your contractual rights and obligations;
- ▶ contracts are needed in modern professional sporting relationships; and
- ▶ the need to prepare before entering a mobile phone contract.

24.1 RESOLVING CONTRACT DISPUTES

The importance of knowing and understanding the nature of your contract, and being able to identify how any dispute affects your rights and obligations, cannot be overstated. It obviously affects your bargaining position. If you have strong legal advice which supports your position, you are more likely to want to enforce your rights. If the matter is important to you, there is no substitute for **good legal advice**.

You can then approach resolving the dispute with confidence. The mechanisms and avenues of dispute resolution are already set out **Chapter 15: Dispute Resolution in the Civil Law**. There are also in **Chapter 17: Resolving Civil Issues resolved in action** a number of case studies giving practical examples where disputes of different kinds have been taken to different jurisdictions.

24.2 A RESIDENTIAL TENANCY DISPUTE

A person who rents a home is called a tenant. A person who owns a home and provides it for rent is called a lessor. Whenever a tenant rents a home there will be an agreement between the tenant and the lessor as to the terms and conditions upon which the tenant occupies the property. In Queensland, residential tenancies are subject to the *Residential Tenancies and Room Accommodation Act 2008* (Qld) ('the Act'). Where the Act applies to a residential tenancy a standard tenancy agreement must be used, and s54 says that the parties to a residential tenancy are not allowed to make an agreement inconsistent with the standard tenancy agreement or the Act.

HOLDING DEPOSITS

The Act allows a lessor to require a prospective **tenant** to pay a holding deposit for a tenancy of the premises. If this happens, s160 of the Act requires that the **lessor** must give the prospective tenant a **receipt** for the holding deposit which is to be signed by the prospective tenant. If the prospective tenant does not enter into the tenancy agreement, or does not notify the lessor that he or she does not intend to enter the tenancy agreement, then the holding deposit is **forfeited**. Otherwise, the lessor must return the holding deposit.

HYPOTHETICAL

Facts: Kim and Christina planned to leave New South Wales to live in Brisbane. Kim travelled to Brisbane to look at homes to buy. They could not make up their minds which one to buy so they decided to rent for three months. They agreed to put a holding deposit on a home in an area they liked. They paid \$800 for the holding deposit and the agent provided them with a receipt setting out all the information required by the Act which they signed. The receipt stated that Kim and Christina had to take up the option to sign a tenancy agreement by 1 November 2018. After a month, Kim and Christina found a home and entered a contract with a settlement date which allowed them to take up occupation on 31 October 2018.

In the excitement of buying a new home, they forgot to inform the agent that they did not wish to exercise the option. It was not until 4 November 2018 that they contacted the agent.

Legal issues:

1. Are Kim and Christina entitled to the return of their holding deposit? [C]
2. What reasons can you give for the Act entitling a lessor to keep the holding deposit of a prospective tenant? [C] [A]

HYPOTHETICAL CONTINUED...

3. Suppose the agent does not provide Kim and Christina with the receipt setting out all of the information required by the Act, although he sends them an e-mail saying they must take up the option by 1 November 2018 or he will find another tenant. Do you think Kim and Christina are entitled to the return of the holding deposit? [C] [A]
4. Suppose that in the circumstances set out in question 3, the agent refuses to return Kim and Christina's holding deposit. They ask you, as their lawyer, to prepare a plan of approach to resolve the dispute including, if necessary, going to litigation. Set out the steps you propose and the jurisdiction to which you will apply, if litigation is required. Provide them with advice about how to get ready for the litigation. [C] [S] [A] [E] [R]



RESEARCH

1. Go to www.rta.qld.gov.au (the website of the Residential Tenancy Authority) and click on 'disputes'. If you scroll down you will see a set of headings which are links to Dispute resolution, Helping to resolve tenancy issues, Applying for dispute resolution and Applying to QCAT. Investigate each of these headings/topics online and select information which would be useful in providing advice to Kim and Christina. Make notes of your investigations. [C] [S]
2. Describe and explain how the information on the website would be useful to anyone experiencing a dispute about a residential tenancy agreement. [C] [A] [E]

24.3 SPORTING CONTRACTS, RIGHTS AND OBLIGATIONS

There are many stakeholders with an interest in modern professional sport. Typically, they all enter contracts to protect their interests. Sponsors enter agreements with national sporting organisations which they expect to be reflected in agreements with the players and clubs involved in the sport. Sponsors do not like being identified with violence, racism, criminal acts and other behaviours which reflect poorly on the sport they sponsor. This means they usually want the right to withdraw from a sponsorship agreement if the behaviour of players and clubs does not reflect the values they want associated with their products. A practical application follows which gives you the opportunity to make your own judgments about an effective contract meeting the needs of all stakeholders.



PRACTICAL APPLICATION

SPONSORSHIP AGREEMENT - SPORTING ORGANISATION AND SPONSOR

Typical Terms

1. Payment

The sponsor shall pay to the club a fee of \$..... for the sponsorship rights to be paid in equal instalments on 1 June and 1 December in each year of the agreement.

2. Exclusivity

The club must not identify itself or the competition with any other sponsor without the permission of the sponsor.

3. Application of sponsorship rights

The club will make sure that throughout the term of the agreement the competition will be known as the (insert name of the sponsor) cup. The club must refer to the sponsorship rights and display the sponsor's logo in all promotional and advertising material, official programs (including in editorials, fixtures and results in such programs), stationery, official functions, public announcements, interviews, press releases and in all material relating to the competition. Any promotional material produced by the club featuring or making reference to the sponsorship rights shall require the prior approval of the sponsor. The club will use its best

endeavours to ensure that the media, in all its forms, will refer to the sponsor as sponsor of the competition in articles regarding the competition.

4. Television advertising

The club must ensure that any commercial television stations which broadcast live competition matches do not give any advertiser other than the agreed nominated sponsor of the telecast, naming rights to any program featuring the competition matches. Television replays of competition matches are permitted as long as the telecast identifies the sponsor of the premiership competition clearly in any promotion or the actual replay of the event.

5. Promoting through media

The club agrees to promote the competition through all available media outlets obtaining as much media space as possible.

6. Ground promotion

The club must give every assistance to the sponsor to obtain a prominent identification of the sponsorship rights at all grounds where the sport is played.

1. Assume the sponsor is a promoter of healthy foods, and sells pre-packaged ingredients in retail outlets and online for delivery. The sponsor is very concerned to promote a clean, healthy and community-minded image. It does not condone domestic violence, racism and criminal acts of any kind. Google racism in Australian sport. List the key issues that will need to be addressed in the sponsorship agreement to satisfy the sponsor. [C] [S] [A]
2. If you were the lawyer acting for the sponsor in this agreement would you be satisfied that the sponsor will receive maximum exposure for each sponsorship dollar? [A] [E] [R]
3. The above agreement does not contain clauses dealing with any obligation the players have to promote the sponsor and to adhere to a code of conduct. Why do you think the sponsor might wish to include such clauses? Draft suitable clauses about these issues. [A] [E] [R]
4. If you were the lawyer acting for the club to finalise this agreement with the sponsor what suggestions would you make to your client about issues to include helpful to their interests? [A] [E] [R]
5. There is no default clause in this agreement. In what circumstances could either party end the agreement. Draft such a clause for each party to rely on. [E]



INQUIRY



CAN YOUNG ATHLETES (MINORS) BE BOUND BY CONTRACTS?

In **Chapter 21.1: Setting aside a contract** you studied the circumstances in which a minor (a person under the age of 18 years) can be bound by contractual obligations even though they are not adults. All major sports organisations have access to, and can afford, good legal advice. This means that they take special care to draft player contracts which take into account the age of the player. They generally structure the contracts so that they make it clear that the benefits being provided at least include the ‘necessities of life’ and they often pay for the young athlete to obtain independent legal advice before signing. Modern sports organisations are quite sensitive in these days of media scrutiny and publicity about young athletes.

HYPOTHETICAL

Facts: Joan made a living as a swimming coach. She trained a number of state swimmers and one swimmer of international status. She also trained a number of junior swimmers in a large squad. Joan went to the state titles at Toowoomba. While she was there she saw an outstanding young swimmer, Mimi, from Charleville who was 13 years of age. Joan met Mimi’s parents and suggested that Mimi might like to come to Brisbane where she could join the elite squad that Joan trained, could live with Joan as a boarder and go to the local school. Joan explained to Mimi and her parents that if Mimi became successful at national and international level she would be able to organise sponsorship contracts for her and that normally she (Joan) would be entitled to a commission. Joan and Mimi’s parents exchange regular e-mails over a period of at least two years during which these matters are discussed, and agreed. Mimi is not always involved in these communications, but did know about them from conversations with Joan and her parents.

For three years, Joan cared for Mimi as though she was her daughter. Mimi’s parents sent financial support but Joan often paid for extra equipment for Mimi, for example, goggles and a special swimming suit for Mimi. Mimi became a very successful swimmer representing her state and breaking a world record in her best event at the national titles when she was 16. She made a dramatic improvement that year and came to national and international attention.

Mimi’s parents were approached by an agent to manage her sporting career and offer financial advice as she was an attractive and intelligent girl who was very marketable and sought after by different marketing groups. Joan objected, and Mimi was put in the position of deciding between the agent and Joan. Mimi left Joan for another highly qualified swimming trainer, Alfred, signed many sponsorship agreements, continued to swim successfully and within twelve months won a gold medal at the Commonwealth Games. Mimi and Alfred admitted that before Mimi left Joan she was already going to achieve this success. Mimi turns 18 years of age in one month. She is still a minor.

1. You have been Joan’s lawyer for many years. She contacts you about the problem with Mimi and her parents. In the first interview with Joan you go through the details of their contractual relationship in chronological order to establish the terms of the contract. You then give Joan advice about the likely outcome if the matter proceeds to litigation. From the information you have, identify the terms of the contract between Joan and Mimi and her parents. Write these up in the form of a ‘Heads of Agreement’ document for Joan to confirm and sign. [C] [S] [A]
2. Joan tells you that 4 of the 6 sponsors with whom Mimi and her parents have signed agreements are sponsors of the national swimming team and that they also sponsor some of Joan’s other elite swimmers. The other two sponsors are not businesses with whom she has any relationship, although she could have approached them if asked to do so. The value of the commissions from the 4 sponsors she deals with over an 18 month period would total \$300,000, excluding the training fees and financial support she provided Mimi and her parents while Mimi was with her. Joan says the 4 sponsors that support her squad have agreed to give evidence that they would have sponsored Mimi if she had stayed with Joan. You give advice to Joan that if she took Mimi and her parents to court and was successful, she would be likely to recover damages of at least \$300,000. What are the arguments in favour of this advice? [C] [A] [E]
3. You explained to Joan the different options to resolve the dispute. You tell her that if she goes to court she will be in the District Court. Give Joan advice about the civil trial processes involved, and the likely costs including the cost consequences if she loses the court action. Set out your advice in writing. [C] [A] [E]
4. Joan decides that she will seek alternative dispute resolution and leave court action as a last resort. She asks for your assistance with the process of negotiation, including preparing for formal mediation before a mediator. Give Joan a plan in writing outlining the steps that you propose to take to resolve the dispute, ending with a formal mediation if required. Set out your plan in writing. [C] [S] [A] [E]

24.4 ENTERING A MOBILE PHONE CONTRACT

The statistics show that possession of a mobile phone is extremely widespread. It is probably the electronic device that is owned by nearly everyone, and is frequently changed for a new model. Everyone can understand clearly what it means to enter a contract to buy a mobile phone.



INQUIRY



PREPARING TO ENTER A CONTRACT TO BUY A MOBILE PHONE.

PRACTICAL APPLICATION

MOBILE PHONE PROVIDERS-UNFAIR CONTRACT TERMS

SOURCE: CONSUMER AFFAIRS VICTORIA, WWW.CONSUMER.VIC.GOV.AU, 22/08/2018 (EXCERPTS ONLY)

Mobile phone providers generally use standard form consumer contracts-that is, contracts prepared by the business and offered on a 'take it or leave it' basis. All businesses, including mobile phone providers, should ensure their contracts comply with laws about unfair contract terms. We have worked with mobile phone providers to encourage the removal or modification of unfair contract terms, including terms that:

- ▶ give providers the right to vary prices and other terms and conditions but do not allow the consumer to cancel the contract without penalty;
- ▶ restrict the liability of the supplier or its employees or agents (for example, allowing the provider to suspend the service without notice or liability);
- ▶ penalise the consumer for breach or termination of the contract (for example, allowing the provider to charge an early termination fee that requires the consumer to pay out the remaining contract price); and
- ▶ prevent or restrict the consumer's dispute resolution options.

1. Search for the above article on the Internet. In groups of three or more, obtain copies of standard contracts to buy a mobile phone from Telstra and one other provider. Go through the contracts and identify any terms which you regard as being unfair. [C] [A] [E]
You need to go to a Telstra shop or the other provider's shop to ask the following questions.
2. Ask a sales person if Telstra/the other provider reserves the right to vary prices without your consent. Find out if you can terminate the contract if this happens. Record the responses in writing. [C] [S]
3. Ask a salesperson if Telstra/other provider can suspend your service without notice or liability. Write down the response. [C] [S]
4. Can you pay cash for a mobile phone and prepay for the services you require? On what terms? [C] [S]
5. Ask about payment plans. As a group identify a payment plan which seems appropriate for you. Find out what arrangements are available to you if you enter the payment plan. [C] [S] [A]

PRACTICAL APPLICATION CONTINUED...

6. Discuss as a group the legal obligations you would have if you:
 - ▶ bought a prepaid phone; or
 - ▶ entered a payment plan to buy a phone. [C] [A]
7. Discuss as a group the differences and similarities between the two options (prepaid/payment plan) to buy a mobile phone. As a group which do you prefer? Is one or the other fairer to the consumer? Explain your reasons. [C] [S] [A] [E]
8. Summarise the group's findings in a short report and present it orally to the class. [A] [E] [R]
9. Were the experiences and conclusions of other groups in the class similar to, or different from, your own? Explain your answer. [C] [A] [E] [R]

REVIEW

1. Describe the following: [C]

sponsorship | minor | necessities of life | tenant | lessor |
holding deposit | code of conduct

2. Describe and explain the following: [C] [A]

- (a) The contractual obligations of a sponsor to a sporting organisation.
- (b) The contractual obligations of a sporting organisation to its participating clubs.
- (c) The contractual obligations of the players in a professional sport to their employer clubs.
- (d) How it is possible for a minor to be bound by a contract in professional sport.
- (e) How to prepare yourself to buy a mobile phone.

3. Describe and explain how contract law has provided the means whereby the various stakeholders involved in each of the activities presented to you in this chapter, have dealt with the contract issues that they have needed to resolve. [C] [A]

TOPIC 3: NEGLIGENCE AND THE DUTY OF CARE

CHAPTER 25: WHAT ARE THE ELEMENTS OF NEGLIGENCE

FOCUS SUBJECT MATTER

25.1 WHAT ELEMENTS MUST THE PLAINTIFF PROVE?

25.2 WHAT IS A DUTY OF CARE?

25.3 WHEN DOES A PERSON BREACH THE DUTY OF CARE?

25.4 WHEN IS THE DAMAGE CAUSED BY THE BREACH

TO UNDERSTAND AND APPRECIATE:

- ▶ the main purposes of the law against negligence;
- ▶ the origins of the law of negligence in *Donoghue v Stevenson*; and
- ▶ the legal requirements for a plaintiff to win a negligence action.

25.1 WHAT ELEMENTS MUST THE PLAINTIFF PROVE?

Negligence is the **breach of a person's duty** to another person to **take reasonable care** in the circumstances where such breach of duty **causes damage** to another person. For the defendant to be negligent, the plaintiff must prove to the judge, **on the balance of probabilities**, the existence of the following **three elements**:

1. The defendant must owe a **duty of care** to the plaintiff.
2. The defendant must **breach** this duty by failing to meet the required standard of care.
3. **Damage** to the plaintiff must be **caused** by the breach of the duty of care.

Before turning to each of these elements that need to be proved, it will be helpful to look at some specific instances of negligence that you will recognise.

CASE STUDY

State of Victoria v Bryar [1970] 44 ALJR 174

Facts: Bryar was a student in the Heidelberg Technical School in Victoria. While in class, supervised by the teacher, Mr Keyte, he suffered an injury to his right eye from a blow from a pellet. This blow eventually caused a total loss of sight of the eye. The paper pellet was fired by another student using a rubber band. A large number of the class were firing paper pellets over a substantial part of the lesson. Mr Keyte's evidence was that he was unaware of the firing of the pellets but that, if he had been aware, he could have, without difficulty, restored order. The jury at the trial took the view that the teacher did see the majority of his students engaged in a concentrated exchange of paper pellets and had done nothing about it. At the trial the student was successful. The appeal to the Full Court of the Supreme Court of Victoria was dismissed. The defendant appealed to the High Court.

Legal Issues:

1. Did the school teacher owe a duty to the student to take reasonable care for his safety?
2. Was the failure of the teacher to prevent the exchange of pellets a breach of this duty?
3. Was the damage to the student's eye caused by the breach of the duty?

Decision: The High Court held that the school teacher did owe a duty to the student to take reasonable care for his safety. The teacher's failure to discipline the class was a breach of this duty. He didn't act reasonably in the circumstances. A reasonable teacher would have disciplined the class. Further, given that the teacher himself said that he could have brought the class to order, it was his failure to do so that caused the damage to the student.



1. What duty of care did the teacher owe to the student? [C]
2. What steps do you think the teacher should have taken so it could be said he had acted reasonably? [A]
3. What other events could be regarded as having caused the harm to the student? Do you think it is fair for the teacher to shoulder the whole of the legal burden? [A] [E]



YOU BE THE JUDGE



Assuming the facts in *Bryar's* case were the same, other than the changes in the situations referred to below, say whether you think Mr Keyte would have been negligent in each of the following situations.

1. Imagine that the injury was caused by a pellet (being the only pellet fired throughout the lesson) which was fired without any warning. [A]
2. What if the pellet that harmed the student was fired from outside the room by a student walking by? [A]
3. Imagine that the students were adults, instead of being teenagers, attending a conference at which Mr Keyte was a lecturer delivering a paper. [A]



The Court found that the teacher in *Bryar's* case did not act reasonably in the circumstances. To establish that the teacher has breached his or her duty of care it must be shown that a teacher failed to act as an '... **ordinary reasonable teacher**...' (Kitto, J. in *Ramsay v Larson* (1964) 111 CLR 16 at 27). In determining the standard of care required of a teacher in a negligence action, courts today generally use the test of what steps a reasonable teacher, with similar skills, experience and qualifications possessed by the defendant teacher, would have taken in a similar situation.

Because *Bryar's* case was heard in the High Court, this means that the decision and its legal principles are **binding on every court in Australia**. If another case with **similar facts** were to come before a court, then the same decision as *Bryar's* case must be **applied** to the later case, unless it can be proved to the court that the facts of the later case are materially (significantly) different from the facts in the High Court authority of *Bryar*. If there are **materially different facts** in the later case, then its facts will be **distinguished** from the facts of the case authority (precedent) and the decision in the earlier case will not be followed.

That is what happened in the following South Australian Supreme Court case of *Johns v Minister of Education, Chinner and Beck*, which also involved a classroom teacher with unruly students who were firing objects at each other. It sounds very familiar but did the later case have any facts that were **materially (significantly) different** from the facts in *Bryar's* case?

Material facts are those which are **significant or important to proving the main legal elements of the case**. In *Johns' case*, as in *Bryar's case*, the main legal element in dispute was whether the teacher had breached the duty of care owed to the students in the classroom. Clearly, the different sex of the teacher was not a material fact and neither would have been the fact that a different subject was being taught.

To apply or distinguish the facts of *Bryar's* case?

... that was a key question for the South Australian judge in:

CASE STUDY

Johns v Minister of Education, Chinner and Beck (1981) 28 ASR 206

Facts: A female secondary teacher, Mrs Chinner, became aware of two boys who were using catapults to fire ballpoint pens at other students in the classroom. The teacher ordered all students with catapults to put them in a bin and several students did so. She was not aware that any student had retained a catapult. Later in the same lesson, the plaintiff, Johns, a boy of twelve years of age, was struck in the eye by a ballpoint pen discharged from a catapult by another twelve-year-old boy, Robert Beck.

Legal Issue: Did Mrs Chinner breach her duty of care to the injured student by failing to take steps that would be expected of a reasonable teacher in the situation?

Decision: No, according to Justice Sangster of South Australia's Supreme Court, the teacher had not breached

her duty of care. She had acted reasonably in the circumstances to prevent or minimise the injury occurring. Thus, the negligence action against the teacher and her employer, the Minister for Education in South Australia, was dismissed by the judge. The plaintiff was, however, entitled to an award of damages against the other schoolboy, Robert Beck, who had caused the injury by firing the ballpoint pen.



1. What decision was made by the South Australian Supreme Court judge in *Johns v Minister of Education, Chinner and Beck*? [C]
2. How were the facts in *Johns'* case similar to those in *Bryar's* case? [A]
3. How were the facts in these two cases different? [A]
4. Why was the decision made in *Johns'* case different from the decision in *Bryar's* case? [A]
5. Do you think the decision made by the judge in *Johns'* case was fair? [E]

Because of its similar facts, the High Court decision in *State of Victoria v Bryar* was a legal precedent (a case authority) that the South Australian judge was bound to consider in deciding whether the teacher was negligent in *Johns'* case. The decision in *Bryar's* case was not, however, applied to *Johns'* case by the South Australian judge. The facts of *Bryar's* case were **distinguished** from the facts of this case because they were **materially different**.

In *Bryar's* case, the teacher must have been aware of the fact that paper pellets were being fired by a majority of the students but took no steps to stop the unruly and dangerous behaviour. In *Johns'* case, by contrast, the teacher had taken reasonable steps to stop or minimise injury to the students by ordering all students to dispose of their weapons in the bin and then supervising their disposal.



Mrs Chinner, in contrast to the inaction of Mr Keyte, had acted promptly and decisively to take control of the class. This was the major point of distinction between the two cases. Mrs Chinner had made a reasonable attempt, using her teaching skills and experience, to stop the dangerous behaviour. If, however, Mrs Chinner had totally ignored the firing of ballpoint pens by the two boys, the decision in *Bryar's* case would have been applied to *Johns' case* and she would have been found negligent.

HYPOTHETICAL

As a class, brainstorm as many potentially dangerous situations as possible that could occur during lunchtime at your school if no teachers were supervising the oval, tuckshop and other parts of the school grounds. Write the situations in a column down the left side of the board and then write beside each situation on the right side of the board different ways in which your teachers can reduce the potential danger.



VICARIOUS LIABILITY

Although a teacher is usually at the centre of initial allegations of negligence in a school, the relevant school or an educational authority, such as the Department of Education (state schools) or a Board (most private schools), is most often sued for negligence instead of, or as well as, the teacher concerned. This is generally based on the principle of **vicarious liability**, which **stems from the contract of employment** between the school authority and the teacher. Vicarious liability is a form of strict liability, in the sense that the school or higher educational authority may be liable for damages, even though it has not been personally negligent.

A **major purpose** of the legal principle of vicarious liability is to shift the burden for payment of damages from the negligent teacher to the broader shoulders of the teacher's employer. Another purpose is to ensure that the school authority trains and supervises its staff so that they meet acceptable standards when supervising children.

The injured student will normally bring the school authority to court, because the school authority is, in most cases, better able to pay any damages that may be awarded. It should be noted that, even if a claim of vicarious liability is made, **the plaintiff must still prove that the teacher was negligent** before the school authority can be held vicariously liable for the injury.

Since Mr Keyte's employer at the state school was the Victorian Government (referred to as the State of Victoria in the official case title), it was held to be vicariously liable for the damage caused by Mr Keyte's negligence. Thus, the order for compensation was made against the State of Victoria as well as personally against Mr Keyte, effectively meaning that the compensation was paid by the State of Victoria rather than its employee, Mr Keyte. Similarly in *Geyer v Downs and Another* (1978) 52 ALJR 142 (referred to later in this chapter), the headmaster of the school was sued and the New South Wales Government was vicariously liable.

You will see from the above that vicarious liability results in liability being imposed on one person for the wrongful act of another. It is **most commonly seen** in our society where an employer is responsible for the negligence of its employee **when the employee acts within the usual scope of his or her employment**.

RESEARCH

1. Survey a number of teachers in your school about their knowledge and attitudes in relation to the legal principle of vicarious liability, especially as it relates to situations where teachers are negligent, but the Education Department or the School Board is likely to have to pay whatever compensation is granted by the courts. [C] [S] [E] [R]
2. Invite a representative of the Education Department or the Queensland Teachers' Union to present its policy on the question: "Should the Education Department be vicariously liable for the negligence of its employee teachers?" [R]
3. Write a report which summarises the results of your survey and the views of the Education Department or the Queensland Teachers' Union. [C] [A] [R]
4. Based on your research, what is your opinion of the legal principle of vicarious liability – is it fair for the employer to be held legally responsible for an employee's negligence? [A] [E] [R]

25.2 WHAT IS A DUTY OF CARE?

For a plaintiff to be successful the court must decide that the plaintiff is owed a **duty of care** by the defendant. To understand how a court decides whether a person is owed a duty of care or not we must look briefly at the historical development of the duty of care.

DEVELOPMENT OF THE DUTY OF CARE

The starting point and the cornerstone of determining whether a duty of care exists is the famous case of *Donoghue v Stevenson*, which was decided by the House of Lords (the highest court in England) in 1932. Prior to 1932, no legal relationship was recognised as existing between the manufacturer of a product and a person (the consumer) who used the product, unless there was a legally binding contract made between them. As you can suppose, there was not a contract in most cases because a consumer very rarely bought directly from a manufacturer. Most consumers bought from retailers. This case, however, changed the law.

CASE STUDY

Donoghue v Stevenson [1932] AC 562

Facts: The plaintiff and her friend were in a cafe when her friend bought her a bottle of ginger beer in a bottle made of dark glass through which the contents could not be seen. The owner of the cafe poured some of the ginger beer from the bottle into a glass. Once the plaintiff had drunk some of the ginger beer from the glass, the plaintiff's friend poured the remainder of the ginger beer into the glass, at which point the decomposed remains of a snail fell from the bottle. The plaintiff suffered shock at the sight of the snail and severe gastro-enteritis (stomach upset).

Legal Issue: Did the defendant owe the plaintiff a duty of care? Because the plaintiff did not buy the ginger beer, she had no contractual relationship with the cafe owner (seller). She therefore couldn't sue the café owner

for breach of contract and sued the manufacturer of the bottle of ginger beer, claiming that the manufacturer had a duty of care to her. Thus, the basis of the plaintiff's claim was that her shock and illness had been caused by the defendant's failure to take reasonable care in making and bottling the ginger beer.

Decision: A majority of the House of Lords (3-2) decided that the defendant owed a duty of care to the plaintiff and had breached that duty in manufacturing the product in question. Significantly, the court held that the fact there was no contractual relationship between the plaintiff and the defendant did not stop the plaintiff from suing someone for a tort.

CASE STUDY CONTINUED...

As a result of this case, a very important new principle, which became known as the 'neighbour principle', was established by Lord Atkin, one of the majority judges in *Donoghue v Stevenson*.

This obligation to take reasonable care of your neighbour became a legal duty. As happened in *Donoghue v Stevenson*, it is very important to understand that this legal duty can arise independently of any contract between the people involved. In practice, however, it is sometimes the case that there is both a contract and a duty of care in tort arising out of the same situation. For example, imagine that you purchased a meal from a restaurant and the food used in the preparation of the meal was so old and so far beyond its use by date that it was poisonous to your system, and you suffered damage. In that situation there would be both a breach of contract between you as the consumer and the restaurant owner and also a breach of a duty of care to you which the owner of the restaurant owed you as a customer. In those circumstances, you could sue for both a breach of contract and in negligence.



Although Lord Atkin stated that he was merely summarising the existing law of negligence, his above words actually **brought about a fundamental change in the scope of the tort of negligence**. The duty to take care could now arise where there was a risk of injury, damage or loss being suffered, even though no duty of care had previously been imposed by the courts in that type of case.

1. Who was the plaintiff? [C]
2. Who was the defendant? [C]
3. Before the case of *Donoghue v Stevenson* was decided, why didn't consumers have the right to sue manufacturers if there was no contract made between them? [C]
4. Why is the neighbour principle so important to consumers? [C]
5. What fact meant that the plaintiff could not prove that the owner of the cafe who sold the bottle of ginger beer had been negligent? [A]
6. In your opinion, was this a wise decision? In answering this question, consider the long-term effects the decision has had on the way manufacturers, suppliers, retailers and consumers do business in our modern world. [A] [E]

The **neighbour principle** provides the **starting point** for testing whether a duty of care is owed by one person to another.

The High Court has pointed out that the cases which have been decided over the years have **clearly established situations in which duties of care are owed**. However there is a difficulty associated with determining whether a duty of care exists or not in new cases arising out of new situations. Nevertheless, we can say that, **for a duty of care to exist, the plaintiff must show at least two things. These are:**

1. that the plaintiff is a **reasonably foreseeable person** who would suffer harm as a result of the negligence on the part of the defendant; and

2. that the **type of damage actually done** to the plaintiff is **foreseeable** when looking at the circumstances of the case.

To illustrate this, we turn to the specific example of a **hotel or club**. There is no doubt that a hotel or club serving liquor owes a duty of care to its customers in certain circumstances, but it does not owe a duty of care to its customers in all circumstances. A customer in a hotel or club is a reasonably foreseeable person who might be injured by the negligent acts of the club or hotel. The first test above, therefore, is met. In particular the club would owe a duty of care to its customer not to sell the customer adulterated liquor and thus make the customer sick. It would owe a duty of care to the customer to ensure that the premises were sound and that the bar did not collapse and injure the customer when a customer leans on the bar. It would owe a duty of care to the customer to have sufficient exits in the event of a fire occurring in the club. There are circumstances, however, where the court has found that a duty of care is not owed to a customer. The following case illustrates this.

CASE STUDY

Cole v Sth Tweed Heads Rugby Club 217 CLR 469 (15 June 2004)

Facts: Mrs Cole (the plaintiff) had been present on the club's premises for approximately eight hours. She had consumed free wine supplied by the club at a champagne breakfast. After that she continued to drink alcohol. By 3.00 p.m. she was intoxicated and the club refused further service to her at that time. At 5.30 p.m. the club manager asked her to leave the club. He offered her the use of the club's bus or to call her a taxi. The plaintiff rejected those offers and left the premises on foot in the company of two men who said that they would look after her. They were apparently sober. Approximately fifteen minutes later the plaintiff was struck by a car about 100 metres from the club premises. She was severely injured. At hospital her blood alcohol content was measured at .238% (the equivalent of sixteen alcoholic drinks). The plaintiff sued not only the driver of the motor vehicle but the club, alleging that the club owed her a duty of care and that the club had breached its duty.

Legal Issue: Did the club owe the plaintiff a duty of care in the circumstances?

Decision: A majority of the High Court held the club had no duty to protect a customer from a risk of injury resulting from self-induced intoxication. Gleeson CJ said that the harm suffered by the plaintiff was personal injury resulting from her careless behaviour. He said that most adults know that drinking to excess is risky and that a supplier of alcohol in either a commercial or social setting is usually in no position to assess the risk. He said that the consequences of the plaintiff's argument involved both an unacceptable burden upon ordinary social and commercial behaviour and an unacceptable shifting of responsibility for individual choice.



1. Why wasn't the plaintiff successful? [C]
2. What duty of care did the Chief Justice say did not exist? [C]
3. What type of injury did the plaintiff suffer? [C]
4. If the champagne was contaminated and Mrs Cole's injury was paralysis due to poisoning, do you think the result would have been different? [A]
5. Imagine if the plaintiff suffered the same type of personal injury as a result of her being hit by a glass in a fight between other customers in the club. Do you think the result would have been different? [A]
6. Do you think that the decision of the High Court was fair? In answering this question, consider whether or not the type of damage done to the plaintiff, namely personal injuries from a motor vehicle when the plaintiff was intoxicated, was reasonably foreseeable by the club [A] [E] [R]

The current Chief Justice of the High Court of Australia French CJ said in a recent case, *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA36 (8 October 2014) that reasoning by analogy (seeing if a duty of care exists by looking at earlier decisions of the courts) should be helpful to a coherent development of the law of torts.” It is fair to say that, in new cases, the courts will assess whether a duty of care exists by referring to well established duties in cases already decided. It is also fair to say that there will only be a gradual recognition of new duties of care.

25.3 WHEN DOES A PERSON BREACH THE DUTY OF CARE?

Before turning to the general principles, the following case study illustrates the common sense nature of how a court determines whether a duty of care has been breached or not.

CASE STUDY

Lawes v Nominal Defendant [2007] QSC 92

Facts: The plaintiff was riding his motorcycle from Gympie to Rainbow Beach in Queensland. After overtaking a utility, the plaintiff shortly thereafter saw and then struck a horse lying directly in his path on the road. The plaintiff fell off his motorcycle and was injured. The plaintiff contended that the horse had been previously struck by a car or a truck and that the driver of the car or truck had taken no steps at all to warn of the danger of the horse being on the road or to remove the horse from the road. The Nominal Defendant (the defendant in cases where drivers of motor vehicles are unknown or unidentified) argued that the evidence did not identify any earlier injury to the animal and that the horse could have died through other mishap, for example, by way of a snake bite or from slipping and falling. In other words the Nominal Defendant argued that another misfortune (other than being struck by an unidentified or unknown motor vehicle driver) might account for the presence of the otherwise healthy horse lying on the road. It was an issue for the trial judge to decide whether it was more probable than not that the horse was lying on the road because of a recent collision with an unidentified motor vehicle or that the collision between the horse and an unidentified motor vehicle may have occurred without any negligence on the part of the driver of the unidentified motor vehicle. The plaintiff could not, however, prove that

it was more probable than not that the impact between the horse and the unidentified motor vehicle resulted from negligence of the driver of the unidentified motor vehicle.

Legal Issues:

1. Was it more probable than not that the horse was lying on the road because of a recent collision with an unidentified motor vehicle?
2. Given that the Nominal Defendant is responsible for the negligent acts of unknown or unidentified drivers, was it liable for the loss suffered by the plaintiff?

Decision:

1. The trial judge concluded that it was more probable than not (which is the standard of proof in a civil action) that an earlier driver had struck the horse and had left the prone horse on the road.
2. Even though such striking of the horse may have been blameless, there was a duty on that driver to exercise reasonable care to prevent that hazard from harming other road users. There was a breach of the duty by the driver in that he did not either remove the horse or remain and warn any oncoming drivers of the presence of the horse.

1. What was the duty of care that the judge found? [C]
2. In what two ways was the duty of care breached? [C] [A]
3. Do you agree that a driver should have such a duty of care imposed on him or her? [A] [E] [R]

Once a court decides that a duty of care exists, the next question is whether or not the defendant has breached that duty. To decide this, we must first turn to the *Civil Liability Act 2003* (Qld). This Act was passed after an Australia-wide review of the law of negligence. The Act applies to all types of claims in tort, including claims of personal injuries, economic loss, and damage to property. In many parts of the Act it sets out the common law principles that were adopted by the courts over many years, while other parts of the Act set out significant changes. In relation to breach of duty of care, s9 of the Act provides as follows:-

S.9 General principles

- (1) A person does not breach a duty to take precautions against a risk of harm unless
 - (a) the risk was **foreseeable** (that is, it is a risk of which the person knew or ought reasonably to have known); and
 - (b) the risk was **not insignificant**; and
 - (c) in the circumstances, a **reasonable person** in the position of the person **would have taken the precautions**.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things):
 - (a) the **probability** that the harm would occur if care were not taken;
 - (b) the **likely seriousness** of the harm
 - (c) the **burden of taking precautions** to avoid the risk of harm; and
 - (d) the **social utility** of the activity that creates the risk of harm.

The factors set out in s9(2) of the *Civil Liability Act 2003* (Qld) are some of the factors laid down by Justice Mason in the High Court decision of *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47. These and others are set out below. They provide judges with useful guidelines to follow in deciding what constitutes a breach of the duty of care in each case. The first four factors set out below are clearly seen in s9(2) of the *Civil Liability Act*.

FACTORS TO BE CONSIDERED IN DECIDING WHETHER A REASONABLE PERSON WOULD HAVE TAKEN PRECAUTIONS.

a. The probability that the harm would occur if care were not taken

The greater the risk of injuries occurring in a particular situation, the higher is the associated standard of care in relation to the activity. In the earlier case of the horse being left on the road, there was a very high probability of harm occurring to other motorists if care wasn't taken. A further example was when a teacher was found negligent in failing to closely supervise at all times a high risk activity in the form of shot put practice (*Thomas v South Australia* – unreported Supreme Court decision, 24 July 1992).

Great caution is needed when students participate in potentially dangerous activities, such as camping, hiking and mountain climbing. In *Nicholas v Osborne 1985* (unreported decision of a Victorian County Court judge), 20 students were accompanied on a hike by three teachers (a student-teacher supervision ratio that was approved by the State Education Department). The judge found the school negligent in relation to the death of a student and the physical injury, nervous shock and insomnia of another student who had been walking on the high part of the track at the time of the accident. The deciding factors for the judge in determining that the teachers had not met the required standard of care were the degree of supervision possible (despite existing guidelines, the ratio should have been greater), the inexperience of the children and the large amount of rain both during and immediately before the hike.

On the other hand, consider the following case study.

CASE STUDY

Donald Joseph Mizzi v Trevor William Haines [1996] NSW SC 279

Facts: Donald Mizzi was a child in Year Six, aged almost twelve. He jumped from the top of a blackboard cupboard in his classroom striking his head on a rotating ceiling fan. He suffered injuries. This occurred on the second last day of term, when teachers and pupils were engaged in cleaning and re-organising school rooms. Mizzi, without permission, left the task he was given and went into Miss Jardine's classroom. She had given permission for two other students to climb onto the top of a cupboard next to the blackboard to clean it. Mizzi, without permission, climbed up to the top of the cupboard. Miss Jardine, when she noticed him, asked him to climb down and to 'get down carefully'. Instead of climbing down he put his feet up towards the top of the blackboard and put his hands on the edge of the blackboard and propelled himself forward, jumping outward. He hit the fan and suffered injuries. He would not have hit the fan if he had climbed down the way he got up or if he dropped straight down from his position on the ledge. Miss Jardine gave evidence that she knew that the fan was 'a danger to somebody on top of the blackboard'. However it was not a danger to anyone who ascended the blackboard in a manner prescribed or dropped down from the top of the blackboard without springing outwards into the fan.

Legal Issue: Did Miss Jardine breach her duty of care to the plaintiff?

Decision: There was no breach of duty. Mizzi was directed to descend as soon as Miss Jardine saw him. It was not reasonably foreseeable that the boy would propel himself outwards and upwards from the shelf in a way which would bring his head into contact with the fan. Furthermore, it was held that there was no breach of duty in not turning off the fan before directing Mizzi to descend because it was not reasonably foreseeable that he would propel himself outwards into contact with the fan.



1. Was Miss Jardine held to be negligent? [C]
2. How was the injury to Mizzi caused? [C]
3. Why was not turning off the fan not a breach of duty? [A]
4. Imagine that Mizzi had been given permission along with the other two students to climb on to the top of the cupboard. If that was the only change in the facts, do you think the result of the case would be different? [A]
5. Mizzi was injured at school. He was unsuccessful in this claim. Do you think that was fair? [A] [E] [R]

b. The likely seriousness of the harm

The more serious the injuries are likely to be, the higher is the standard of care to be taken and the more necessary it would be for a reasonable person to take precautions. Obviously, when a teacher takes students on a snow trip, snow tobogganing and skiing are inherently dangerous activities that require greater precautions to be taken than when supervising other less dangerous activities such as a game of soccer on the oval. Those responsible for supervising more dangerous activities should have experience and training in the particular activity and should be able to show that they have carefully considered and acted upon all foreseeable risks and eventualities.

In the case of *Beck v State of NSW* [2001] NSWSC 278 (referred to later as *Beck's case*), an engineer gave expert evidence about the substantial dangers involved in tobogganing. According to the engineer's evidence, riding a crudely made toboggan in the form of a real estate "For Sale" sign head-first down a steeply sloping snow-covered hill was an extremely hazardous activity. It placed a very high standard

of care, which was not reached in this case, on the school's principal and teachers to ensure the safety of the school's students and practice teacher who were on a snow trip. It was the practice teacher who, tragically, as a result of losing control of his toboggan while participating in the unacceptably dangerous activity, became a high level quadriplegic who was dependent on others for most of his personal functions. He was awarded \$9 million in compensation, less a 20% deduction for contributory negligence. Both the school and the ski resort were found to have been negligent. The ski resort should have placed warning signs of the dangers of tobogganing at both, rather than just one, of the exit levels from the resort onto the nearby slope in question.

c. The burden of taking precautions to avoid the risk of harm

How costly and practically difficult would it have been for the defendant to take steps to prevent the injury, damage or loss from occurring? In *Beck's* case, it would have taken the teacher-in-charge of the snow trip very little time and effort to enquire of a Blue Cow resort staff member whether the intended tobogganing adventure, using the makeshift signs as toboggans, was advisable in the prevailing icy snow conditions. A simple telephone call would have alerted the school to the activity's inherent dangers. If the burden of taking precautions is small, then a reasonable person is more likely to have taken precautions.

d. The social utility of the activity that creates a risk of harm

What is the defendant hoping to achieve by his or her conduct? Was the activity's purpose to benefit those taking part in it?

In *Kretschmar v State of Queensland* [1989] Aust Torts Reports 68,888, an intellectually disabled child was injured during a game at a special school, but the court found the school was not negligent because the game's purpose was to improve the student's manipulative skills and encourage team spirit. The court also took into account the fact that the risk of injury was small and that the game was in a State Government handbook of recommended activities. On the other hand, in *Beck's* case, there was no obvious benefit to be derived from careering head-first down an icy slope on a make-shift toboggan.

e. Whether standard procedures in the profession have been followed

Has the defendant changed the usual practice that is adopted in the activity in question? With respect to the duties of schools to students, all schools have playground supervision rosters for school staff during breaks. In *Commonwealth v Introvigne* (1982) 56 ALJR 749, the High Court recognised that educational authorities are responsible for proper supervision by teachers. In that case, it was negligent for only one teacher to be supervising 900 boys, even if for only five minutes, when the top of a flagpole, loosened by a student swinging on the halyard, fell on another student.

In *Geyer v Downs and Another* (1978) 52 ALJR 142, an eight year old student was severely injured before school at Blacktown, New South Wales, when she was accidentally hit on the head with a softball bat. Even though it was before school, and there was a school rule that the students were not to run around and play games before lessons commenced, there was evidence to show that, even though attempts had been made by the staff to enforce the rule, the children continued to play on the grounds before lessons. No measures had been taken to ensure regular supervision of the playground before lessons began. This was a breach of the duty of care and the girl successfully sued the school and the NSW Government was vicariously liable.



CASE STUDY

Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba (2005)
221 CLR 161

Facts: The plaintiff, a school student, was playing on a flying fox in the playground. A boy and girl each grabbed one of the plaintiff's legs. The plaintiff struggled to free herself and told the other children to let her go. However, she was pulled off the flying fox, striking her face on the platform as she fell. There were two teachers supervising the area in which the children were playing. There was a 'hands-off' school rule requiring that the children not touch each other while playing in the playground. This rule was enforced by the school and there was evidence that teachers had in the past insisted on the rule being observed. When the incident occurred the school teacher on playground duty was supervising the toilet block and the classrooms. The accident occurred in the 20 or 30 seconds which elapsed between the moment when the teacher had left the area in the playground where she could see the flying fox and when her attention was drawn to the toilet block and classrooms. The plaintiff sued the school for negligence.

Legal Issue: Both the plaintiff and the defendant agreed that the school owed a duty of care to the plaintiff. Both agreed that the plaintiff had suffered injury. The issue was whether the school had breached its duty of care to the plaintiff.

Decision: The High Court of Australia, by a majority of 4:1, held that the school was not in breach of its duty of care. Even though there was not constant supervision by teachers, the school had deployed competent supervising teachers. The school had a 'hands-off' rule. There was no prior accident of a serious kind in nearly 6 years with the flying fox and there was no sign of trouble immediately before the accident occurred. Most importantly, the court found there was no requirement that, in these circumstances, a teacher was required to be permanently stationed to monitor the flying fox.

f. Whether the standard procedures meet the standard of care required by law

Merely following standard procedures, however, may not be enough. In the case of *Rogers v Whitaker* (1992) 109 ALR 625, the doctor, before performing the operation, had followed standard medical practice of only warning of the most likely complications that could result from the surgery but not warning the plaintiff of the unlikely event that occurred, namely, a one-in-14,000 chance that the surgery might result in her going blind in her good eye. The High Court stated that, despite following standard medical practice, the doctor failed to meet the standard of care required by law which, in this case, was to inform the patient of every possible adverse event, no matter how remote it might be. This failure to warn the patient amounted to a breach of the doctor's duty of care to the patient.

There is now an Act of Parliament in Queensland that tends to reduce this burden on doctors and other professionals. Section 21(1) of the *Civil Liability Act* provides that professionals who acted in a way that is regarded widely by the opinion of peer professionals as competent behaviour are not liable in negligence. Furthermore this section provides that there will be a breach of duty by a doctor by failing to give information to a patient only if a reasonable person in the patient's position requires information. This means that, if a person requests information about the medical procedure which is unreasonable, the doctor will not breach his duty if he fails to give that information to the patient. This statutory provision was passed in direct response to a community concern that doctors may well become uninsurable.

g. Any special characteristics of the plaintiff or the defendant

A plaintiff may have a disability such as epilepsy or attention deficit disorder. The reasonable teacher must be able to foresee fairly exotic possibilities. In addition to having to take into account the mischievous tendencies of young children, the reasonable teacher needs to consider the unusual susceptibility of some students such as asthmatics or wheelchair-bound students. Although a defendant

is not generally bound to anticipate the presence of an especially susceptible person, it should be remembered that the amount of care to be provided should be in proportion to “...the inability or disability of those who are immature or feeble in mind or body...” (Lord Sumner in *Glasgow Corporation v Taylor* [1922] 1 AC 424).

h. Whether the requirements of relevant Acts and Regulations have been followed

Is there a statute that regulates conduct in the matter? For example, has the defendant breached any traffic regulations, such as travelling faster than the speed limit, failing to give way to other traffic, running a red light, or driving while under the influence of alcohol or other prohibited substances? This may be used as evidence of failure to act as a reasonable driver.

It is against the law to use a hand-held mobile phone while driving. Motorists are risking their lives and the lives of others each time they dial a number, send a text message or hold a conversation while driving. In fact, an overseas study has branded texting as dangerous as drink-driving. Obviously, this breach of the law would be an important factor in a court’s decision about the negligence of the mobile phone motorist in relation to any accident caused by the motorist. A reasonable motorist does not use a hand-held mobile phone while driving.

Seat belts have been required by law for drivers and passengers since 1972 and for all interstate buses built since 1994. Thus, failure to provide a seatbelt to a passenger or to request passengers to wear them on such vehicles would be an important factor taken into account by a court in deciding whether the vehicle’s owner or driver has breached his or her duty of care.

These are some of the factors that the courts consider. However, the list of such factors is ever expanding. The phrase, *among other relevant things*, in s9(2) of the *Civil Liability Act* caters for other factors. For example, if there is a **relationship of dependency** between the plaintiff and the defendant, then the breach of a duty of care might more easily be found. This is true of school/student relationships. It is also true of other relationships of dependency, as illustrated by the following case.

CASE STUDY

NSW v Bujdoso [2005] HCA 76

Facts: The plaintiff had been convicted of sexual assault on minors. He had requested, and been granted, a place in the Work Release Program and was housed within the section of the prison which had minimal supervision by prison officers. The plaintiff was allocated the room at the end of a unit despite requesting a room closer to the prison officer’s station. One night at about 11.00 p.m. two to four men dressed in balaclavas burst into his room and bashed him with iron bars. Most blows struck were to his head. He suffered injuries, including a fracture of the skull. The system of supervision by prison officers was such that during the night there were some periods when there was no officer at the units where the plaintiff lived at all. There was evidence at the trial that the plaintiff had been taunted in the dormitory and lunch room and been called a “rock spider”. He had received a threatening letter and had often reported incidents in which he had been threatened. The prison authorities had solicited from the plaintiff a signed document (a release form) which said that he accepted responsibility for his own safety and welfare at the institution.



CASE STUDY CONTINUED...

Legal issues: There was no issue as to whether a duty of care was owed. Was, however, there a breach of the duty of care?

Decision: The High Court of Australia concluded that there was a breach of the duty of care owed by the prison administration (the Government of New South Wales) to the prisoner. There was more than a merely foreseeable risk of injury to the plaintiff. There was a risk that had actually been expressly threatened. Such a risk, once known to the authorities, called for the

adoption of measures to prevent it. No effective measures were adopted so the plaintiff didn't merely rely on a well known fact that people convicted of sexual offences faced threats of grave physical danger but was able to show that the prison authorities had actual knowledge of the threats made against him. Further, the fact that the prison authorities solicited a form of release from liability from the plaintiff showed that the State must have been aware that the plaintiff was at greater risk from the threat of physical harm than other prisoners.

1. What was the evidence of this plaintiff being at greater risk than the ordinary prisoner? [C]
2. In the context of the decision, what was the effect of the prisoner signing a form of release? [C]
3. Do you think a prisoner who has been convicted of a sexual assault should be successful in a claim against a State Government in these circumstances? [A] [E] [R]

25.4 WHEN IS THE DAMAGE CAUSED BY THE BREACH?

For a plaintiff to be successful, he/she must show that:

- a) damage was suffered;
- b) the damage was caused by the defendant's negligence; and
- c) the damage is not too remote from the defendant's negligent act or omission.

a. Damage must be suffered

If there is no damage, a negligence action will fail. Even if there is a duty of care and it has been breached by the defendant, a negligence action will fail if the plaintiff is unable to prove to the judge that he or she has suffered damage of some kind.

The following newspaper report of a case clearly illustrates this point.

'FACELIFT FLOP' WOMAN SUES

SOURCE: GOLD COAST BULLETIN, 2 JUNE 2001 (EXCERPTS).

A woman who claimed a facelift left her looking like a gargoyle [a grotesque carved face], yesterday lost her battle for damages against a plastic surgeon who performed the operation.

Retired photographer Roma Blackwell, 78, had sued Sydney plastic surgeon Michael Baldwin over the December 1998 operation, to get rid of a double chin and baggy eyes.

She claimed the surgery left her looking like "a gargoyle", with a lopsided face, an increase in the size of the whites of her eyes, dragging upper eyelids and chronic eye irritation.

However, Judge Richard Rolfe in the NSW District Court did not agree, finding she looked no worse after the \$9,000 surgery than she did before.

He found Dr Baldwin had properly carried out a limited facelift, taking into account Ms Blackwell's age, bad heart condition, smoking habit and previous facelift scars.

Judge Rolfe ordered Ms Blackwell to pay the doctor's costs.

Once the fact that damages were suffered is established, there must be a connection between the breach of a duty of care and the damages suffered by the plaintiff. If the plaintiff's damages were not caused by the defendant then there is no claim even though the defendant might have suffered damages.

b. Caused by the defendant's negligence

The common law principles developed in the courts have now been set out in s1 of the *Civil Liability Act* which states that, for a breach of duty to have **caused particular harm**, it must have been a **necessary condition** of the occurrence of the harm (factual causation).

This really involves asking the question:

Did the defendant cause the harm or did somebody else or some other action cause the harm?

In the past the 'but for' test was the one used widely by the Courts to determine whether the action which constituted the defendant's breach was a **necessary condition** for the harm or damage suffered by the plaintiff.

A negligence action against a teacher or a school will fail if the student's injury would have occurred regardless of whether there had been a breach of the teacher's duty of care. Even reasonable supervision or precautions will not prevent injuries where an incident happens suddenly. In *H v Pennell* (1987) 46 SASR 158, the court decided that the temporary absence of a supervising teacher in the school grounds during lunch would not have prevented the injury which was caused by a 15 year old student throwing a car aerial which struck another student in the eye. In *Warren v Haines* (1986) Aust Torts R 80-014, a student suffered a serious back injury when she landed on her tailbone after a school bully had dropped her onto a cement slab. The Court held that the plaintiff had not been able to prove that adequate supervision would have prevented the injury, because the incident took place very quickly and the manoeuvre became dangerous only when the plaintiff struggled to free herself.

The following newspaper report of a case clearly illustrates this point.

PRACTICAL APPLICATION

PARKS NOT LIABLE FOR DIVE INJURY

SOURCE: MARK OBERHARDT, COURIER MAIL, 17 MAY 2007 (EXCERPTS)

Queensland's national parks could not be held liable for a schoolboy who became a paraplegic after diving into a rock pool, despite having breached its duty-of-care to him, a judge has found.

Justice Kerry Cullinane found the State Government had breached its duty by not having taken greater steps to provide a warning in prominent locations about the risks of diving or jumping into rock pools.

However, he found that the Government could not be held liable because it was likely that, even had there been adequate warning signs, Craig John Reardon would still have dived into the rock pool.

Justice Cullinane found that Reardon had not established a causal link between the absence of a warning sign and his injury.

The Supreme Court in Townsville had heard that Reardon, 18 at the time of the accident and now 26, suffered spinal injuries when he dived into the water in Alligator Creek National Park on November 18, 1998.

He was rescued from the water by friends and airlifted to safety by helicopter. Reardon, now permanently confined to a wheelchair, was a final year student at Kirwan High School when he and friends went to the swimming hole.

PRACTICAL APPLICATION CONTINUED...

His lawyers argued that the Queensland Parks and Wildlife Service had not provided proper and adequate signage to warn visitors about the dangers of swimming, and particularly diving, in the creek.

The court heard Reardon and four friends had visited Alligator Creek, staying overnight before trekking to a waterfall and swimming hole for about half an hour

before Reardon hit his head on a submerged ledge.

In a written judgement, which became available yesterday, Justice Cullinane said that, while the State Government had failed in its duty of care, "I think it quite unrealistic to expect had Reardon and his colleagues seen such a sign it would have altered their conduct on the day."

1. How did National Parks breach its duty of care to the school boy? [C]
2. What injuries did the schoolboy suffer? [C]
3. Why did the Judge decide that there was no "causal link between the absence of a warning notice and his injury"? [C] [A]
4. Do you think this is a fair result? [E] [R]

Consider the following High Court decision.

CASE STUDY

Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem [2009] HCA 48
(10 November 2009)

Facts: Adeels Palace carried on a reception and a restaurant business at Punchbowl, in New South Wales. The premises were licensed premises and were open for business on New Year's Eve. At about 2.30 am. on 1st January there was a dispute between some women dancing on the dance floor. Words were exchanged. Relatives and friends intervened. Fighting erupted and onlookers joined in. Punches were thrown. Chairs, plates and bottles were thrown. One man who was involved in the fight was hit in the face, drawing blood. He left the restaurant and returned soon after with a gun. Someone called out 'gun, gun, run away!' One of the plaintiffs, Mr Najem, did just that, running into the restaurant's kitchen but slipping on the floor. The gunman came in. Mr Najem tried to get up. The gunman pointed the gun at him. Despite Mr Najem's pleading not to shoot, the gunman did shoot, wounding him in the leg. The gunman then left the kitchen and went back into the restaurant. There he found the man who had struck him in the face – Mr Moubarak. The gunman shot Mr Moubarak in the stomach and then left the premises. Both Mr Najem and Mr Moubarak brought proceedings in the District Court of New South Wales against Adeels Palace, claiming damages for personal injury. Each alleged that they had suffered injury

as a result of negligence of the restaurant. It was argued by the plaintiffs that a duty of care was owed by Adeels Palace and that such duty was breached in that Adeels Palace failed to provide any or sufficient security staff to prevent the plaintiffs' injuries.

Legal issue:

The court found that Adeels Palace owed a duty of care. The real issue in the case was whether a failure to provide sufficient security staff at the entrance to the restaurant caused the injuries suffered by the plaintiffs.

Decision: The defendant did not cause the injuries suffered for the following reasons:



CASE STUDY CONTINUED...

1. The evidence at the trial did not show that the presence of security personnel would have deterred the re-entry of the gunman.
2. Nor did the evidence show that the security personnel could, or would, have prevented re-entry by the gunman who was a determined person armed with a gun and irrationally bent on revenge. The evidence given by security consultants called on behalf of Adeels Palace emphasised that the overriding principle which governs the conduct of security personnel confronted by a gunman is 'safety for all parties' and that 'once a determined gunman is targeting a victim there is no guaranteed safe or effective option'.

Do you believe this was a just decision? [R]

It becomes much more difficult to determine whether the breach of the duty by the defendant was a necessary condition of the harm if there are two or more causes of the harm that the defendant has suffered, as occurred in the following case.

CASE STUDY

Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC32

Facts: There were three separate employees whose claims as plaintiffs were considered together in one case. One employee, Mr Fox, had developed mesothelioma (a deadly disease) because of exposure at work to asbestos dust. He was employed as a lagger by one employer for two years, using asbestos materials on a daily basis. He was covered in asbestos dust "from head to foot" while he was working there. After that he was employed for thirty four years on the Liverpool docks where asbestos fibre was imported and handled by Mr Fox. There was no evidence available of the frequency of Mr Fox's handling of cargo containing asbestos but Mr Fox was exposed to substantial amounts of the dust. He died because of his exposure to asbestos dust. There was no question of whether the employers owed him a duty of care or whether in fact it had been breached by the employers.

Legal issue: Did either employer cause the damage to Mr Fox?

Decision: In the Court of Appeal it was concluded that, since mesothelioma was a disease that could be triggered by one inhalation of dust alone and not by an aggregation of inhalation of fibres, the plaintiff could not prove



where he had been exposed to the fibres and therefore which employer had caused the harm. Therefore he was unsuccessful. On appeal the House of Lords said that there needs to be a modified approach to the proof of causation. In a case such as this, proof that each defendant's wrongdoings had materially increased the risk of contracting the disease was sufficient to satisfy the causal requirements. Both defendants were held liable. It was simply impossible to show where he had contracted the disease and it would be unjust for him not to have a remedy.

1. What did the House of Lords say was sufficient for the plaintiff to satisfy the test of causation? [C]
2. Strictly apply the "necessary condition" test (or the "but for" test) to the breach by each of the employers. Could the plaintiff be successful against either of them? [A]
3. Do you think the House of Lords provided a just result? Look at this question from the plaintiff's viewpoint and each of the defendant's viewpoints. [E]

The state of medical science in *Fairchild v Glenhaven Funeral Services Ltd* was such that it was impossible for the plaintiff to prove that it was the negligence of either of the employers that resulted in his loss. Remember that this is an English decision and therefore not binding on Australian courts. There is now a recognition in the *Civil Liability Act* that, for cases where there is real difficulty with evidence, the Court may be able to find factual causation. A section (s11(2)) has been inserted in the Act which allows the courts, in deciding **exceptional cases**, to impose liability on a defendant even where the necessary condition test has not been satisfied.

The extent of the use of this clause will be determined in the future as cases arise, but no doubt it will be used very rarely. **The necessary condition (or “but for”) test will continue to be the primary test.**

c. The damage must not be too remote from the defendant’s negligent act or omission

The *Civil Liability Act* did not affect the common law principles developed in the courts in determining whether damage is too remote from the defendant’s breach of his duty. The common law principles still apply. Consider the following hypothetical.

HYPOTHETICAL

Tarnya was injured in a car accident. While she was in hospital recovering, she fell down some steps and hurt herself again. When she fell down the steps, she was being supervised by a nurse. Tarnya sued the driver of the car and the nurse. The driver of the car was found to have been negligent and to have caused her original injuries and the nurse was also found to be negligent.

Was the damage suffered in hospital too remote from the car driver’s initial act of negligence? [A]

Even though the necessary condition test may be satisfied, a negligence case will still be unsuccessful if the damage is too remote from what the defendant has done or failed to do. The difficulty, of course, is that, if Tarnya had not been injured originally, she would not have been at the hospital and would not have fallen down the steps. In that sense, it could be argued that the driver of the car was the cause of her falling down the steps. However, in the case from which these facts were taken, the judge decided that the driver of the car was not responsible because the injury Tarnya suffered on the hospital steps was not reasonably foreseeable. It was too remote, or too removed, from the original negligence of the driver of the car.

The test laid down by the courts to decide if the damage is too remote from the defendant’s act or omission is: “Could the defendant have reasonably foreseen the kind of damage suffered by the plaintiff?”

In 1967, the Privy Council said that **damage is reasonably foreseeable if there is a real risk which would occur to the mind of a reasonable person in the defendant’s position.** The risk must not be able to be pushed aside as being far-fetched. Even if the damage is unlikely it might still occur to the mind of a reasonable person.

HYPOTHETICAL

In the earlier Hypothetical, assume there was no nurse involved and Tarnya, while recuperating alone at home, had tripped over her crutches or fainted from physical weakness.

Do you think that, in these different circumstances, it is arguable that her injuries would be reasonably foreseeable by the car driver? [A]

In the context of whether damage is too remote or not it is often argued by the defendant that a new action has occurred which makes the damage too remote from the defendant. It has also been argued that mental harm is not reasonably foreseeable and therefore too remote. Both of these are considered below.

AN INTERVENING ACT (NOVUS ACTUS INTERVENIENS)

In the High Court case of *Chapman v Hearse* (1961) 106 CLR 112 in which a doctor had stopped to help an injured accident victim, but was struck and killed by another vehicle, the driver who caused the first accident tried to transfer the blame from himself to the second driver. He argued that the second accident intervened between the initial negligent act and the injuries suffered by the doctor. The argument was that, even if he had been negligent, the injury suffered by the doctor was too remote because it was caused by the intervening act of the last driver. In *Chapman v Hearse*, however, the court decided that the damage was not too remote because it was reasonably foreseeable to a driver that, if he or she causes an accident, assistance will be given as soon as possible on the roadside.



WHAT DO YOU THINK?



You be the judge in this case. Refer to the facts and legal issue before arriving at your decision.

McCarthy Wellington City (1966) NZLR 481.

Facts: The Wellington City Council (the defendant) operated a quarry on which it kept detonators. Boys broke open the safe in which the detonators were kept with a crowbar they had found. The boys took the detonators home. One of the boys gave the detonators to a younger brother, who later gave some to the nine year old plaintiff who was injured while playing with them.

Legal Issue: Given that the Council had negligently failed to adequately secure the detonators, did the acts which followed the taking of the detonators amount to a *novus actus interveniens* so that the injury to the plaintiff was not a foreseeable consequence of the Council's negligence?

What is your decision? Don't forget to include reasons for your decision. [A]

MENTAL HARM

The common law position once was that mental harm was a psychiatric illness and could not arise from negligent acts, because it was too remote and damages could not be recovered by a plaintiff. The law of negligence has, over time, been extended by the courts to provide compensation for mental harm as well as the traditional cases of physical damage. This means that an increasing number of negligence court actions have been successful in claiming damages for nervous shock, or trauma, suffered by the plaintiff in the aftermath of an accident that has been caused by a negligent act or omission. Mental harm, therefore, is no longer considered as being too remote. The courts prefer to use the expression 'psychiatric injury' or 'mental harm' to the expression 'nervous shock'.

CASE STUDY

Jaensch v Coffey (1984) 58 ALJR 426

Facts: A man was severely injured by a driver who had been driving negligently. The wife of the injured man sued the driver for negligence, claiming that, even though she did not witness the accident, she had suffered nervous shock (a psychiatric condition) as a result of seeing her husband in obvious pain in the hospital's casualty ward immediately after the accident. For several weeks, she did not know if he would survive.

Legal issue: Was the wife's damage (nervous shock) too remote from the negligent driving?

Decision: On appeal to the High Court, she succeeded in her claim for damages by convincing the court that her nervous shock was caused by the driver's negligence. Mrs Coffey was considered by the court to have been caught up in the immediate aftermath of the accident. Thus, the damage was not too remote from the initial negligent act.

The courts must consider each case on its individual facts in deciding whether a nervous shock condition has been caused by an initial negligent act or whether the condition is too far removed (or remote) from it. In the *Wagon Mound No. 2* case [1967] AC 617, the meaning of reasonable foreseeability of damage was explored.

It was recognised in that case that there is a range of risk of damage from fantastically remote through to possible, probable and highly likely. The Privy Council in the *Wagon Mound No. 2* case held that the damage is not too remote if there is a real risk, that is, one which would occur in the mind of a reasonable person in the defendant's position and would not be brushed aside as far-fetched.

In *Wyong Shire Council v Shirt* (1980) 146 CLR 40, a High Court judge, Justice Mason, summarised the current position as follows: "... a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable."

The facts in *Jaensch v Coffey* were, however, **distinguished** from the facts in the following case.

CASE STUDY

Spence v Percy [1992] 2 Qd R 299



Facts: The mother of a child who died as a result of a negligent driver did not suffer nervous shock until three years after the child died.

Legal issue: For the third element (causation of damage by the negligence of the driver) to be proved, the court had to be satisfied that the mother's nervous shock was not too remote (distant) from the original accident in which her child had been killed.

Decision: The time lapse between the negligent act and the nervous shock, combined with the fact that the mother had several sources of stress in her life, led the court to hold that the damage was too remote from the negligence. The mother's negligence claim was unsuccessful.

1. What decision was made in the earlier case of *Jaensch v Coffey*? [C]
2. What decision was made in this later case of *Spence v Percy*? [C]
3. What facts were materially different in this case to distinguish it from the case authority precedent of *Jaensch v Coffey*? [A]
4. In your opinion, were both the decisions fair, taking into account the competing interests of the plaintiff and the defendant in each case? [A] [E]

Now consider the following case which illustrates *novus actus interveniens*.

CASE STUDY

Kavanagh v Akhtar (1998) 45 NSWLR 588

Facts: The plaintiff was an Indian Muslim born in Fiji. She was injured while shopping at the defendant's premises. A heavy box containing perfume fell on her as it was being passed between two employees. The box knocked her on to shelving and then onto the floor. The defendant was found to be negligent. Damages were awarded, including damages for psychiatric injury. These damages created problems of causation (remoteness of damage) because six months after the accident the plaintiff cut her hair because she was no longer able to care for it, because of her physical injuries. Her husband took objection to that conduct which he had not authorised and which was contrary to a scripturally based control over his wife. Furthermore, it was against the Muslim religion for a woman to cut her hair. The husband, a very devout Muslim, lost control, became insulting to his wife, stopped sleeping with her and started sleeping with another woman, stopped doing household chores, and on one occasion threatened his wife with a knife. The marriage broke down and the plaintiff suffered psychiatric injury.

Legal issue:

1. Was the wife's psychiatric injury caused by the defendant (factual causation)?
2. Were the psychiatric injuries too remote from the negligent handling of the perfume box by the defendant (remoteness of damage)?

Decision:

1. The Court held that the breakdown of the marriage resulting in the psychiatric injury was caused by the negligence of the defendant (factual causation).
2. The psychiatric injuries suffered by the plaintiff were not too remote. It was foreseeable that a severe shoulder injury would affect the plaintiff's capacity to attend to matters of personal hygiene and adornment and further that the psychiatric injuries were foreseeable as a result of her disabilities in that regard. The argument that the woman voluntarily cut her own hair and the husband's extreme reaction were intervening acts (*novus actus interveniens*) was rejected.

1. Using the "necessary condition" test, what was the Court's finding on factual causation? [C]
2. Do you agree with the Court's finding on factual causation? [A]
3. Do you agree with the Court's finding that the damages, that is, the psychiatric damage, was not too remote? [A]

REVIEW

1. Describe the following: [C]

proximity | causation | foreseeability | remoteness | vicarious liability | mental harm

2. Describe and explain the following: [C] [A]

- (a) The three elements the plaintiff must prove in an action for negligence.
- (b) The two things a plaintiff needs to show for a duty of care to exist.
- (c) The 3 general principles in relation to breach of the duty of care set out in s9 of the Civil Liability Act 2003 (Qld).
- (d) The 4 matters in the Civil Liability Act that the court must consider in determining whether a reasonable person would have taken precautions against a risk of harm.
- (e) The test used in determining whether the defendant caused harm complained of by the plaintiff.
- (f) *Novus actus interveniens*.

TOPIC 3: NEGLIGENCE AND THE DUTY OF CARE

CHAPTER 26: DEFENCES AND REMEDIES IN NEGLIGENCE

FOCUS SUBJECT MATTER

26.1 WHAT DEFENCES ARE AVAILABLE TO THE DEFENDANT?

26.2 VOLENTI NON FIT INJURIA-VOLUNTARY ASSUMPTION OF RISK

26.3 CONTRIBUTORY NEGLIGENCE

26.4 REMEDIES AVAILABLE FOR A SUCCESSFUL CLAIM IN NEGLIGENCE

TO UNDERSTAND AND APPRECIATE:

- ▶ the defences able to be pleaded by the defendant in a negligence action;
- ▶ the meaning and application of volenti non fit injuria;
- ▶ the issue of risks of dangerous recreational activities is dealt with in the Civil Liability Act 2003 (Qld) (CLA);
- ▶ the meaning and application of contributory negligence;
- ▶ the effect of the plaintiff and/or defendant being intoxicated in actions concerning motor vehicle accidents; and
- ▶ the nature and scope of remedies available to the successful party in a negligence claim.

26.1 WHAT DEFENCES ARE AVAILABLE TO THE DEFENDANT?

In the civil jurisdiction, the standard of proof is on the balance of probabilities. The onus of proof is generally carried by the plaintiff, who must prove each of the elements of negligence: duty, breach and causation of damage. Failure to do so will mean that, if a defendant denies being negligent, then there is no liability. When the defendant pleads a defence, however, the defendant has the onus of proving it (unless the onus is reversed by an Act).

Two defences that are most commonly used by the defendant in a negligence claim are:

1. *volenti non fit injuria* (voluntary assumption of risk by the plaintiff); and
2. contributory negligence.

26.2 VOLENTI NON FIT INJURIA-VOLUNTARY ASSUMPTION OF RISK

The translation of this Latin phrase is “to one who consents no injury can be done”.

If the defendant can prove that there was ‘voluntary acceptance of the risk’ by the plaintiff, then a negligence claim will fail, even if all three elements of negligence have been proved by the plaintiff.

A defendant who establishes that the plaintiff voluntarily accepted the risk is absolved (freed) from all responsibility. Thus, voluntary acceptance of risk is a **complete defence to a claim for negligence**.

It is well established that if a plaintiff, with full knowledge of what he or she is doing, voluntarily accepts the risk of injury, she or he may not recover damages. The legal test used to decide if there is voluntary acceptance of risk has **two sub-elements**.

The plaintiff must:

- a. **know the facts** which make up the danger; and
- b. **submit freely and willingly** to that danger.

CASE STUDY

Ramsay v Larsen (1964) 111 CLR 16

Facts: A child climbed a tree against the teacher’s instructions. The teacher did not immediately ask the child to come down from the tree, but instead asked him to try to retrieve an object that have become lodged in another branch of the tree. The child injured himself when he fell while moving towards the object.

Legal issue: Was the child partly to blame for his injury? If so, in what proportion?

Decision: The High Court decided that the child was not partly to blame. Thus, the defence of contributory negligence failed. Although the child had initially climbed the tree without the teacher’s permission, he had been following the teachers instructions when he fell and injured himself. The teacher clearly breached his duty of care by prolonging the danger of injury to the student.



CASE STUDY

Horne v State of Queensland (1995) Australian Torts Reports 81-343

Facts: A teacher told a group of secondary students to “make their own way” to tennis courts which was some distance away as part of the school’s physical activity programme. The teacher made it clear to the students that both walking and cycling were permitted. The 13 year old plaintiff borrowed her friend’s bicycle, which was too large for her and had faulty brakes, and began riding along the busy road to the tennis courts at about 11am without a teacher in attendance. The school had previously told parents that the students would travel to the tennis courts in a group that was supervised by a teacher.

As she was travelling down a steep part of the road, the plaintiff ran into the back wheel of the bicycle ridden by her friend. Due to her riding inexperience and the defective braking system, the plaintiffs veered out onto the road and fell under the wheels of a semi-trailer,

causing serious injury to her leg and other parts of the body. The semi-trailer driver had taken all reasonable precautions, but could do nothing to prevent the student being run over.

Legal issue: Was the child partly to blame for her injury?

Decision: A Queensland Supreme Court judge decided that the plaintiff did fail to take care of herself to the extent that would be expected of a girl of her age (13 years) by borrowing and riding a bicycle that was obviously too big for her and clearly had a problem with its brakes. She was, therefore, held at 25% responsible for the accident, while the school authority was 75% responsible for the teacher’s actions (vicarious liability). The teacher should have provided proper control and supervision of the plaintiff.

There has been for some time a concern that people who take obvious risks and engage in dangerous recreational activities should be responsible for their own behaviour and not be successful in negligence actions against others. These principles have now passed into law in the *Civil Liability Act 2003* (Qld).

OBVIOUS RISKS

Section 14 of the *Civil Liability Act* provides that, where a defendant has raised the defence of voluntary assumption of risk by the plaintiff and the risk is an **obvious risk**, the plaintiff is presumed to be aware of the risk unless the plaintiff proves he or she was not aware of the risk. This is a reversal of the onus of proof which usually lies on the defendant.

The definition of **obvious risk** is set out in s13 of the *Civil Liability Act*. Understandably these include **patent risks** and risks that are a **matter of common knowledge**. As cases come before the courts, they will determine how wide these definitions really are. However, sub-section 5 sets out that a risk is **not an obvious risk** if it arises because of a failure to properly operate, maintain, replace, prepare or care for something (unless the failure itself is an obvious risk). These can be regarded as **hidden risks, not patent risks**. The following two examples are given in the sub-section in the Act.

- ▶ A motorised go-cart that appears to be in good condition may create a risk to a user that is not an obvious risk if its frame has been damaged or cracked in a way that it is not obvious.
- ▶ A bungee cord that appears in a good condition may create a risk which is not obvious if it is used after the time recommended by the manufacturer for replacement, or it is used in circumstances contrary to the manufacturer’s recommendation.

Section 15 of the *Civil Liability Act* states further that the defendant has no duty to warn of obvious risks unless the plaintiff has requested advice or information about the risk, or the defendant is required by law to warn of it.

The effect of these provisions is that if the risk is an obvious risk, the plaintiff cannot say he was not aware of it, and therefore the plaintiff cannot say he or she was not aware of the facts making up the

danger. That is, the first of the two sub-elements of voluntary assumption of risk is proved if it is an obvious risk.

DANGEROUS RECREATIONAL ACTIVITIES

Section 19 of the *Civil Liability Act* provides that a defendant is **not liable** for the plaintiff's harm when **an obvious risk of dangerous recreational activity** materialises and causes the harm to the plaintiff. A dangerous recreational activity is defined in s18 and is one:

engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to that person.

You can see that this is a very wide definition. The courts in Queensland will need to interpret and apply these sections in the future. Base jumping would clearly be a dangerous recreational activity. Would skiing behind a power boat also be? This section ensures that the plaintiff will not be successful where he engages in a dangerous recreational activity because (1) the risk is obvious (he therefore knew of the facts making up the dangers) and (2) if the risk materialises then that section deems that he has submitted freely to it.

There is no doubt that the defence of voluntary assumption of risk has been widened by this legislation from the narrow definition it was previously and therefore that people will be less successful in negligence actions.

There have been a series of Queensland cases considering s.13, s.14, s.15 and s.19 of the *Civil Liability Act 2003*

CASE STUDY

Felhaber v Rockhampton City Council [2011] QSC 23 (24 February 2011)

Facts: The plaintiff was rendered a paraplegic. He had been swinging on an improvised rope swing attached to the bough of a tree on the bank of the Fitzroy River in Rockhampton. Letting go of the rope, he dived head first into the water, struck his head on the river bank and effectively broke his neck. It was a serious accident and his damages were great. Both parties agreed before the case on liability. It was decided that the quantum of damages was \$5 million. It was also agreed that the incident happened in a recreational area not far from the centre of Rockhampton known as the "Ski Gardens" and that the defendant owed a duty of care to entrants to that recreational area (such as the plaintiff) to take reasonable care to protect them from being injured.

Legal issue: Had the council breached its duty of care?

Decision: The judge found that the activity being engaged in had obvious risks and found that the council could expect that a person in the plaintiff's position with his age, knowledge and experience would not need a warning that to dive from a swing could be a dangerous activity. The plaintiff himself had engaged in this very activity up

to 1,000 times before. It was suggested by the plaintiff that the action that the council should have taken was to remove the bough of the tree from which the rope was hung, to remove the rope swing, or to erect a sign warning the public that the depth of the river may change and that diving was prohibited. The judge however pointed out that such measures do not meet the risk presented by other trees or by other branches even on this tree, which line the Fitzroy River. Generally the judge concluded that the exercise of reasonable care did not require the council to take those steps because the activity in which the plaintiff was engaged was a voluntary recreational activity, commonly enjoyed in waterways around the district, that the risks inherent in the activity were obvious and the exercise of care by members of the public could be expected to keep them safe. Further, the judge pointed out that the council was not armed with any special knowledge relating to the risks inherent in carrying out this activity. These risks were obvious to all. Further the council was responsible for a significant area of parkland and waterway abutting that parkland and the area where the accident occurred was in no way physically different

CASE STUDY CONTINUED...

to any area of the Fitzroy River where such swings might be erected. Furthermore the council in no way required or invited or encouraged entrants to engage in such activities and so was not instrumental in putting any of such people in harms way. Furthermore, there had been a long history of no report of injury from such activities despite the wide spread and frequent engagement in the activity.

The judge went on to consider the issue as to voluntary assumption of risk by the plaintiff in the possibility that the duty owed by the defendant to the plaintiff had been breached (the judge found that it had not). The judge found that there was no compulsion or obligation on the plaintiff to accept what was an obvious risk and that the plaintiff had an opportunity to avoid the risk and did not take it. He therefore concluded that there was a voluntary assumption of risk."

1. What reasons did the judge give for the finding that there was no breach of a duty by the council? [C]
2. Do you agree with the judge's conclusion that there was a voluntary assumption of risk? [A] [E]

26.3 CONTRIBUTORY NEGLIGENCE

Negligence involves a person seeking money for physical injury, property damage or financial loss caused by another person's carelessness. Once the plaintiff is able to prove all the elements of negligence, then the defendant may be able to allege that **the plaintiff failed to exercise reasonable care for his or her own protection**. Under past laws, if the defendant could show that the plaintiff had also been even slightly careless, then the plaintiff could not recover his or her loss from the defendant.

In Queensland the *Law Reform Act 1952* changed this. If the person making the claim is also partly to blame, the court can decide what percentage she or he must contribute to the loss suffered. This is called **apportionment** and is very important in practice. Thus, contributory negligence is a **partial defence**. If successfully pleaded by the defendant, it will reduce the amount of damages to be paid to the plaintiff, rather than fully absolving (releasing) the defendant from all responsibility.

Prior to the *Law Reform Act 1952* (Qld), if the defendant established that the plaintiff's own negligence contributed to the harm he or she suffered, it was a complete bar to recovery by the plaintiff. The plaintiff's negligence could take the form of either breach of duty to the defendant or failure to take care of his or her own safety.

The *Law Reform Act* states:

s10(1) [Apportionment]

- ▶ Where any person suffers damage as the result partly of the person's own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the default of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Take an example of an energetic teenager who is speared by a protruding hook in a supermarket aisle. His injury is held to be 70% the fault of the supermarket owner and 30% his own fault for running down the aisle and trying to side-step another customer. Before the *Law Reform Act*, his contributory negligence would have meant no compensation at all. Now, he is entitled to 70% of the damages (70:30 apportionment) that he would have received if there was no contributory negligence.

Contributory negligence is most often seen in negligence cases involving motor vehicles. Often both the plaintiff and defendant can be at fault and there is an apportionment of liability between the plaintiff and defendant.

Look back also at *Larves v Nominal Defendant* [2007] QSC 92. In that case the evidence was that the plaintiff did not slow down after he saw the horse. The court found that his failure to slow down was more than a mere error of judgment on the spur of the moment. What confronted the plaintiff was an obvious danger and he should promptly have decreased his speed considerably which would have enabled him to pass around the horse safely. However, the Court found that, the greater proportion of responsibility for the injuries had to be borne by the unidentified driver who had struck the horse. The court found that having regard to the respective degrees of responsibility for the harm that the plaintiff suffered, it was just and equitable that the apportionment of liability be 80:20 in favour of the plaintiff.

On the question of contribution between the plaintiff and the defendant, there has been a further development in s24 of the *Civil Liability Act 2003* (Qld):

24. Contributory negligence can defeat claim

- ▶ In deciding the extent of a reduction in damages by reason of contributory negligence a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.

It is clearly now possible that the plaintiff may suffer 100% reduction in damages because of contributory negligence. That is, the whole claim may be defeated even though the plaintiff has shown negligence on the part of the defendant. This section of the *Civil Liability Act* contemplates circumstances in which the defence of contributory negligence acts as a complete bar to the plaintiff, as it was before the *Law Reform Act 1952*.

As you can imagine, an area in which contributory negligence has been levelled at a plaintiff is where the plaintiff travels in a motor vehicle with an intoxicated driver. As motor vehicle accidents give rise to the largest number of actions in negligence in the Courts, the issue of the willingness of a plaintiff to risk travelling with an intoxicated driver is a frequent one.

TRAVELLING WITH INTOXICATED DRIVERS

The *Civil Liability Act* (s48) deals with the situation when the plaintiff relies upon the skill and care of a person known to be intoxicated. If the plaintiff is over sixteen years of age, relies upon the skill and care of the defendant, and is aware of the intoxication, then the plaintiff is presumed to be **contributorily negligent to the extent of at least 25%**. The plaintiff can rebut the presumption of this contributory negligence by showing either:

- (a) the intoxication of the defendant did not contribute to his breach of duty; or
- (b) the plaintiff could not reasonably be expected to have avoided relying on the care and skill of the defendant.

The first of these may be very difficult to show. This is so because the definition of intoxication in the *Civil Liability Act* is very wide. It only requires that a person who is under the influence of alcohol or a drug have his or her capacity to exercise proper care and skill **impaired**. It does not take much alcohol to impair a person's capacity to exercise proper care and skill. A defendant then who has taken a little amount of alcohol will be intoxicated. The onus then is on the plaintiff to show that the defendant's intoxication did not contribute to his breach of duty. That would be very difficult to prove.

The second of these would also be very difficult to show. The plaintiff would need to show that he or she really had no other reasonable way of getting where he or she was going. The plaintiff most often

could reasonably be expected to have walked, taken some public transport, or taken a lift with another person.

The situation becomes worse when Section 49 of the *Civil Liability Act* is considered. This section provides that there is a **minimum contributory negligence of the plaintiff of 50%** where the plaintiff (as a passenger in a motor vehicle) relies on a driver who has a blood alcohol content of **.15% or above**, or is **so much under the influence** that he can not exercise effective control of the vehicle.

Every person should now be wary of taking a lift with another person who is under the influence of alcohol or a drug.

CASE STUDY

Robbins v Skouboudis & Suncorp Metway Insurance Ltd [2013] QSC101 (22 April 2013)

Facts: The plaintiff was a passenger on a motorcycle driven by the first defendant Skouboudis. The first defendant lost control of his motorcycle and the plaintiff was thrown off. She suffered severe injuries and brought an action against the first defendant and Suncorp Metway Insurance which was the compulsory third party insurer of the first defendant. On the evening in question the plaintiff had been to a friend's house at about 9.00 p.m. with the intention that both of them would then travel into the city for a "night out". She shared a number of drinks at the friend's house. She and her friend then went to a bar in the Sofitel Hotel in Brisbane arriving about 11.00 p.m. At the hotel she met the first defendant. They commenced talking and after a while he offered her a drive to the place she next wished to visit, namely the Chalk Hotel at Woolloongabba. He had his motorcycle parked at the Sofitel. He gave her his helmet to wear and then drove off towards Woolloongabba. Witnesses called for the defendant recall seeing a motorcycle travelling at a high speed and in a reckless manner. Another witness saw the motorbike travelling at about 80 kilometres per hour and saw the first defendant lean over to negotiate a kerb in the road and saw the exhaust of the motorcycle scrape along the bitumen. When the defendant tried to straighten the motorcycle he struck the median strip and both he and the plaintiff were thrown off. There was no issue in the case about a duty of care being owed. Nor was there any issue in the case about whether the defendant was negligent or not. The second defendant however relied upon s.24 of the *Civil Liability Act* (Contributory negligence can defeat the claim) and s.47 to s.49 of the *Civil Liability Act*.

Legal issues: There were four main legal issues to be determined by the judge. These were:

1. Was the plaintiff intoxicated at the time of the accident and if so did a presumption of contributory negligence of 25% apply pursuant to s.47 of the *Civil Liability Act*?
2. Was the first defendant intoxicated at the time of the accident and did the plaintiff rely upon the skill of the defendant, at the same time being aware (or reasonably should have been aware) that the defendant was intoxicated and, if so, did a presumption of contributory negligence of 25% apply pursuant to s.48 of the *Civil Liability Act*?
3. Once having decided that the plaintiff's contributory negligence was 50% after considering s.47 and s.48 should such percentage be increased by virtue of s.49 of the *Civil Liability Act*?
4. Should there be a reduction of 100% of the plaintiff's claim by virtue of her contributory negligence thus defeating the claim pursuant to s.24 of the *Civil Liability Act*?

Decision:

1. After the plaintiff and the defendant were taken to the Princess Alexandra Hospital a test was taken of the plaintiff's serum ethanol level. The doctor gave evidence that the reading equated to a blood alcohol concentration of approximately 0.18%. That evidence was consistent with the other evidence of the doctor who examined the plaintiff saying that she was "intoxicated and smelt strongly of liquor". Further the plaintiff admitted to a doctor that she was "drunk at the time". The blood alcohol content reading together with other evidence satisfied the judge that the plaintiff's capacity to exercise proper care and skill was impaired and thus she was intoxicated within the meaning of that expression in the CLA. (See the definition of intoxicated in schedule 2 to the CLA). Thus s.47 of the CLA came into effect. Contributory negligence was then to be presumed to an extent of at least 25% unless the plaintiff could establish that the intoxication did not contribute to the breach of duty or that the intoxication was not self induced. The evidence was very clear that the plaintiff's intoxication was self induced. The judge

CASE STUDY CONTINUED...

concluded that a contributory negligence of 25% must be presumed against the plaintiff.

2. After the accident the first defendant pleaded guilty in the District Court in Brisbane to a charge that he caused grievous bodily to the plaintiff and at the time he was adversely affected by alcohol and that the concentration of alcohol in his blood at the time was 0.134%. A blood sample was taken at the hospital at 4.00 a.m. after the accident. Evidence was called from a clinical forensic medical officer who stated that a person with a blood alcohol concentration of .134% has a marked impairment of perception, judgment and of the ability to concentrate and focus attention. He was also asked by the Solicitors for the defendant to undertake a calculation which would allow him to estimate the blood alcohol content at the time of the accident. His estimate was that the first defendant's blood alcohol content at that time was in the range of .15 to .18. From that evidence the judge concluded that the first defendant was intoxicated at the time of the accident. Thus s.48 of the CLA came into effect. The plaintiff was over 16 years of age and the judge found that she had relied on the care and skill of the defendant. She was offered a lift to the Chalk Hotel and took it. She knew also that the first defendant was going to be the driver as he had told her that. The judge also found that the plaintiff ought reasonably have been aware that the first defendant was intoxicated. It didn't matter that the plaintiff was under the influence of alcohol at the time and may not have realised the defendant was intoxicated because the test at law is whether an ordinary reasonable person (a sober person) would have regarded

the defendant as being intoxicated. The judge found that an ordinary person would have so regarded the defendant. There was therefore a presumption of 25% contributory negligence. This presumption was not overturned by the plaintiff because the plaintiff could not show that the first defendant's intoxication did not contribute to the accident (which it did) or that she herself couldn't reasonably have been expected to have avoided relying on the first defendant's care and skill (which she could – she could have taken a cab). The judge therefore held that there should be a reduction of damages under s.48 by 25%.

3. At this point damages were reduced by 50% by operation of s.47 and s.48. The judge then considered the operation of s.49. He found that the evidence established at s.49 did apply. Where the concentration of alcohol in the first defendant's blood was greater than .15 this allows the judge to consider a greater percentage over and above 50%. The judge however refused to do so.

4. The judge also refused the argument under s.24 that there should be 100% reduction by virtue of the contributory negligence of the plaintiff. He found that the plaintiff was most likely intoxicated when she met the defendant. He found that the plaintiff really never contemplated travel with the first defendant until the time he offered to take her, and that the plaintiff had not been on a drinking spree with the driver contemplating from the very beginning that she would be a passenger in the vehicle driven by the driver. Damages were assessed at \$238,649.00. This was to be reduced by 50%. Judgment was entered for the plaintiff in the sum of \$119,324.50.

Do you think it is fair for damages to be reduced by 50% in circumstances where an intoxicated plaintiff accepts a ride in a motor vehicle from an intoxicated defendant? [A] [E] [R]

What if the plaintiff is intoxicated? Section 47 of the *Civil Liability Act* provides that, if the plaintiff was intoxicated at the time the defendant breached his duty to him or her, then contributory negligence of a minimum of 25% is presumed. If the plaintiff was driving a motor vehicle and either had a blood alcohol level of .15% or over, or was incapable of exercising actual control of the vehicle, then the contributory negligence of the plaintiff increases to a minimum of 50%.

The plaintiff can rebut such a presumption if he can show that **his intoxication did not contribute** to the breach of the duty by the defendant or the **intoxication was not self-induced**. An example where a plaintiff could rebut such a presumption is where he was driving a motor vehicle but was stationary at traffic lights when another motor vehicle driven by the defendant struck his car in the rear. That would be a circumstance in which he may be able to show that his intoxication did not contribute to the breach of duty of care owed to him by the defendant driver.



26.4 REMEDIES AVAILABLE FOR A SUCCESSFUL CLAIM IN NEGLIGENCE

If the plaintiff is successful in proving that the defendant has been negligent, the judge will usually award the plaintiff one or both of the following major remedies:

1. DAMAGES 2. INJUNCTION

1. DAMAGES

TYPES OF DAMAGES

It was partly because of the level of damages that the courts were awarding that prompted the reforms in the law of torts in 2002–2003. In Queensland these reforms resulted in the passing of the *Civil Liability Act*.

Section 52 of that Act now provides that a court cannot award **exemplary, punitive, or aggravated damages** in a claim for personal injuries unless the action which gave rise to the claim was:

1. an unlawful, intentional act done with intent to cause personal injury; or
2. an unlawful sexual assault or other unlawful sexual misconduct.

This means that in negligence cases resulting in personal injury the damages that will be awarded will be compensatory damages. These include;

1. General damages
2. Special damages
3. Future economic loss.

GENERAL DAMAGES

General damages include pain and suffering, loss of amenities of life, loss of expectation of life, and disfigurement. The most common claims in this category are for pain and suffering and loss of amenities of life. Loss of amenities of life include no longer having the ability to play sport or engage in other recreational activities that the plaintiff used to enjoy.

To assess how much overall a court will award to a plaintiff for general damages restraints have been placed upon the judge by s61 and s62 of the *Civil Liability Act*. The judge is required to consider how severe a particular plaintiff's general damages are, ranking them on a scale of 1:100, with 100 being the most severe general damages a plaintiff could suffer and 1 being the least severe. This is referred to as the **scale value**. A mathematical formula then is applied to this **scale value**, provided by the judge. For the full



mathematical formula look at s62 of the *Civil Liability Act*. One example given is given in s62(f):

- ▶ If the scale value of the injury is assessed at 30 or less but more than 25, add \$35,000 to an amount calculated by multiplying the number by which the scale value exceeds 25 by \$2,000.
- ▶ For example, a scale injury of 30 would give general damages of \$45,000. This is calculated by adding \$35,000 to (\$2,000 multiplied by 5).

When one looks at the highest limit of the scale, the maximum amount of general damages that can be awarded in Queensland is \$250,000. Very many litigants and practising lawyers regard this figure as being too low, and, being overly protective of defendants, especially insurance companies which indemnify the defendants. Prior to the *Civil Liability Act* judges had a very wide discretion in assessing **general damages**. Now they do not.

SPECIAL DAMAGES

These include monetary compensation for expenditure capable of being given a precise value. Examples are doctor and hospital bills, physiotherapy charges, and even the cost of taxis to and from healthcare professionals.

FUTURE ECONOMIC LOSS

Future economic loss is most commonly seen in loss of future earnings. This is to compensate the plaintiff for the fact that the injury arising from the negligence prevents the plaintiff from returning to work for a time or, perhaps, at all. It has been calculated in the past by looking at the plaintiff's net pay each week and then multiplying that by the time the plaintiff was expected to be out of work (based usually on expert medical opinion), discounted by expenses that the plaintiff wouldn't need to have because he or she wasn't actually going to work.

A limit has been placed on the award of future economic loss by s54 of the *Civil Liability Act*. The Act now provides that the maximum amount that can be claimed is "the present value of **three times the average weekly earnings** per week for each week of the period of loss of earnings."



WHAT DO YOU THINK?



Many plaintiffs earn much more than three times the average weekly earnings in Queensland. For example, a doctor who is injured can now only recover as a loss of earnings a figure which represents three times the average weekly earnings in Queensland. Before the *Civil Liability Act* that doctor would have been compensated by the defendant for the loss of earnings which he himself would have experienced.

Do you think that this restriction means that the defendant, who would ordinarily be responsible for damages that have actually been done, now escapes some of his liability? Is this fair? [A] [E] [R]



2. INJUNCTION

If the plaintiff succeeds in convincing the court that the defendant is continuing to engage in negligent acts, the court may grant the plaintiff an injunction. This is a **court order that usually commands a party to stop performing an unlawful act, in this case a negligent act**. An example may be an unsafe work environment, such as a coal mine where the owners of a mining company are ordered not to send any more miners underground until certain unsafe procedures and structures are improved.

An example of the development of the duty of care in schools is a duty to prevent bullying. Seeking an injunction may well be part of the process by a plaintiff, when he or she is being bullied at school, to stop the bullying continuing. In short this action could be brought against the school to prevent the school breaching its duty of care to the student by preventing bullying. This chapter commenced with negligence in schools and concludes in the same way highlighting such a present problem.

REVIEW

1. Describe the following: [C]

Volenti non fit injuria | contributory negligence | apportionment

2. Describe and explain the following: [C] [A]

(a) Section 14 of the *Civil Liability Act*.

(b) An example of a risk that is not an obvious risk set out in the *Civil Liability Act*.

(c) Section 19 of the *Civil Liability Act*.

(d) Section 24 of the *Civil Liability Act*.

(e) The test to determine whether the plaintiff ought reasonably have been aware that the defendant driver in a motor vehicle negligence action was intoxicated.

TOPIC 3: NEGLIGENCE AND THE DUTY OF CARE

CHAPTER 27: NEGLIGENCE LAWS IN CONTEMPORARY CONTEXTS

FOCUS SUBJECT MATTER

27.1 THE CHANGING LANDSCAPE OF NEGLIGENCE

27.2 DEFECTIVE GOODS

27.3 DRIVERS OF MOTOR VEHICLES

27.4 TEACHERS

27.5 RESCUERS

27.6 DOCTORS AND HEALTH CARE PROFESSIONALS

27.7 NEGLIGENCE IN SPORT

TO UNDERSTAND AND APPRECIATE:

- ▶ governments can change the law to set higher or lower levels of compensation for injured workers;
- ▶ more groups of people are joining together to bring a combined court action (class action) where they have a common interest;
- ▶ there is a duty of care in the manufacture of goods to ensure the goods are not defective;
- ▶ there is a well-established duty of care owed by drivers of motor vehicles to other users of the road;
- ▶ there is a clearly developed principle of law that teachers owe their students a duty of care;
- ▶ doctors have a duty of care to warn patients of risks of treatment and to treat and advise patients reasonably;
- ▶ there is no duty to rescue, but rescuers are owed a duty of care; and
- ▶ the law of negligence applies to the participants in sporting activities

27.1 THE CHANGING LANDSCAPE OF NEGLIGENCE

The basic proposition that has been presented to you about negligence is that the courts must find that the victim is owed a duty of care before being able to award compensation to the victim. The categories of negligence are never closed. It is always possible that a new set of factual circumstances will give rise to a new duty of care. To combat this ever-growing octopus of negligence, with its variety of claims, Australian governments have tried to limit the rights of individuals to claim by both limiting the scope of the duty of care, and by putting ceilings on the amount of compensation that can be claimed. We will look at two different areas which illustrate how negligence has developed. On the one hand, we will look at an example where the Queensland government introduced a **ceiling to claims for compensation**, but then reversed that when there was a change of government. On the other hand, we will look at examples of how persons with similar claims have joined together in what are called **class actions**.

CLASS ACTIONS

An area which is of great interest is increased use by lawyers of **class actions** to make claims. This is where large numbers of people pursue the same or a sufficiently similar claim for the court to allow them to join a class action. Our legal system does not have the same court rules as the United States, where such actions are common. Nevertheless, in recent times there have been class actions taken or threatened in the following areas:

- ▶ negligent financial advice
- ▶ overcharging by banks
- ▶ asbestos related illness
- ▶ institutional child sex abuse
- ▶ faulty breast implants
- ▶ product liability
- ▶ failure of government owned infrastructure

It is however not so much the change in law but the change in the way cases are brought to court which represents one of the most significant current legal issues in the tort of negligence. It is the use of class actions in the courts to bring proceedings in negligence, which is now a significant current legal issue.

The purpose of a class action is to allow plaintiffs who have the same interest in a legal case to obtain a court order in one action rather than in separate actions. This assists the administration of justice by reducing the number of cases the court may need to deal with, reducing the costs of litigation, and speeding up the court process for the litigants.

On 1 March 2017 Queensland adopted the class action regime used in the Federal Court and in Victoria and New South Wales courts. Previous to that, group litigation was referred to as a **representative action**. For a class action to proceed there must be at least seven members of the class, the claims of each of the class members must arise out of similar circumstances and raise a substantial common issue of law and fact. In short, a court will only allow one plaintiff to represent other plaintiffs if each of the plaintiffs have the same sort of interest in the court action.

CASE STUDY

Kinsella v Gold Coast City Council (2014) QSC 65

Facts: The plaintiffs own a house in Arundel Hills on the Gold Coast near a council dump (Suntown Landfill Facility). The plaintiffs claim that the council's operation of the dump resulted in the escape of noxious materials from its site causing damage to the plaintiffs by reducing the value of the plaintiffs land. They claim that the council was aware of the risks of the noxious materials escaping and were negligent in allowing the area in which their property is located to be developed as a residential subdivision. The plaintiffs sued as representatives of other persons who are owners of houses within Stage 3 of the estate. Approximately 80 lots were owned by those whom the plaintiffs were purporting to represent. The properties were spread along 4 streets and parts of another 4 streets. Some lots adjoined the dump. Some were up to 400 metres from it. The plaintiffs property was about 150 metres from the dump. It was pleaded by the plaintiffs that the council was negligent in that the noxious materials could have been reasonably controlled and managed by steps which were not taken by the council. It was further pleaded that each lot was worth 15 to 20% less than it would have been had the council not been negligent. The plaintiffs sought a declaration therefore that the council owed a duty of care to the plaintiffs and each of the representative lot owners and a declaration that the council had breached its duty.

Legal Issue: Could the plaintiffs sue as representatives of the other lot owners

Decision: The court looked at the interpretation of Rule 75 (Court Rules) which required all the representative parties along with the plaintiffs to have the same interest

in the proceedings. The court decided that they had the same interest. The plaintiffs and the representative parties had the same interest in the answer to the declaration sought by the plaintiffs, that is, that a duty of care was owed to the lot owners and that the council had failed to perform its duty of care. This was so notwithstanding the amount of damages might be different for each lot owner and notwithstanding each lot owner was in a slightly different position with respect to the dump. The lot owners had the same interest in the declarations and the issue of damages to be assessed for each lot owner could be dealt with in later proceedings. The case therefore proceeded with the plaintiffs acting in a representative capacity.



EXAMPLES OF CLASS ACTIONS

You will see from the above case study that this case was commenced in Queensland. Most class actions in Australia however are commenced under the Federal Court of Australia's representative action rules. Regardless of where the class action is commenced there has been an increase in the number of high profile class actions and ones in which large amounts of money are at stake. 2017 was the 25th anniversary of class actions in Australia. In 2017 the 500th class action in Australia was filed. The majority of such class actions are supported by litigation funding. Typically litigation funding is provided by companies in meeting the litigant's legal costs and disbursements and typically the litigation funder agrees to pay any adverse costs orders should the litigation fail. For those services the litigation Funder is paid substantial fees out of the settlement if successful.

The traditional area for class actions was in product liability cases, that is, cases usually directed at manufacturers for the negligent manufacture of products which have caused damage to consumers. The types of negligence cases in which class actions are now used however has broadened. These include actions for negligent financial advice, overcharging by banks, asbestos related illness, institutional child and sexual abuse, and faulty breast implants. Some further examples follow:

(A) QUEENSLAND FLOOD CLASS ACTION

Maurice Blackburn Solicitors have filed a class action in the Supreme Court of New South Wales on 8 July 2014 in what is referred to as the Queensland Flood Class Action. Damages are being sought for losses caused by the negligent operation of Wivenhoe and Somerset dams during the 2011 flood in southeast Queensland. There are approximately 5,000 represented by the plaintiff in that case, all suffering damage from water released from the Wivenhoe dam at the peak of the floods. This case has continued for years and it is not yet resolved. Evidence is still being given at the time of writing this book in July 2018. The cost of mounting such a class action is considerable. There are costs of investigations, costs of having expert reports produced and considerable legal costs as the case proceeds. The costs of this action are being paid by a litigation funder, Bentham IMF.

(B) CENTRO CLASS ACTION

In May 2008 a class action was commenced in the Federal Court against two public companies Centro Properties Ltd and Centro Retail Ltd. This class action was brought on behalf of those who purchased an interest in either of the public companies between 9 August 2007 and 15th February 2008 (for Centro Properties) and between 7 August 2007 and 15 February 2008 (for Centro Retail). It was alleged that both companies engaged in misleading and deceptive conduct by failing to adequately disclose to the stock exchange and to their security holders the full extent of their maturing debt obligations, and the risk that they may not be able to refinance maturing debts, and further that there was a risk that there was no longer a reasonable basis for their profit forecasts. When the companies revealed the extent of their debt obligations that had become payable, their share prices fell dramatically and as a result losses were incurred by a class of persons buying shares (or taking security over the companies). **On 19 June 2012 a settlement of \$200 million was agreed to by all the parties to the class action. This settlement represents the largest shareholder class action settlement in Australia to date. The action was supported by a litigation funder.**

(C) SHAREHOLDERS ACTION AGAINST ARISTOCRAT LEISURE LTD

Shareholders of the Aristocrat Leisure Ltd brought a class action against the company alleging that the way the financial accounts of the company were done overstated the revenue of the company. Such overstating was not in accordance with ordinary accounting standards and was misleading and deceptive. The case settled in August 2008 after trial but before judgment was delivered for \$136 million plus \$8.5 million in costs. This was the second largest shareholder class action settlement in Australia.

(D) CRANBOURNE GAS LEAKS

There was a series of methane gas leaks from a landfill site in outer Melbourne. The properties of 750 owners were affected adversely by this methane gas leak. There was a negotiated settlement of \$23.5 million paid by the Environmental Protection Agency and the local council, to the home owners in compensation for the fallen value of their properties, along with the loss of enjoyment of the use of their homes.

(E) BLACK SATURDAY BUSHFIRES

The 2009 Black Saturday bushfires in Victoria resulted in the deaths of 173 people, personal injury to others and the loss of homes and property. More than a thousand homes were destroyed. The class action was brought against SP AusNet (whose ageing power lines were found to have caused the bushfire), the Utility Services Corporation and Victorian State Government Instrumentalities. The case settled when SP AusNet agreed to pay \$378.6 million, Utility Services Corporation Ltd agreed to pay \$12.5 million and the Victorian State Government agreed to pay \$103.6 million. This settlement of almost \$500 million is the highest class action settlement in Australia to date.

(F) NUROFEN CLASS ACTION

A class action was taken against the owners of Nurofen alleging contraventions of the misleading or deceptive conduct provisions of the ACL. These were denied by Nurofen. The class action settled in July 2017 for \$3.5 million of which 20% was to go to the litigation funder.



WHAT DO YOU THINK?



Are class actions here to stay? Give your reasons. [A] [E]

CHANGES TO WORKCOVER LAWS

Changes were made to WorkCover legislation in Queensland in 2013. One of the changes which has caused division in the community is that for all injuries from 15 October 2013 there will be no right to seek common law damages against a negligent employer unless a worker has greater than 5% degree of permanent impairment (DPI). Given that the degree of permanent impairment is not stated in parts of percentages, this in effect means that a worker must have a 6% degree of permanent impairment to be able to pursue his common law claim against his employer. This is a significant change.

These changes were made despite the Queensland WorkCover scheme being highly profitable (unusually in Australia – the 2012 profit was \$518 million) and despite it having the second lowest premium payments in the country at the time. There had also been an enquiry into the operation of the Queensland Worker's Compensation Scheme in 2012. This enquiry was conducted by the Finance and Administration Committee of the Queensland Parliament. In May 2013 the committee, made up of a majority of Liberal National Party members, released their report which recommended no major changes be made. Despite that, the Queensland Government in October 2013 made significant changes.

These changes will affect a large number of workers in Queensland making common law claims. On WorkCover's own figures over half of all people injured in unsafe workplaces will now have no right to a common law claim for damages. This is a significant number.

PRACTICAL APPLICATION

WORKERS COMPENSATION AND REHABILITATION AND OTHER LEGISLATION AMENDMENT ACT 2015

SOURCE: WORKCOVER QUEENSLAND, WWW.WORKSAFE.QLD.GOV.AU DOWNLOADED 2/09/2018

The Worker's Compensation and Rehabilitation and Other Legislation Amendment Act 2015 was passed by Parliament on 17 September 2015. The Act implements the Queensland Government's election commitments for Restoring the Rights of Queenslanders Injured at Work.

The Act achieves the Government's commitments for workers compensation matters by amending the Workers Compensation and Rehabilitation Act 2003 to:

- ▶ remove the current limitation on the entitlement to seek damages that requires a worker to have a degree of permanent impairment greater than 5% to access common law for all injuries sustained on or after the Queensland State election (31 January 2015);
- ▶ establish the ability to provide additional compensation to particular workers impacted by the operation of the common law threshold on or after 15 October 2013 and before 31 January 2015;
- ▶ introduce provisions for firefighters diagnosed with one of 12 specified diseases that will deem their injury to be work related;

PRACTICAL APPLICATION CONTINUED...

- ▶ remove the entitlement prospective employers have to obtain a copy of a prospective worker's compensation claims history from the Workers' Compensation Regulator; and
- ▶ clarify certain procedural aspects of the claims process and reduce regulatory burden through a number of minor miscellaneous amendments.

More information

For more information on the provisions of the Act as passed can be found on the Queensland Parliament's website.

- ▶ Read more about common law rights restored for injured workers.
- ▶ Read more about the new deemed disease provisions for firefighters.

1. What was the limit on common law damages for workers between 15 October 2013 and 31 January 2015? [C]
2. What has happened to the limit on common law damages for workers after 31 January 2015?[C]
3. What has happened to the common law rights of workers for injuries sustained between 15 October 2013 and 31 January 2015. [C]
4. What other policy was introduced to enlarge the rights of workers in the Act? [C]
5. Conduct research by going online and exploring the topics available on the WorkCover Queensland website, or by contacting WorkCover Queensland and requesting brochures or information which will assist you to form a view about the policy change on 31 January 2015, and to compare it to the policy which existed between 15 October 2013 and 31 January 2015, including explaining the reasons given by the respective governments at the relevant time about their policies. Write a short opinion piece to be offered to your local paper for publication, expressing your point of view about the appropriate balance between the rights and obligations of WorkCover, employers, and employees. [C] [S] [A] [E] [R]

27.2 DEFECTIVE GOODS

There is a clear duty on manufacturers of goods to ensure that the process of manufacture is not negligent and that the goods that arise from the manufacturing process are not defective and liable to cause damage to users. This is a well established principle. The case of *Donoghue v Stevenson* referred to in Chapter 26 is an early example of a defective goods case. There are many examples. A recent example arose in the Supreme Court decision of *McDermott v Robinson Helicopter Company* [2014] QSC 34 (17 March 2014). In this case the plaintiff was seriously injured in a helicopter accident. The defendant was the manufacturer of the helicopter. The helicopter was being used to inspect fence lines on a cattle station on the Queensland/Northern Territory border. After a loud bang and a massive vibration the helicopter hit the ground. The pilot was killed. It was common ground between the parties that the accident occurred because the forward flex plate failed. The plaintiff alleged that the accident and his damages were caused by the negligence of the defendant in that the defendant failed to exercise reasonable care in not ensuring that the maintenance manual provided for an adequate inspection procedure to deter cracks occurring at the forward flex plate bolt holes. The defendant argued that the provisions of the manual were adequate and appropriate. It was held by the Judge in that case that the maintenance manual was adequate and sufficiently comprehensive to identify a risk of failure. It was also found that neither the helicopter nor the maintenance manual had a defect.

27.3 DRIVERS OF MOTOR VEHICLES

There are very well established duties of care owed by drivers of motor vehicles to other drivers, to pedestrians, and to owners of property. The duty of care is to people whose property might be damaged or whose person might be injured if a driver does not drive in a reasonable manner. These are so well established that the majority of negligence cases in the courts arise out of breaches of duties of care owed by motor vehicle drivers.

27.4 TEACHERS

There is a clearly developed principle of law that teachers in schools owe a duty of care to students. You have already seen this in *Bryar's* case and *Johns'* case earlier in Chapter 18. In situations where students are injured while at school the question is really whether there has been a breach of the duty of care, not whether a duty of care exists. We have already referred to breaches of the duty of care by teachers in Chapter 26

27.5 RESCUERS

There are two aspects to be looked under the general heading of rescuers. These are:

1. Is there a duty upon a person to rescue another when he or she is in danger (duty to rescue)?
2. Is there a duty of care owed by persons who create conditions of emergency or danger to those who come to the rescue of persons in such danger (duty to rescuers)?

DUTY TO RESCUE

The first of these is a very important question. **The law of negligence does not impose a duty upon a person to take a positive action to protect another from harm.** This approach is regarded as fundamental to our law of negligence. This applies even if it is within the power of one person to remove another person from danger with little effort. The law of negligence draws a distinction between creating and increasing a risk of harm to another person (in which case a duty of care would be owed) and the failure to prevent something which a person has not brought about (in which case a duty of care is not owed). In our legal system there has been a reluctance historically to interfere, or to encourage interference, with the freedom of an individual. Where a person is in danger from some source which is unconnected with another person, the other person is **not** required to come to his assistance. This means, in effect, that a citizen is not required to render assistance to any other person in a road accident. A good surfer is not required to go to the aid of another weaker surfer in distress. A good swimmer is not required to go to the assistance of another person who is in danger of drowning.

The refusal of the law to impose a general duty to act has been criticised. Some countries impose criminal sanctions where a person fails to assist. German law imposes such an obligation in circumstances where there is imminent peril and the person can act without damage or harm being done to themselves.

The Northern Territory imposes such a duty.

Criminal Code (Northern Territory) – Section 155

Failure to rescue, provide help, etc

- ▶ Any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime and is liable to imprisonment for seven years.

Once a rescuer, however, embarks upon a rescue, then the rescuer will have a duty of care to the person whom he is rescuing. For example, if you went to the aid of a person who was drowning, you would have a duty of care to that person to act reasonably as a rescuer in those circumstances. This seems to lead to a strange result. A person who takes no action whatsoever to help another cannot be negligent. The good Samaritan, on the other hand, may be liable in negligence.



WHAT DO YOU THINK?



Is it fair for a good Samaritan to be liable in negligence while there is generally no liability for failing to go to another person's aid? Give your reasons. [A] [E]

DUTY TO RESCUERS

A person who commits the tort of negligence by creating conditions of danger or emergency for another person is liable to third persons who come to rescue another. This is illustrated by the High Court decision in *Mt Isa Mines Ltd v Pusey* (1971) 125 CLR 383 in which Mr Pusey sued Mt Isa mines after going to the rescue of two electricians very badly burnt in the defendant's powerhouse. Mr Pusey suffered a serious mental disturbance. The court decided there was a duty of care owed to Mr Pusey who came to the rescue of a burnt electrician, and he could recover damages for his serious mental disturbance arising from his seeing and helping the burnt electrician.

27.6 DOCTORS AND HEALTH CARE PROFESSIONALS

For a long time the law has imposed on doctors and health care professionals a duty to exercise reasonable care and skill in providing treatment and giving advice to patients. Medical specialists, general medical practitioners, dentists, physiotherapists, laboratory technicians and nurses all have such a duty to use reasonable skill and care towards their patients.

A very large number of examples could be given of cases which have come before the courts in which health care professionals were alleged to have breached a duty of care. Doctors of course have always owed a duty of care to their patients in relation to a diagnosis or in the conduct of a surgical procedure. However, in the High Court case of *Rogers v Whitaker* (1992) 175 CLR 479 the court widened the duty of care to include a **duty to warn patients of material risks of the treatment**. The duty of care and standard of care expected of medical practitioners in relation to their patients was summarised as follows by the High Court in *Rogers v Whitaker*:

The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case.

In *Rogers v Whitaker* the plaintiff had suffered a penetrating injury to her right eye when she was young. She was almost totally blind in that eye. Some 40 years later she sought advice from an eye specialist

who suggested that an operation might improve the sight in her right eye. The operation, although performed with all due skill and care (as determined by the trial judge), was unsuccessful. The patient developed a very rare condition “sympathetic ophthalmia” in her left eye, which meant that her left eye lost sight in sympathy with her right eye. She was left blind in both eyes. She sued her doctor in negligence because of his failure to warn of the risk of this happening. The evidence at the trial was that this condition occurred only once in 14,000 procedures. Even so, she was successful and was awarded slightly over the sum of \$808,000 in damages.

Since *Rogers v Whitaker*, there is an **obligation on the medical practitioner to make sure that the patient understands the treatment that the doctor is going to perform**. This was confirmed in the following case:

CASE STUDY

Chappell v Hart (1998) 55 CLR 232

Facts: Mrs Hart was a teacher and librarian suffering from a condition which meant that, when she swallowed food, small parts of the food collected in a pharyngeal pouch. This caused a sore throat which was very stressful. She saw Dr Chappell, an ear nose and throat surgeon. He proposed an operation in which the pouch could be surgically removed. One ordinary complication of such surgery was the possibility of the perforation of Mrs Hart’s oesophagus. This usually does not have any lasting effects. However, if an infection sets in at the same time, there may be damage to vocal cords. An infection did set in after the operation and Mrs Hart was left with a husky voice which prompted an early retirement. The Court accepted that perforations can and did occur without any negligence on the part of Dr Chappell and that Dr Chappell had advised Mrs Hart about the risk of a perforation occurring. He did not, however, advise Mrs Hart about the risk of the combination of the perforation and the infection. It was accepted that the operation was performed competently. It was held at the trial that Mrs Hart had expressed a concern about the safety of her voice. However, she said that, if she had been warned of the risk of damage to her vocal chords, she would have

put off the operation and had the operation later at the hands of a more experienced surgeon. There was also evidence from reputable medical practitioners, some of whom said they would have warned the patient of the risk of the condition, and some who said that they would not have.

Legal Issues:

1. Did Dr Chappell owe Mrs Hart a duty of care to advise her of the risk of the combined effect of the perforation of the oesophagus and an infection?
2. Was the failure to warn of the risk a cause of Mrs Hart’s injury?

Decision: The High Court held (by a majority of 3:2) that:

1. Dr Chappell did owe a duty of care to advise Mrs Hart of the risk; and
2. his failure to warn her about the risk to her vocal chords constituted a breach of the duty of care, and such breach caused Mrs Hart’s injury.

1. What warning did Dr Chappell fail to give? [C]
2. What would Mrs Hart have done if she had received the warning? [C]
3. Do you think *Rogers v Whitaker* was applied to this case? Compare the material (important) facts of each case? [A]
4. Do you think it is just that a surgeon can perform an operation in a competent manner and still be held liable because he failed to warn of the risk? [E]
5. Describe and explain how the court’s decision in *Chappell v Hart* balances the risk taken by the patient, Mrs Hart, against the nature and scope of the duty of care owed to her by Dr Chappell. [C] [A] [E]

27.7 NEGLIGENCE IN SPORT



INQUIRY



IN WHAT CIRCUMSTANCES DO PARTICIPANTS IN SPORTING ACTIVITIES OWE A DUTY OF CARE, AND TO WHOM?

Participants in sport include players, coaches, organisers, spectators, and board members. Accidents in sporting activities often raise the issue of whether or not a participant can seek compensation from some other person by establishing that they are owed a duty of care. In some cases the circumstances in which an injury occurs may mean that compensation may even be sought from state.

THE STATE EDUCATION DEPARTMENT

CASE STUDY

Watson v Haines (1987) Aust Torts R 80-094

Facts: The plaintiff, Watson, was a 15 year-old schoolboy, who was playing hooker for his school's first grade rugby league team against another school's team in the competition. As a result of a scrum collapsing, he suffered a fractured spine and became a quadriplegic. He sued the State, through its Education Department, on the grounds that he should not have been allowed to play in the first or second row because he had a long thin neck. There was evidence that the Minister of Education had been advised of the risk of spinal injuries through a kit, entitled 'Don't Stick your Neck Out'. Copies of the kit were sent to schools, but there was no check by the Department as to whether teachers had seen the kits and knew of the risks involved.

Legal Issue 1: Did the State owe a duty of care to Watson? For a negligence claim it must first be established whether there was a duty of care owed by the defendant to the person injured.

Whether this duty exists or not is a question of law, and will depend on the individual circumstances of each case and the nature of the relationship between the parties. Recent decisions by the High Court indicate that the court takes into account a range of factors such as foreseeability, proximity and policy considerations of fairness and justice. To decide if there was a duty owed the court will determine whether the damage suffered by the plaintiff was a reasonably foreseeable consequence of the defendant's actions.

Decision: The State, through its staff, owed a duty to take reasonable care for the safety of school children including the safety of boys like Watson. Football was a school activity and as such it was the duty to take reasonable care for all safety aspects of sport played. As members of the State's Education Department knew that injuries of this type could occur, it was the State's duty to make sure teachers were informed of this.

Legal Issue 2: Did the State breach its duty of care to Watson? There must be a breach of the duty of care owed - standard of care owed by the defendant.

Here it has to be shown that the duty of care was breached by falling below the standard required by law. This is a question of fact to be answered after a duty of care has been established. The standard is that of a reasonable person, so that a duty will be breached if the conduct of the defendant falls below that of a reasonable person with knowledge of that sport. Children playing sport are required to do what a child of similar age and knowledge of the sport would reasonably be expected to do in the circumstances.

Decision: The State failed to ensure reasonable care was taken for the safety of boys with long thin necks, who play football. By letting him play, Watson was exposed to unnecessary risk of injury. Hence the State breached its duty.

CASE STUDY CONTINUED...

Obiter: The duty would also have been breached if a boy with a long thin neck had merely been warned of the risk. The duty required a person in authority to prevent a player with that physique from playing hooker or any position in the first or second row.

Legal Issue 3: Did the State cause the injury?

Causation of damage

A negligence action will only succeed if the victim plaintiff suffered damage and the defendant caused the damage.

Decision: The injury to his spine was caused by the fact that the school allowed him to play as hooker. There was nothing unusual about the scrum and there was no other explanation for the injury apart from his long thin neck.

Defences to negligence

There are two defences that are relevant to negligence in the context of sport. These can be argued by the defendant to reduce liability for the injury. They are (a) voluntary assumption of risk, and (b) contributory negligence. Both were raised in the case of *Watson v Haines*.

Legal Issue 4 (a) Had Watson by agreeing to play as hooker voluntarily assumed the risk of serious injury?

a. Voluntary Assumption of Risk

Because sport involves inherent risk and players know that injuries occur frequently, it can be said that playing a sport voluntarily means the player is agreeing to assume those risks. If the player has

freely decided to play that sport, knowing the nature and likelihood of the risks involved, then the defence of voluntary assumption of risk is relevant.

Decision: Although he played the sport voluntarily, he was never warned of the risk involved. The duty, however, was to stop schoolboys with long thin necks from playing in these positions and a mere warning would have been insufficient in the context of school sport.

Obiter: 'If after leaving school, men with thin necks choose to go into first or second row in adult competition that is their own concern'. In such cases this defence of 'voluntarily assuming risk' may apply.

Legal Issue 4(b): Had Watson failed to take reasonable care for his own safety.

b. Contributory negligence

To successfully plead this defence, a defendant has to show that the plaintiff's own actions were also negligent and contributed to the injuries or damage suffered. The court in working out the damages for the plaintiff will reduce the amount by what it decides is the plaintiff's share of responsibility for the damage.

Decision: There was 'not a scintilla of evidence' on the facts for contributory negligence.

What different facts can you think of that may have given rise to the defence of contributory negligence? [C] [A] [E]

CHILDREN PLAYING SPORT

Children are required to do what a child of similar age and knowledge would reasonably be expected to do in the circumstances.

CASE STUDY

McHale v Watson (1966) 115 CLR 199

Facts: A twelve year old boy threw a dart at a dartboard, which missed, hitting instead the nine-year plaintiff old in the eye.

Legal Issue: Did the twelve year old breach his duty to take reasonable care when throwing darts, which would make him liable in negligence?

Decision: No. Although an adult would have been negligent in those circumstances, the child did not have to meet the adult standard. The standard here was the degree of care one would expect from a twelve year old with the same level of experience in dart throwing.

COACHES

Coaches are required to be reasonably competent in their level of sport. Coaches who use extreme or potentially harmful techniques in training can breach that duty. One example has been gymnasts whose training regime has resulted in health problems, such as anorexia nervosa, bulimia and psychological stress disorders. Twins, Kate and Emma Major, elite gymnasts at the Australian Institute of Sport sued their coach, doctor and other members of the Australian Sports Commission for an obsessive eating disorder which left them without sufficient nutrition to maintain good health. Coaches are required to have a working knowledge of injuries common in their field of sport to enable appropriate rest or for specialists to be called. Allowing an injured player to continue playing, encouraging aggression or the use of dangerous manoeuvres can all breach the standard of care required by a coach.

CASE STUDY

Foscolos v Footscray Youth Club [2002] VSC 148

Facts: Foscolos took up boxing at Footscray Youth Club and then in 1997 when aged 22, he commenced wrestling under the guidance of Samuel Parker, an experienced coach at the club. During one training session, Foscolos agreed to a practice bout with Bassi, who was younger but more experienced than Foscolos. During the bout, Bassi executed a 'suplex' throw. This was a recognised move used at the highest levels of the sport but was dangerous in inexperienced hands. The throw fractured Foscolos' spine rendering him a quadriplegic.

Legal Issue: Had Parker, the coach, breached his duty of care by failing to stop the bout when Bassi commenced the 'suplex' throw?

Decision: Coach Parker's failure to stop the training bout when Foscolos' opponent commenced the 'suplex' throw was a cause of the injury. Parker failed to adequately supervise the wrestling contest and was, therefore, in breach of his duty of care to Foscolos. The coach was the person in effective control of the bout.

The damages awarded were \$5,744,244.31. Parker, the coach, had indemnity insurance for \$5 million but as the award of damages exceeded that amount he was personally liable for the balance.



WHAT DO YOU THINK?



- ▶ Why was Bassi not sued? [A] [E]
- ▶ How does a coach decide when a person is ready for new techniques and when they should be removed from training or a competition? [A] [E]
- ▶ Should the duty of care be different when children, rather than adults, are involved? [A] [E]

HYPOTHETICAL

As a lawyer employed by the Australian Swimming Federation, advise the following swimming coaches what they should do and not do in order to meet the required standard of care? [S] [A] [E]

- ▶ Taking a learn-to-swim class.
- ▶ Training a school swimming team.
- ▶ Personal coach of an Olympic swimmer.

ORGANISERS

Organisers of sporting events also have duties of care to the participants and the spectators. This was seen in the 1998 Sydney to Hobart Yacht race when organisers allowed the race to go ahead despite difficult and potentially dangerous weather conditions on the ocean. Six sailors died in the extreme conditions, 55 sailors had to be rescued and five yachts went down in the huge seas. Only 44 of 115 boats completed the race. The South Wales Coroner found that Cruising Yacht Club had, 'abdicated its responsibility to manage the race.... during this crucial time the race management team played the role of observers rather than managers and that was simply not good enough.'

The CYC of Australia was subsequently sued for negligence for not calling off the race when it knew, or ought to have known, that the weather conditions had become dangerous and life-threatening. The Club argued that 'no one cause can be identified as being responsible' and that the decision to continue or retire, is for the skippers or captains of the boats in the race, not the organisers to decide. The skipper of one boat the '*Winston Churchill*' was also sued for negligence. The claims against both settled out of court for an undisclosed amount in 2005.



WHAT DO YOU THINK?



- ▶ In an ocean race, such as the Sydney to Hobart, do you think is it the duty of the organisers or the captain of the boat to decide whether to continue to sail after a report of bad weather is received? [A] [E]
- ▶ What risks, if any, do participants continue to accept when they enter one of the world's acknowledged 'toughest three ocean races'? [A] [E]

Similarly, a lawsuit was brought in 2011 against the organisers '*Racing The Planet*', which was an ultramarathon of 100km through the Kimberleys. Two women suffered horrific injuries when fire swept through a rocky gorge during the marathon. The government of Western Australia gave each an ex gratia payment but negligence claims against *Racing The Planet* were commenced on the basis that the organisers should not have allowed runners to proceed through the course once they become aware of fires in the area. '*Racing The Planet*' argued that reasonable and adequate steps to protect competitors were in place and that remote location sporting activities can never be free from risk.



WHAT DO YOU THINK?



- ▶ If competitors desire to challenge themselves in extreme sports in remote locations is there the same or a different duty of care from the organisers than would be required in a city location? Is it greater or less? [E] [A]
- ▶ If each competitor signs a waiver in which they legally accept that emergency medical services may not be available should that make a difference to the organisers' duty of care? [A] [E]

RESEARCH

Surf Life Saving Australia operates at a national, state, local and club level. One of its main competitions, the National Surf Lifesaving championships held on the Gold Coast, has had three young lifesavers, Matthew Barclay, Saxon Bird and Robert Gatenby, die whilst competing in heavy surf conditions. Their deaths occurred in different years but at the same beach.

1. Did Surf Life Saving Australia owe a duty of care to the lifesavers in the competition? If so, what was that duty? [C] [E]
2. Did it breach any duty of care, or not? [C] [E]
3. What changes have been introduced by Surf Living Saving as a consequence? [A] [E]

HYPOTHETICAL

You are a lawyer. In an email, advise an organiser of either a triathlon or a marathon what they should do so that they do not breach their duty of care. [A] [E]

Organisers must ensure that spectators are reasonably protected and safe from harm. This may include providing safety barriers, ground security, restricting entry and prohibiting or limiting the sale of alcohol.

CASE STUDY

Wilkinson v Joyceman (1985) 1 Qd R 567

Facts: Wilkinson's husband was killed by one of the racing cars at a stock car race. (These are also known as speedway races. Cars frequently collide, crash, overturn and roll off the track during these races.) Wilkinson was standing near the unprotected pit area, where cars come in for mechanical attention during the race. There were pit marshals patrolling the area to keep away spectators. A protective fence had been previously trampled down and not replaced

Legal issue:

1. Did the organisers and owners of the speedway breach their duty of care to the spectator?
2. If so, was the spectator also negligent by standing in the pit area?

Decision:

1. The organisers owed a duty of care to the spectators and breached their duty. It was foreseeable that if a spectator stood in that place to watch the race, a serious injury could result if a car rolled off the track. The organisers were liable in negligence.

2. The spectator, by standing in an unprotected place during a stock race, where cars are known to roll and collide was also being negligent. His actions contributed to his death. Damages were reduced by 50% due to contributory negligence.



SPECTATORS

When spectators attend a sporting event they can have a duty of care to other spectators and to participants in the sport. Fans who run onto the field during, or at the end of a game, have a duty not to assault or injure players, sporting officials or other spectators. Organisers of these events have to make sure crowd control measures are adequate.

BOARD MEMBERS.

The High Court considered the issue of whether persons responsible for making and monitoring the rules of a sport owe a duty of care to the players of that sport.

CASE STUDY

Hyde v Agar & Ors; Worsley v Australian Rugby Football Union Ltd & Ors (1999) Aust Torts Reports 81

Facts: Two young rugby players received serious spinal code injuries playing the game. The players brought an action against the Board's members who were responsible for writing and interpreting the rules of the Rugby Union. It was argued by the players that rules must ensure the safety of the players and that the Board owed them a duty of care.

Legal Issue: Because players rely on the board to make rules for their safety, do the members have a duty of care to all rugby players to minimise the risk of harm to them?

Decision: There is no duty of care owed by the Board to the players. The High Court felt it was unrealistic for the Board to owe a duty to each person who played the game. The Board, as the law-making authority, did not encourage breach of laws, which was responsible for the injuries received by the two players. The court noted that it is an inherently dangerous sport, and that the only way to avoid risk of injury is to not play the game.



WHAT DO YOU THINK?



In the case outlined above, the players were adults who had voluntarily decided to play the game, aware that it was a contact sport and there were risks of injury. Do you think that if it were at school where students played the game as part of PE classes that there may have been a different decision? [E]

HYPOTHETICAL

Who may have breached their duty of care on these facts?

- ▶ Supporters of a home team throw empty and full cans of soft drink at a group of supporters from the visiting team. Cans of soft drink could be bought at the venue, but there were signs saying that no drinks were to be taken into the grandstand. [A] [E]
- ▶ Disappointed at their team's loss, several spectators start spitting and kicking the referee. After questioning, the spectators admit to consuming alcohol prior to the game. [A] [E]
- ▶ A spectator takes a flash photograph during a gymnast's routine. The flash momentarily blinds the gymnast who falls and is injured. An announcement was made at the start of the competition requesting people not to take photographs. This spectator arrived late. [A] [E]

As well as contributory negligence, **voluntary assumption of risk** also can apply to spectators. The general principle is that, as long as organisers of sporting events have taken all reasonable steps to ensure the safety of spectators, spectators voluntarily assume risk for events that could not reasonably have been foreseen by the organisers.

HYPOTHETICAL

Consider the following scenarios and determine whether the spectators have voluntarily assumed risk of injury. [A] [E]

- ▶ A high school hockey game is held on a school oval. A parent spectator brings a one year old daughter to the game. Both sit on a picnic blanket near the sidelines. A ball hits the daughter in the face causing injury.
- ▶ A spectator at a car race is standing behind a screen labelled a safety barrier. A car hit the barrier, it falls down, killing the spectator.
- ▶ During the running of a horse race a clap of thunder in the distance frightens one of the horses. The horse, in panic, gallops off the track, jumps the barrier and knocks over several spectators, causing various injuries.
- ▶ A sprinter, having won a Gold medal, throws one of his spiked running shoes into the crowded stadium. It hits a spectator in the face, causing permanent eye damage.

REVIEW

1. Describe the following: [C]

class actions

2. Describe and explain the following: [C] [A]

- (a)* The duty on manufacturers of goods to ensure manufacturing processes do not result in defective goods which are liable to cause damage to users.
- (b)* The duty of care owed by drivers of motor vehicles that other drivers, pedestrians, and to owners of property.
- (c)* The duty of care owed by teachers to students.
- (d)* The issue of whether or not duty of care exist when a person rescues someone to protect them from harm.
- (e)* The duty of care owed by doctors and healthcare professionals when providing treatment and giving advice to patients.
- (f)* The duties of care owed by the various participants in sporting activity to persons injured while participating in the sport.

3. Describe and explain the changes that were made by successive governments to the ceiling of compensation for general damages in common law claims for injuries at work.

ESSENTIAL LEGAL STUDIES SKILLS

CHAPTER 28

FOCUS SUBJECT MATTER

28.1 FOCUS ON INQUIRY-BASED LEARNING

28.2 FINDING AND SELECTING THE LAW

28.3 LEGAL PROBLEM SOLVING

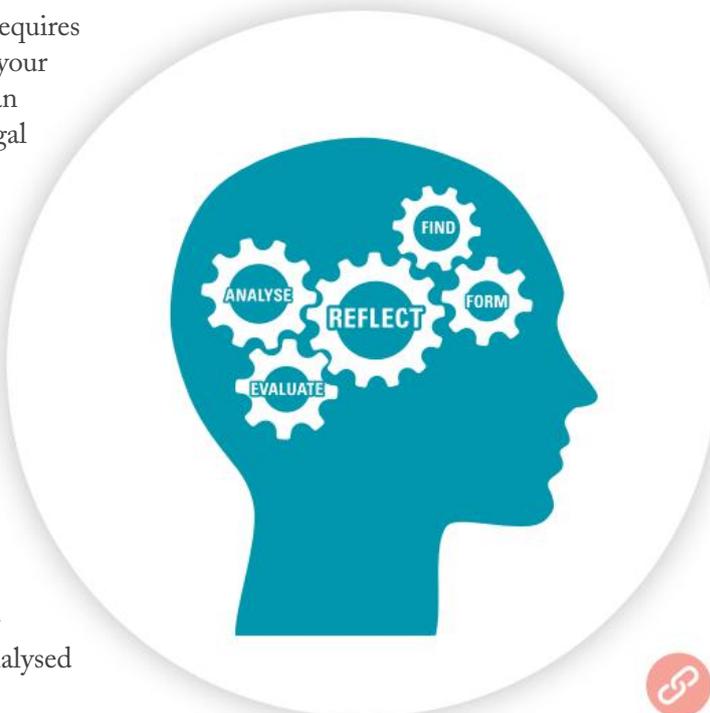
TO UNDERSTAND AND APPRECIATE:

- ▶ essential skills needed to demonstrate a mastery of the objectives set out in the Queensland Legal Studies 2019 General Senior Syllabus.

28.1 FOCUS ON INQUIRY-BASED LEARNING

Legal Studies is a dynamic, real-world subject that requires you to learn how to develop an inquiry approach to your learning, which is illustrated in ‘Figure 3: Stages of an inquiry approach’ on page 10 of the Queensland Legal Studies 2019 Syllabus (referred to as ‘the Syllabus’).

‘Inquiry Focus’ activities are a regular, distinctive and thought-provoking feature of this textbook. They are designed to help you to hone your skills of ‘Forming’, ‘Finding’, ‘Analysing’, ‘Evaluating’ and ‘Reflecting’ in relation to a wide range of topical and controversial legal issues as you undertake the Syllabus-mandated inquiry approach to learning in Legal Studies. For example, an Inquiry activity in Chapter 3.2: ‘Inquiries into Criminal Legal Issues’ delves into the effectiveness and fairness of Queensland’s new ‘One Punch Kill’ laws, beginning with the following ‘Forming’ of a central question to be investigated, analysed and evaluated:



Ch 3.2



INQUIRY FOCUS



DO QUEENSLAND’S NEW ‘ONE PUNCH KILL’ LAWS ACHIEVE THE PURPOSES FOR WHICH THEY WERE CREATED AND FAIRLY BALANCE THE RIGHTS AND RESPONSIBILITIES OF THE DIFFERENT PARTIES AND OTHER STAKEHOLDERS AFFECTED BY THEM?



A number of topical sources of information are provided in this Inquiry Focus activity in Chapter 3.2 in relation to this emotion-charged, media-driven issue, followed by the following reproduced INQUIRY FOCUS questions:



INQUIRY FOCUS CONTINUED



1. State in your own words the issues which each of these sources raise. Outline the facts used by each author that supports his/her point of view about the particular issue. Are the facts relevant and persuasive? Give your reasons. [C] [A]
2. Conduct research and select relevant and up-to-date sources which provide opposing viewpoints in relation to this contemporary legal issue. For example, as a starting point, research the viewpoints of the following stakeholders: Bill Potts (Queensland criminal defence lawyer), Tina Good (Queensland homicide victims' support group) and Simon Turner (Director of the 'Just Let it Go' Foundation) [S]
3. Examine the opposing viewpoints and consequences which are presented in these sources and in sources which you have selected during your research, referring to evidence which supports these opposing perspectives and outcomes. [A]
4. Based on your weighing up of the competing arguments and substantiating evidence, make a decision as to what is the most persuasive viewpoint in relation to this issue. [E]
5. Present the alternatives available to respond to this issue which, in your opinion, are just and equitable. Provide recommendations for law reform which you believe will result in just and equitable outcomes for the community. Set out the facts and principles which support your views. [E] [R]

At the end of the INQUIRY FOCUS questions are square brackets, each with a capital letter in them, which allow you, as a student of Legal Studies, to know which Syllabus objectives you are addressing as you answer each question. These are explained as follows so that you know what is expected of you by the Syllabus.

COMPREHEND [C] LEGAL CONCEPTS, PRINCIPLES AND PROCESSES AND SELECT [S] LEGAL INFORMATION FROM SOURCES

Legal Studies is an excellent subject for you to **develop an inquiring mind**, which, of course, involves **asking probing questions** to find out the **what, when, where, who** and **how** of each law under investigation before **asking the big questions: Why does this law exist?** In other words, you could ask, 'What is its **purpose?**' or 'What is it **intended to achieve?**'

Whether you are given, or you have to locate for yourself, sources of legal information, it is important to **dig below the surface of a controversial legal issue** that is being debated in our media-driven society (for example, the effectiveness and fairness of Queensland's new 'One Punch Kill' criminal laws) **to the first layer of your inquiry process in order to identify the purposes of any new or proposed laws** which are **current (up-to-date)** and **relevant** to the specific area of law which you are investigating.

These fundamental processes of the inquiry-based learning process are described on page 4 of the Syllabus as the following Legal Studies objectives:



1. COMPREHEND LEGAL CONCEPTS, PRINCIPLES AND PROCESSES:

When students comprehend legal concepts, principles and processes, they identify features and examples to demonstrate understanding. Comprehending includes describing, explaining, translating knowledge into symbolic representations, constructing diagrams, and using legal terminology.

2. SELECT LEGAL INFORMATION FROM SOURCES:

When students select legal information from sources, they choose legal information from primary and/or secondary sources, for example, case law, legal databases, legislation, government and other institutional websites, published reports, media and expert commentaries, and lobbyist statements. Students make these choices based on currency and relevance, and use a recognised system of referencing to document and acknowledge sources.

ANALYSE [A] LEGAL ISSUES AND COMPREHEND [C] LEGAL SITUATIONS

You will then be given many opportunities in the subject of Legal Studies to dig deeper into the legal and social issues arising from the application of the law affecting specific scenarios (cases/situations/circumstances) based on the perspectives of various stakeholders in our society. A ‘stakeholder’, according to the Syllabus Glossary (p. 68), is a ‘... person, group or organisation that is affected by, can affect, or is concerned with an issue.’ The Glossary then defines ‘stakeholder perspectives’ (p. 68) as ‘... viewpoints, opinions and beliefs in regards to the presented situation.’

Once you have found out what are the laws and what they are intended to achieve (i.e. their purposes), it is essential to dig more deeply into the effectiveness and fairness of the laws by analysing [A] and evaluating [E] the legal issues arising from the specific cases or scenarios to which the relevant laws are applied.

These higher order processes of inquiry are described on pages 4 and 5 of the Syllabus as the following Legal Studies objectives:



3. ANALYSE LEGAL ISSUES:

When students analyse legal issues, they apply legal concepts, principles and processes to determine the nature and scope of the issue and to examine viewpoints and consequences.

4. EVALUATE LEGAL SITUATIONS

*When students evaluate legal situations, they use knowledge from their analysis to present legal alternatives, and then make a decision or propose recommendation/s to resolve the situation. Students synthesise information to justify the decision or recommendation/s using **legal criteria** and discuss their implications.*

According to the Syllabus Glossary (p. 62), 'legal criteria' are explained as follows:

examples can be drawn from:

- a. *elements of the rule of law;*
- b. *common law and/or statutory law; and*
- c. *just and/or equitable outcomes.*

A. THE RULE OF LAW

As you learned in **Chapter 1.1 The Concept Of The Rule Of Law**, a foundation principle of Australia's legal system is the concept of the rule of law, which is defined in the Syllabus Glossary on page 67 as:

the doctrine that all people are equal before the law, and that the government is subject to the law; a concept implying the subordination of the three aims of government (the executive, the legislature and the judiciary) to legal process, and the equality of all before the law; the absence of arbitrary executive power

B. STATUTORY LAW AND/OR COMMON LAW

When evaluating the effectiveness and fairness of the law, it is important to go to the law making source/s to ascertain what members of the courts, parliaments and governments have done and said in responding to the legal issues arising from the application of the law in specific cases or scenarios.

C. JUST AND/OR EQUITABLE OUTCOMES

Just and equitable outcomes are the third type of legal criteria, specifically referred to the Syllabus, which are to be used in Legal Studies for evaluating legal situations in order to arrive at a decision and/or provide recommendations for reform (improvement) of the law.

The term, 'just', is defined in the Glossary of the Syllabus (p. 62) as:

legally right, conforming to that which is lawful or fair; that which is fair and proper in the (or all) circumstances

The word, 'equitable', is defined in the Glossary of the Syllabus (p. 58) as:

even and impartial [unbiased]; balance between the rule of law, and the rights and freedoms of individuals and society; impartial and fair outcome or result where the statute law is silent, e.g. remedies in civil issues

When evaluating the fairness and equity of the way the law is applied to specific contexts or situations, it is important to realise that, while the law may seem just in its treatment of a person or organisation, the way that it is applied may fail to fairly balance the competing rights and responsibilities of other parties or stakeholders also affected by the law. For example, it is commonly accepted, in the light of the recent spate of domestic violence deaths, that it is just for the law to be changed (amended) to make it much harder for alleged domestic violence offenders to be granted bail by a judge, however, it is important to ensure that there is a fair balance of the rights of victims to safety from serious harm or death, on the one hand, and the rights of alleged perpetrators of domestic violence to protection of his or her rights to a presumption of innocence and a fair trial in which the prosecution must prove the guilt of the alleged abuser to the very high standard of beyond reasonable doubt.

CREATE RESPONSES [R] THAT COMMUNICATE MEANING

There are different ways (genres) of formally responding to the law by which you can really drive home your thesis (central point of view/argument) about the effectiveness and fairness of the application of



Ch 1.1



Ch 2.5
Ch 2.6

laws to specific scenarios in our legal system. For example, the Syllabus contains two different types of investigative assessment techniques: inquiry reports (Syllabus, pp. 36–40) and argumentative essays (Syllabus, pp. 45–49).

This final objective of Legal Studies is to be found on page 5 of the Syllabus as follows:

5. CREATE RESPONSES THAT COMMUNICATE MEANING

When students create a response, they use their knowledge to communicate meaning according to the intended purpose. Students use language conventions and genres that suit the context and convey legal meaning.

28.2 FINDING AND SELECTING THE LAW

One of the main skills required of all lawyers and legal students is to be able to find the law.

The **primary sources of law** are legislation (statutes or Acts of Parliament and regulations) and decided court cases. These two are the sources of law that are cited in legal argument in the court and are used by the judges in coming to their decisions. Today most legislation and many cases are available on the Internet.

To find any Queensland statute you go to www.legislation.qld.gov.au

Queensland Government
Queensland Legislation
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Home In force legislation Acts as passed SL as made Bills Repealed legislation Legislative tables Notifications Information Historical information
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What's new

Bills

- Waste Reduction and Recycling (Waste Levy) and Other Legislation Amendment Bill 2018
- Waste Reduction and Recycling Act 2011
- Appropriation (Parliament) Bill (No. 2) 2018
- Appropriation Bill (No. 2) 2018
- Fisheries (Sustainable Fisheries Strategy) Amendment Bill 2018
- Fisheries Act 1994
- Revenue and Other Legislation Amendment Bill 2018
- Aboriginal Cultural Heritage Act 2003
- Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984
- Acquisition of Land Act 1967
- Cross River Rail Delivery Authority Act 2016
- Duties Act 2001
- Land Tax Act 2010
- Payroll Tax Act 1971
- Police Powers and Responsibilities Act 2000
- State Penalties Enforcement Act 1999
- Taxation Administration Act 2001
- Torres Strait Islander Cultural Heritage Act 2003
- Victims of Crime Assistance Act 2009
- Termination of Pregnancy Bill 2018
- Criminal Code Act 1899
- Evidence Act 1977
- Guardianship and Administration Act 2000
- Penalties and Sentences Act 1992
- Police Powers and Responsibilities Act 2000
- Transport Operations (Road Use Management) Act 1995
- Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018
- Criminal Code Act 1899

NEW Indicative reprints for introduced Bills

Welcome to Queensland's legislation website, the official Queensland Government website providing access to authorised Queensland legislation and related information — Bills introduced, Acts as passed, subordinate legislation as made and point-in-time reprints (consolidations) of Acts and subordinate legislation. This website is managed by the Office of the Queensland Parliamentary Counsel.



Ch 2.5
Ch 2.6

To find Australian cases and statutes, you can go to www.austlii.edu.au:

The **secondary sources** are all other publications that deal with legal topics and include books, textbooks, journal articles, encyclopaedias, reports and newspapers. As well, television and radio programs and the Internet can be used to find information about law and legal issues. As most people, other than lawyers, gain their information about the law from newspapers these have been used regularly throughout this book. All secondary sources of law are forms of commentary on law. Primary and secondary sources are defined as follows in the Syllabus Glossary:

Primary source (p. 65 Syllabus Glossary):

(of sources) information and data generated directly by a student (e.g. from a student-designed survey), created directly by a group or organisation (e.g. Australian Bureau of Statistics), and/or from a direct authority (e.g. case transcripts or statute).

Secondary source (p. 67 Syllabus Glossary):

(of sources) information and data not generated or directly created by the author of the source, such as case law, legal databases, legislation, government and other institutional websites, published reports, media and expert commentaries, and lobbyist statements.

When you are researching a topic or particular legal issue, the most comprehensive Australian online source of primary and secondary legal information is austlii.edu.au. Read the 'About AustLII' page on the AustLII website at www.austlii.edu.au/about before discovering for yourself the plethora of free Australian legal materials which you can locate, analyse, evaluate and ultimately synthesise into responses in Legal Studies which will enable, empower and equip you to develop a comprehensive understanding of a significant range of concepts, principles and principles, and increasingly sophisticated use of legal terminology as it is used in relevant contexts in which the law is applied in attempting to achieve just and equitable outcomes for the parties and other stakeholders affected by the legal issue/s under consideration.

28.3 LEGAL PROBLEM SOLVING

The basic steps in solving a legal problem are:

1. Decide what are the relevant **facts**, that is, the facts that will have legal consequences.
2. Analyse the facts to **identify** the **legal issues**.
3. State the relevant **law** [or **rule**].
4. **Apply** the law to the facts.
5. Reach a **conclusion** in relation to each issue.

This is referred to as **the FILAC model of problem solving**.

An example of how to solve a problem using this FILAC model is as follows.



The Problem:

Peter is 18 and has had his driver's licence for six months. He has dark black hair and lives at home with his parents and two sisters. One of his sisters, Kat is nine and she attends River Downs Primary School. Peter agrees to take his sister to a birthday party being held at a picnic site ten kilometres out of town. His car runs out of petrol half way from town to the party. Peter sees a farmhouse and he decides to ask if he can borrow some petrol or to telephone his mother for assistance. No one is home. He sees a window at the back of the garage and puts Kat on his shoulders telling her to, "Climb in through the window and see if there are any cans of petrol inside." Kat pulls up the closed window so she can climb through it. After a few minutes she comes out with a 4-litre can marked 'petrol'. Peter and Kat walk back to the car with Kat carrying the can of petrol. She fills it with petrol, throws the can on the side of the road, and they drive off to the party. "I should write a note explaining what happened," Peter says to Kat as they drive off, "but they'll never know who did this, and, besides, we don't want you to be late for the party".

Advise whether any offence has been committed.

F 1. Decide what are the relevant facts

- ▶ Peter is 18 and Kat is 9 years old.
- ▶ Peter runs out of petrol out of town.
- ▶ He tells Kat to climb in through a closed window and physically assists her to do so.
- ▶ He tells Kat to take any petrol she finds in the garage.
- ▶ Kat fills the car with petrol and throws the can away without making arrangements to return the petrol or repay the owners.

Examples of **irrelevant facts** are hair colour, that Peter lives at home, has two sisters, the school Kat attends, and that it was a birthday party.

I 2. Analyse the facts to identify the legal issues

Issue 1: Kat is 9 – can she be criminally responsible for taking the petrol?

Issue 2: Peter tells Kat what to do but does not actually enter the shed, take the petrol, or put it in the car – can Peter be criminally responsible for Kat's actions?

Issue 3: Kat climbs through the garage window – has there been a break and enter offence committed?

Issue 4: Kat has taken a can of petrol and put it in the car – have the petrol and can been stolen?

Issue 5: This happened out of town on the way to a party – is the defence of 'extraordinary emergency' available?

L 3. State the relevant law

A 4. Apply the law to the facts

C 5. Conclude on each issue

Issue 1: Can Kat be criminally responsible?

- ▶ Section 29 Criminal Code (CC) states that persons under ten cannot be held to be criminally responsible.
- ▶ Kat is nine years old and therefore is legally incapable of committing any offence.
- ▶ Therefore Kat is not guilty of any offence.

Issue 2: Can Peter be criminally responsible for Kat's actions?

- ▶ Section 7 CC sets out the party provisions and states that a person can be criminally responsible for offences that he or she counsels or procures another person to do.
- ▶ Peter told Kat to go in through the window and take petrol. Encouraging and suggesting what she should do amounts to counselling. He also got her to put the petrol in the car, which amounts to procuring.
- ▶ Hence, through the operation of the party provisions, Peter can be deemed criminally responsible for the offences that he counselled or procured Kat to commit.

Issue 3: Has there been a break and enter offence committed?

- ▶ Section 421 CC makes it an offence to enter the premises of another person with an intention to commit an indictable offence.
- ▶ Once Kat climbed through the window, she had entered the building. The fact that she lifts up a closed window makes it a break. She is in the garage with the sole purpose of finding petrol and then taking it to the car. On these facts, her intention is to take petrol belonging to another without their consent. This is the indictable offence of stealing.
- ▶ Therefore, the offence of break and enter has been made out.

Issue 4: Have the petrol and the can been stolen?

- ▶ Section 398 CC sets out the offence of stealing and s390 and s391 define the elements of the offence.
- ▶ **First**, the petrol and can need to be the property of another person, which is moveable or can be made moveable. The Section 1 CC definition of property specifically mentions 'electrical or

other energy' and petrol is a form of energy used in cars. A can is an inanimate object that is covered by the definition. Both the can and petrol are moveable and are owned by another person, the farmer.

Second, the can and the petrol were taken for use in Peter's car. The physical movement of both establishes the taking. The case of *Wallis v Lane* held that actual movement, even of the smallest degree, is sufficient. Here, both were taken some distance to the car.

Third, the taking needs to be done with a fraudulent intent. One way to establish fraudulent intent is to permanently deprive the owner of the thing taken. Here, the petrol was taken without any plan to return it or the can to the owner. This can be distinguished from the case of *R v Bailey* where he intended to return the car to the owner. The petrol and can were therefore taken with fraudulent intent.

Issue 5: Would the defence of extraordinary emergency relieve Peter of criminal responsibility?

- ▶ Section 25 CC says that a person is not criminally responsible for an act done under circumstances of sudden or extraordinary emergency when an ordinary person would reasonably be expected to act in the same way.
- ▶ It is unlikely that an ordinary person would break and enter a building belonging to another person just because they had run out of petrol or were running late for a child's birthday party. It would be more reasonable for Peter and Kat to wait on the side of the road and ask a passing car whether they could assist, or wait for the farmer to return, or simply leave the car there and walk to another farm, to the party or back to town.
- ▶ The facts here do not amount to an extraordinary emergency.

Overall conclusion:

By the operation of the party provisions, Peter has committed the offences of break and enter and stealing. Kat has committed no offences.

If you are asked to be a lawyer advising Peter, then you could conclude:

Peter, as you told Kat exactly what to do and you assisted her, the law says that you were the counsellor and procurer of any criminal offences your little sister committed at the farm, which were a result of your counselling and procuring. Therefore you are likely to be charged, tried and convicted of the offences of breaking and entering the garage, and of stealing the can and the petrol. These are indictable offences and you are entitled to a jury trial. In your defence, we can try to argue 'extraordinary emergency' but it will be difficult to convince a jury that, in these circumstances, an ordinary person would have found it reasonable to break into another's premises and take items from them.

Alternatively, you could say:

In your defence we will argue extraordinary emergency. I think a jury would find that an ordinary person out in the country, kilometres from town and with a young child in their care would find it reasonable to break into a farmer's garage and find petrol rather than be stranded there. If so, you will be acquitted of all charges.

If you are asked to be a judge then you could have a conclusion such as:

I have already set out the relevant facts and the law that is to be applied in this case. I find that the circumstances here do not amount to an extraordinary emergency. Therefore I find you guilty of the offences of breaking and entering and stealing.

INDEX

- Aboriginal and Torres Strait Islanders 288, 33
 - customary law 56-59
 - law in Australia before British settlement 32
 - mandatory sentencing 29
 - Murri Court 290-292, 57-60
 - native title 56
 - Act of Parliament 41
 - steps to pass an Act 41-46
 - Adjudication 315
 - Adversarial system, see Courts
 - Alternative dispute resolution (ADR)
 - see also Settlement of Disputes; Courts
 - Appeals
 - against government decisions 323-326
 - criminal 197, 198
 - Arbitration 315
 - Asylum seekers 39, 40
 - Australian Competition and Consumer Commission 357, 406, 407
 - See Constitution, Commonwealth
 - Australian Consumer Law, see Consumer law
 - Australian Human Rights Commission 70, 71, 321
 - Barristers 317
 - Beyond reasonable doubt, see standard of proof
 - Bullying 16, 17, 21, 69-84
 - cyberbullying 16
 - Capital punishment, see Death Penalty
 - Case appraisal 315
 - Children's Court 292-296
 - Civil law foundations 300
 - balance of probabilities 304, 319
 - burden (onus) of proof 304, 319
 - civil law, nature, growth 300-311
 - branches of, contract, torts 306
 - distinguished from criminal law 303-305
 - international influence 311
 - precedent, doctrine of 307-310
 - mediaeval law 301
 - sources, common, statute law 302
 - civil law, dispute resolution in 312-329
 - commissions of inquiry 326-328
 - court, final choice 316
 - courts, different from tribunals 318, 321
 - disputes, nature of 313
 - methods of resolving 313-315
 - adjudication, court, tribunal 315
 - arbitration 315
 - case appraisal 315
 - expert determination 315
 - lumping to negotiation 313-314
 - mediation 315
 - government decisions, 323
 - complaints, appeals, against 323
 - ombudsman, Commonwealth, Queensland 324
 - review, judicial 323
 - Federal Court 324
 - Supreme Court (Qld) 323
 - tribunals, nature of 322
 - Administrative Appeals Tribunal 324
 - civil law, alternative dispute resolution 329-338
 - Civil Dispute Resolution Act 2011* (Cth) 331
 - Civil Proceedings Act 2011* (Qld) 331
 - mediation process 332-338
 - benefits of 333
 - disadvantages of 333
 - civil law, resolving issues 339-352
 - contract dispute, Magistrates Court 344-349
 - court-ordered, conciliation conference 350-352
 - jurisdictions, in different 340
 - QCAT application, family issue 341
 - ombudsman, Queensland, complaint to 340
 - class-action 471
 - counterclaim 348
 - damages 318-319
 - defendant 318-319
 - injunction 469
 - judgment 349
 - plaintiff 318-319
- Common law** see Courts
- Common law and statute law** 55
- Conciliation** 350
- Conditions and warranties**, see Contractual obligations
- Constitution**
- Australian 25, 34-41, 3, 59, 88, 174, 303
 - concurrent powers 36
 - exclusive powers 36
 - High Court 174, 50
 - residual powers 37
 - separation of powers 38-40
 - trial by jury 174
- Consumer guarantees** 409
- acceptable quality, goods will be 411
 - description, match their 413
 - fit for disclosed purpose, reasonably 412
 - free from security, charge 410
 - remedies for breach of
 - repair and parts, reasonably available 414
 - right to sell 410
 - sample or demonstration model, match the 414
 - statute law, and 409
 - undisturbed possession, right to 410
- Consumer law, Australian** 406
- ACCC 406
 - statutory protection 408
- Contractual obligations** 353-436
- Acceptance 365-368
 - online 370-374
 - breach, remedies for 419-428
 - damages 422
 - implied statutory conditions 428
 - injunction 420
 - specific performance 420
 - time limits 424
 - common law 360
 - conditions and warranties 385
 - consent of parties 393
 - duress 396
 - fraud 395
 - innocent misrepresentation 395
 - misrepresentation 394
 - mistake of fact 393
 - mistake of law 393
 - unconscionability 397
 - undue influence 396
 - consideration 374-379
 - deeds in 375
 - oral contracts 375
 - requirements of writing 376
 - simple contracts, in 375
 - damages for breach of contracts 422-4
 - general principles 422
 - mitigation 423
 - nominal 424
 - punitive 424
 - discharge of contracts 401
 - agreement, by 401
 - breach, 403
 - frustration 402
 - operation of law 402
 - performance 401
 - remoteness 422
 - electronic transactions 370-374
 - ending by setting aside 390
 - capacity, lack of 391
 - consent, lack of 393
 - object, legality of 399
 - essential elements 360-379
 - acceptance 365
 - consideration 374
 - intention to create legal relations 360
 - offer 361
 - form of contracts 374
 - standard form 416
 - written contracts 376
 - infants or minors 391
 - beneficial contracts 392
 - necessaries 391
 - ratification 393
 - legal capacity to make 390
 - legality of object 399
 - illegal contracts 399
 - restraint of trade 400
 - offer 361-364
 - invitation to treat 360
 - postal rule, the 368
 - remedies in contract 419-
 - damages 422-424
 - injunction 420
 - restitution 425
 - specific performance 420
 - statutory conditions 428
 - breach of 428
 - unfair contracts 415
 - unjust enrichment 425-
 - terms of contract 381
 - representations are 383
 - implied 385
 - exclusion clauses 386
 - conditions 385
 - warranties 385
- Corrective Services** 260
- Counter-terrorism laws** 17
- Courts** 317
- adversarial system 68, 195, 197, 320, 321
 - evidence, rules of 321
 - hierarchy 50
 - inquisitorial system 68
 - jurisdiction
 - appellate 31, 49, 50, 198
 - original 49, 320

INDEX

- personnel 317
 - solicitors 317
 - barristers 317
 - judges and magistrates 317
 - legal practitioners 317
 - jury 317
- Criminal court procedure**, see Courts
- Criminal Investigation Process** 87-143
 - altering or amending engine numbers 135
 - arresting and detaining persons 111
 - arson 131
 - attempts to commit crimes 138
 - careless driving 135
 - carrying out forensic procedures 111
 - computer hacking and misuse 134
 - confessions 94
 - covert police operation 97
 - crime scene evidence 102
 - crime statistics, Australian 140-142
 - criminal behaviour 87
 - Criminal Code of Queensland 90, 116-134, 260, 293
 - dangerous driving 134
 - dangerous driving causing death 134
 - different roles in criminal situation 90
 - DNA evidence 103
 - driving under the influence 135
 - elements of an offence 117-118
 - failing to remain at the scene of an accident 136
 - fingerprint evidence 101
 - fraud 132
 - homicide 118
 - indictable and non-indictable offences 115
 - indictment 115
 - manslaughter 123
 - murder 121, 261
 - oral evidence 94
 - parties to offences 139
 - peace and good behaviour act 137
 - Police Powers and Responsibilities Act 93, 101-111
 - racism 135
 - rape 128
 - regulatory offences 116
 - rights after detention 112
 - right to silence 94
 - robbery 93
 - scenario techniques 101
 - searching a person 108
 - searching of property 106
 - searching motor vehicles 108
 - simple offences 116
 - sources of criminal law 88
 - stalking 126
 - statistics of crime in Australia 140
 - stealing 130
 - Summary Offences Act 136, 137
 - taking DNA samples 111
 - unlawful interference with a motor vehicle 135
 - unlawful use of a motor vehicle 134
 - verballing 95
- Criminal justice system**
 - foundation principles 64-68
 - adversarial system 68
 - inquisitorial system 68
 - inquiries into criminal legal issues 69-73
 - role of customary law (Indigenous law) 56-60
 - Murri Court 57
 - role of international law 60, 61
- Criminal trial process** 144-247
 - accused 146
 - adjournment 146
 - appeals, criminal 198
 - arraignment 186
 - bail 146-154
 - cash bail 147
 - conditions 147-148, 149
 - refusal 148
 - right to 147
 - undertaking 147
 - bailiff 317
 - barriers to justice, 225-247
 - approach, impartial 225
 - children 225-230
 - restorative justice 228
 - Youth Justice Act* 228
 - disability, persons with 237-240
 - gender equality 240-249
 - Indigenous Australians 230
 - Aboriginal women 235-237
 - Anunga Rules 232-233
 - barrister 317
 - beyond reasonable doubt 65, 66
 - callovers 161
 - committal 161
 - summary 158
 - committal process, see **Fair trial** 164-167
 - callover 161
 - committal hearing 167
 - crown law office 168
 - hand-up committal 166
 - registry committal 165
 - common law 173
 - constitution, Australian 174
 - conviction
 - counsel 317
 - court rules of evidence 189-
 - defences and excuses 207-223
 - defendant 317
 - double jeopardy, inquiry into 198-205
 - evidence, see **Evidence**
 - hierarchy of courts 50
 - indictable offences, trial procedures for 186-188
 - indictment 186
 - ex-officio 169-170
 - judge 317
 - judgment 186
 - jury, see **Fair trial**
 - legal representation, right to 196-197
 - mentions 154-157
 - natural justice 173
 - pleas 156, 187
 - presumption of innocence 64
 - pre-trial processes, see **Pre-Trial processes** 144-172
 - case conferences 159
 - committal 161
 - flow chart 145
 - indictable offences 161
 - practice directions 158
 - procedural fairness 173
 - proof, requirement of 65
 - standard of proof 66
 - remand 146
 - right to silence, at trial, 194 (see **Silence**)
 - simple (summary) offences 146-147
 - standard of proof 189
 - trial, see also **Fair trial** 172
- Customary Law** (see **Aboriginal and Torres Strait Islanders**)
- Death penalty** 261-264
- Defences and excuses**
 - accident 210-214
 - diminished responsibility 220
 - honest claim of right
 - ignorance of law 207
 - immature age 218
 - independent of will 208-209
 - insanity 215-216
 - intoxication 217-218
 - killing for preservation in an abusive domestic relationship 221
 - mistake of fact 214
 - provocation 218-220
 - self-defence 222
- Disabled prisoners** 296-298
- Domestic Violence** 16, 109, 112, 142, 286, 490
 - death due to 150-152
 - refusing bail 148-154
- Drug Court** 50, 58, 251, 287, 288,
- Essential Legal Studies** skills 486-
 - finding and selecting the law 491-492
 - inquiry based learning 487-491
 - legal problem solving 493-496
- Evidence, court rules** 189-194
 - admissible 190
 - character 191
 - cross-examination 186
 - direct 189
 - examination-in-chief 186
 - hearsay 190
 - illegal 190
 - inadmissible 190
 - indirect 189
 - irrelevant 190
 - onus of proof 189
 - opinion 191
 - privileged 191
 - re-examination 186
 - rules of 189
 - standard of proof 189
 - types 189
- Expert determination** 315
- Fair trial**, see **Criminal trial process** 172-199
 - committal process 164-167
 - common right, a 173
 - Constitution, Australian 174
 - evidence, court rules of (see also **Evidence**) 189-184
 - jury, by judge and 174-
 - importance 175
 - background, historical 176
 - representative, how 176-199
 - reforms 180
 - verdicts, majority 180

INDEX

- judge only 181
- abolishing, inquiry into 181-185
- flow chart 164
- procedures for trial 186-
 - arraignment 186
 - examination in chief 186
 - cross-examination 186
 - re-examination 186
 - verdict 188
 - no case to answer 187
 - opening crown case 187
- Federal (Commonwealth) Parliament 25, 42, 45**
- Graffiti 81-84**
- Hierarchy of Courts, see Courts**
- High Court of Australia (see Constitution)**
- Human Rights 72, 296**
- Imprisonment (incarceration) rates of vulnerable people 288-298**
- Indigenous Australians (see Aboriginal and Torres Strait Islanders)**
- Inquisitorial system (see Courts)**
- International Law**
 - role in Australia's legal system 60, 61
- Judicial precedent 307-310**
 - doctrine of precedent 307-310
 - factors determining if it is followed 307
 - obiter dicta 307
 - ratio decidendi 307
 - the development of 307
 - what it is 307
- Jurisdiction of Courts**
 - original 49
 - appellate 49
- Justice, barriers to, see Fair trial**
- Jury (see Fair trial)**
- Law**
 - characteristics of an effective law
 - clear to the community 24
 - confidence and certainty 24
 - prospective law 25
 - retrospective law 25
 - acceptable to the community 26
 - law should apply equally to all 28
 - law should be enforceable 29
 - concept of the rule of law 3, 4
 - courts, sources of common law 46-55
 - judicial precedent 47, 48
 - court hierarchy – Queensland and Federal Courts 50
 - statutory interpretation by the Courts 53-55
 - common law and statute law 55
 - customs and rules 18
 - definitions 10
 - difference between Rule and Law 18-23
 - social customs 18
 - rules 18
 - features of a law 19, 20
 - international influence on
 - parliaments: sources of statute law (making common laws) see Constitution
 - make a law 41-45
 - bill 43
 - purpose of laws within society 9
 - sources of Law
 - law in Australia before British Settlement 32
 - law in Australia after British Settlement 33
 - what is a law 19
 - why we need them 11
- Life sentence 260, 283**
- Magistrates Court 14**
- Mandatory sentence 254, 255**
- Murri Court, see Aboriginal and Torres Strait Islanders**
- Negligence 437-485**
 - apportionment of loss 463
 - breach of duty of care 445-450
 - Civil Liability Act 2003* (Qld), 446-450
 - contributory negligence 463-466
 - current issues 471
 - class actions 471-473
 - WorkCover, changes to 473-475
 - damage caused by breach 451
 - damage caused by defendants' negligence 454
 - damage must be suffered 451
 - damage not too remote 455
 - dangerous recreational activities 462
 - defective goods 475
 - doctors and health care professionals 477
 - drivers of motor vehicles 476
 - defences 460-463
 - duty of care 442-444
 - elements plaintiff must prove 438
 - future economic loss 468
 - general damages 467
 - injunction 469
 - mental harm 456
 - neighbour principle 443
 - nominal defendant 445
 - Novus actus interveniens* 456
 - obvious risks 461
 - reasonable foreseeability 443
 - remedies available to the 467-469
 - successful party
 - rescuers 477
 - special damages 468
 - sport, negligence in 479-485
 - teachers/schools 476
 - travelling with intoxicated drivers 464
 - volenti non fit injuria* 460
 - vicarious liability 441
 - WorkCover law changes 473
- Obiter dicta, see Judicial precedent**
- One punch kill laws 22, 78-81**
- Parliament**
 - Federal (Commonwealth) 41
 - State and Territory Parliaments 41
 - Local Authorities (Councils and Shires) 41
- Parole 264-266**
- Pathways to fair trial, see Fair Trial**
- Police powers, see Criminal investigation process**
- Precedent, see Judicial precedent**
- Presumption of innocence 64-67**
- Punishment, see Sentencing**
- Rape, consent to, inquiry into 241-247**
- Ratio decidendi, see Judicial precedent**
- Rule of Law 3**
- School phone ban 21**
- Sentencing of Criminals 249-272**
 - analysing principles of sentencing to predict outcomes 267-
 - sentence Hearing
 - effectiveness of sentencing and punishment in Australia
 - too soft on violent criminals? 276, 279
 - serial sex offenders 279-284
 - preventative detention 281-282
 - criminal appeals where sentences are not considered appropriate? 284-288
 - post sentence orders 264-267
 - remission 264
 - release to work and home detention 264
 - parole 264
 - principles affecting sentencing 250-256
 - purposes of sentencing 274-276
 - Queensland Sentencing Advisory Council 267, 279, 284
 - sentencing factors for judges to consider 254-256
 - sentencing hearing procedure 268-271
 - sentencing options 256 – 260
 - cumulative and concurrent sentences 256
 - absolute discharge 257
 - suspended sentence 257
 - fine option order 257
 - fine 257
 - community service orders 257-259
 - probation 258
 - restitution or Compensation 258
 - good behaviour bond 258
 - graffiti removal 258
 - driver licence disqualification 258
 - intensive Correction order 259
 - non-contact order 259
 - banning order 259
 - control Order 259
 - imprisonment 260
- Separation of powers 38-40**
- Sex Offenders 279-184**
- Silence, see Criminal trial process**
 - at trial 194
 - pre-trial 194
 - right to 193
- Smacking of children 30, 44**
- Solitary confinement 297**
- Standard of Proof**
 - balance of probabilities 66
 - beyond reasonable doubt 66
- Statutes, see Laws**
- Terra Nullius 33, 59, 60**
- Transgender surgery 51**
- Unlawful strike or death 15**
- Victim Support Group, Homicide 278**
- Young offenders (juveniles) 292, 293-296**

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